

COON *v.* ABBOTT.¹

Circuit Court, E. D. New York.

November 28, 1888.

EQUITY—PRACTICE—TIME FOR TAKING TESTIMONY.

When a party's time to take his testimony has expired without its being taken, the court may, on cause shown, grant relief by allowing the testimony to be taken and filed *nunc pro tunc*

In Equity. Application for extension of time to take testimony.

H. A. West, for complainant.

John J. Alien, for defendant.

LACOMBE, J. The defendant has failed to secure the taking of his proof by reason, apparently, of some misunderstanding between his counsel and his solicitor as to who would attend to it. To thus lose the opportunity of his presenting his defense, if he has any, would be a great hardship. The court has power under the rule to grant relief by allowing the testimony to be taken and filed *nunc pro tunc*. *Fischer v. Hayes*, 6 Fed. Rep. 76. In view of the fact that the next term for trial of equity causes will not be held till March, the granting of such relief will work no injustice to the complainant. The defendant may enter an order extending his time to take testimony to and including December 31st, such testimony, when taken, to be filed *nunc pro tunc* as of August 10, 1888. If defendant wishes to cross-examine any of plaintiff's witnesses who were examined on July 9th to July 13th, he may, before taking any of his own testimony, secure their presence by subpoena, and upon their appearance proceed with their cross-examination. Complainant may have 20 days after close of defendant's case to take testimony in rebuttal. Defendant must accept notice of trial for March term, and the case is ordered on the calendar for that term.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.