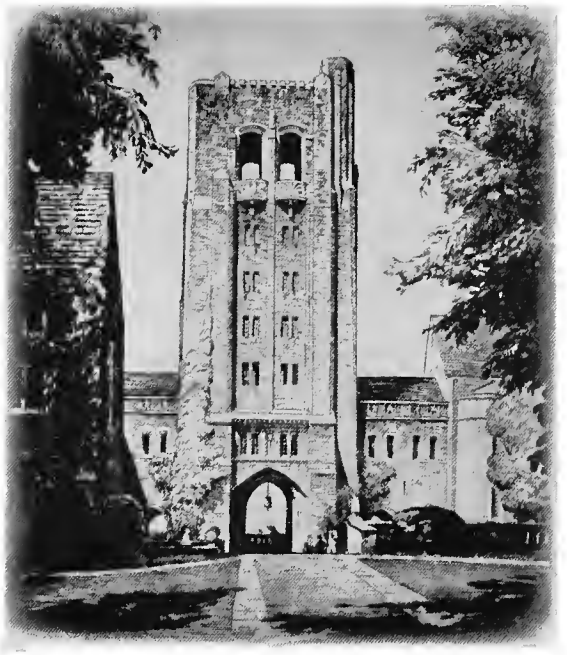

J. P. Robinson
Atty & Slr

THE

COMMON FORMS AND RULES

FOR

DRAWING AND ANSWERING

AN

ORIGINAL BILL IN CHANCERY,

AS DIRECTED AND SUGGESTED BY THE NEW ORDERS OF COURT AND REPORTED CASES;

MOST CAREFULLY COLLECTED

BY GEORGE FARREN, ESQ.,

CHANCERY BARRISTER.

WITH NOTES AND REFERENCES TO AMERICAN AND OTHER AUTHORITIES,

BY

RICHARD STONE,

OF THE BOSTON BAR;

ALSO,

THE RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES,

AS IN FORCE AT THE PRESENT TIME;

WITH ANNOTATIONS ON THE SAME,

AND AN

APPENDIX

ON AMERICAN LAW OF EVIDENCE IN EQUITY CASES DECIDED IN THE COURTS OF THE UNITED STATES AND THE SEVERAL STATES FROM THE EARLIEST PERIOD,

BY

JOHN J. McKINNON,

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E. B. MYERS AND CHANDLER,

LAW BOOKSELLERS AND PUBLISHERS,

CHICAGO:

1866.

Stereotyped and Printed by
ROCKWELL AND ROLLINS,
122 Washington Street, Boston.

FORMS AND RULES.

BEFORE the component parts of a Bill in Chancery can be fully detailed by me, so as to be easily understood, it appears necessary that the extent to which the Court acts on *presumption* be justly defined. To accomplish such an end, the following short rules have been scrutinized with industry, and most carefully worded.

TO WHAT EXTENT THE COURT ACTS ON PRESUMPTION.

1. The Court will not *of itself* presume a party to have a better *title*, or better claims for *equity*, than the pleadings of the party himself discloses.[1]

N. B. Therefore, if relief be sought as *Heir*, it is necessary to show sufficient facts by state-

[1] Bury *v.* Bokenham, 1 Dyer, 12 *a*. Norbury *v.* Meado, 3 Bligh, 233. Cuthbert *v.* Creasy, 6 Maddock, 189. Flint *v.* Field, 2 Anstruther, 543. Harrison *v.* Nixon, 9 Peters, 503.

ment to *demonstrate* the plaintiff to be *Heir*, and not merely a descendant or a son; and also to show by statement in the Bill sufficient facts to manifest *equity* sufficient to warrant such relief being granted to him as he claims as heir by the Bill.

2. The Court will not *of itself* presume a party to be more *guilty* than the pleadings actually show the party to be, until *evidence* supplies proof of further guilt.[1]

N. B. Therefore, mere general assertions in a Bill, that a defendant has acted *fraudulently* or *illegally*, are not sufficient of themselves to induce the Court to presume a defendant to have acted so, as they do not limit the accusation to any character of acts, unless there be also assertions made, supplying *the particular facts* precisely by statement, which show his actions to have been fraudulent or illegal.[2]

3. The Court *of itself* will not presume any pleadings to be *false* or *incorrect*, unless shown to be so by their *own contents*, or by proper *evidence* brought before the Court.

4. The Court *of itself* will not presume that a fact which has been proved *to have occurred* or *to exist*, has ceased to be in existence, or has be-

[1] Crisp *v.* Pratt, Croke Car. 550. Oxford's Case, 5 Coke, 347. Palmer *v.* Vaughan, 3 Swanston, 177. Clarke *v.* Periam, 2 Atk. 333.

[2] For a similar rule as to a plaintiff making *general* statements as to his own acts, see Cuthbert *v.* Creasy, 6 Maddock, 189.

come *more injurious*, unless proved to be so by proper evidence.[1]

5. The Court *of itself* will not presume any *fact to have occurred* or *to exist*, that can possibly affect the *merits* of the case, or rights of the parties, unless *mutual consent*, *sufficient lapse of time*, undue forbearance, or *evidence*, authorizes the Court to do so, unless infants are concerned.[2]

N. B. This rule is observed, even though a particular fact may seem to stand out as being in existence to a certainty, from the very nature of the facts actually already proved, if such apparent fact (affecting the *merits* of the case, or *rights* of parties) may, by any chance, not really be in existence, through force of any one accident that can be mentioned, or supposed as possible to have happened; except when contraries are proved to exist, and then the Court presumes that fact only to have occurred, or to exist, which seems most likely to be so from the nature of the pleadings, evidence and circumstances of the case, taken altogether.

Therefore it is necessary *to state* in the Bill each important fact depending on *provable* cir-

[1] Casus XII. Jenkins's Centuriæ, 198. Lloyd *v.* Trimleston, 2 Molloy, 81. Banbury Peerage, 1 Simon & Stuart, 155. Hall *v.* Warren, 9 Ves. 611. Dunn *v.* Calcraft, 2 Simon & Stuart, 56.

[2] Gordon *v.* Gordon, 3 Swanst. 472. Cridland, *ex parte*, 3 Ves. & Bea. 99. Smith *v.* Clarke, 12 Ves. 477. Clarke *v.* Turton, 11 Ves. 240. Perfect *v.* Curzon, 5 Maddock, 442.

cumstances; for, being of importance to the plaintiff's case, and not undeniably certain in its existence, it will not be presumed.

6. The Court *of itself* will presume such *consequences* to have happened or to exist as are not *provable facts*, but are dependent wholly for their existence on the *logical reasoning* of the Law, or Equity, from the facts actually established in the case. Any reported case will exemplify this rule.[1]

N. B. For instance, the Court, on sufficient facts being established in the case, will presume, as a consequence from such facts, That A ought to ———, is entitled to ———, may ———, is in fault as to ———, should ———, must not ———, because such a writing as ——— is a ———, and imports ———, and therefore is an absurdity in law, and is also uncertain, illegal, &c.; therefore, B is to have ———, and is entitled to possession of ———.

Having mentioned what consequences the Court will presume, it may perhaps help to manifest the rule more fully, if that sort of consequences which the Court will not presume be mentioned by means of an example.

7. The Court *of itself* will never presume that A has possession, however many collateral facts may be established, which together almost mani-

[1] Hampson *v.* Hampson, 3 Ves. & Bea. 41.

fest to a certainty that A, as a consequence, *has possession;* because, whether A has possession or not, is a provable fact, directly provable; and to assume, therefore, that he has possession, were arbitrarily to supply facts by giving evidence as if a witness, and perhaps as a false witness.

8. The Court *of itself* will presume that each party knows the *law*, and what is *equity*, if not shown to be an infant, lunatic, or incapacitated person; but that each party is ignorant of *a fact* till such fact is shown to be his own act, or part of his proper duty, or that he had afforded him proper opportunity for taking *notice* of such fact.[1]

The Form of the Bill.

The modern Bill in Chancery differs in form in many particulars from the old Bill, for, by orders of Court recently issued, it has had many verbal alterations made in its formal parts, and also distinct formal parts added; therefore that division of the Bill into parts, which is spoken of in treatises published anterior to the year 1837, cannot now be said to be a correct division, applying to modern Bills in Chancery.

[1] Hale's Pleas of the Crown, 42. 4 Blackstone's Commentaries, 26. Lowry *v.* Bourdieu, Douglas's Rep. 468. Bilbie *v.* Lumley, 2 East, 469. Brine's Case, 1 Buck, 109. Queen *v.* Roberts, Term Reports (New Series), 427.

I. *Address.*[1]

The Bill is addressed to the judge or justices of the Court wherein the suit is brought, and from which it seeks relief.

In the Circuit Court of the United States for the First Circuit it would be addressed, —

To the Honorable the Judges of the Circuit Court of the United States of America for the First Circuit, within and for the District of ——, sitting in Equity.

In the State of New York it would be addressed, —

To the Honorable ——, Chancellor of the State of New York.[2]

II. *Introduction.*[3]

This part sets out the accurate, critical and full description of each of the plaintiffs (as he is in turn named) in the following order: his *name, place of residence, county, avocation in business,* and peculiarity of legal character in which he sues, when such peculiarity of legal character is that he is but *one* of many of similar character, and acts in his own behalf only, or on his own

[1] See Rule XX., *post.*

[2] 1 Hoffman's Chancery Practice, 40. Goldsmith on Equity, 95.

[3] Story's Equity Pleadings, § 26 and note. Bingham *v.* Cabot, 3 Dallas, 382. Rule XX., *post.*

behalf and of all others of similar character with himself.[1]

When there are more plaintiffs than one, their legal character then is usually here expressed by experienced draftsmen. This accuracy in describing the plaintiff's name and residence is required, in order that a defendant may have every facility in regard to recovery of costs, and of demanding security on occasion happening.[2]

N. B. A Bill, if it be filed by more than one plaintiff, must have those persons only for plaintiffs who have an interest identically alike in every respect, so that one relief suits all of them exactly as if they formed but one plaintiff, with one character of interest at stake; all other persons interested, though friendly, must be made defendants, if their interest is not identical with the plaintiffs', and even if a person, who ought to be a co-plaintiff, will not be so, he must be made a

[1] Or if an infant, lunatic found by commission, officer of corporation, wife, idiot, or deaf and dumb person; but as these are not *ordinary* Bills, they are not included in this work.

[2] Fort *v.* Bank of England, 10 Sim. 616. It is material that the description and place of abode of the plaintiff should be set forth in the Bill, that the defendants may know where to apply to him, should they be disposed to accede to his demands, or should it be necessary to resort to him for the payment of costs, in compliance with any order or process of the Court which may issue against him during the progress of the suit. Barton's Suit in Equity, 42. Howe *v.* Harvey, 8 Paige, 73. Gove *v.* Pettis, 4 Sand. Ch. 403. 1 Dan. Ch. Pr. 362. In all bills in equity in Courts of the United States, citizenship should appear on the face of the bill to entitle the Court to take jurisdiction. Dodge *v.* Perkins, 4 Mason, 435.

defendant.[1] Who ought to be defendants is more fully shown hereafter, under that part of the Bill called the "Prayer of Process."[2]

The commencement of this second part of the Bill is ever thus in ordinary cases: —

Humbly complaining, sheweth unto your Honors, your Orator[3] *A. B., of ——, in the county of ——, esquire*[4] (*a bond and simple contract creditor of J. J., on behalf of himself and all other creditors of the said J. J. who may come in and contribute to the expense of this suit*).[5]

The three next parts of the Bill, which now follow, are called the *Premises*, when spoken of in the profession.

III. *Stating Part.*[6]

What is now the third part of the Bill is called

[1] Fallowes *v.* Williamson, 11 Ves. 313. Whitney *v.* Mayo, 15 Ill. 251.

[2] Fenn *v.* Craig, 3 Younge & Collyer, 218. Lloyd *v.* Markeam, 6 Ves. 145. Cholmondeley *v.* Clinton, Turn. & Russ. 116. Jones *v.* Garcio del Ria, Turn. & Russ. 297. Story's Eq. Pl. § 72, 271. See Calvert on Parties to Suits in Equity, for a full exposition of this subject. On misjoinder of plaintiffs, see Story Eq. Pl. §§ 279, 530. Dawson *v.* Lawrence, 13 Ohio, 543. Yeaton *v.* Lenox, 8 Peters, 123. Bailey *v.* Burton, 8 Wend. 339. Thurmon *v.* Shelton, 10 Yerger, 383. Mix *v.* Hotchkiss, 14 Conn. 32.

[3] Or Orators, or Oratrix, or Oratrixes, as the case requires; for a plaintiff, if a man, is always mentioned as Orator, and if a woman, as Oratrix.

[4] Or joiner, as avocation in business is.

[5] Or with such other peculiarity of legal character as the case affords.

[6] The complainant must stand or fall upon the case made by his

the *Stating Part*, and makes statements, with all proper *dates*, *names*, *descriptions*, *sums*, and *circumstances* concerning each important fact in the plaintiff's case; which is so essential to his success, that he must rely on each of such facts, and must prove each by *evidence*, if denied by the defendants, or any one of them.[1]

The first statement begins thus:—

That ——

and each statement afterwards thus:—

And your Orator further sheweth unto your Honors that ——

N. B. The rules which apply to all statements seem to be these:[2] —

1. That only so much *land*, or so much *property*, or so much *land and property*, be included in or treated as the subject-matter of *one Bill*, as is rendered liable to the *sort of claims* made by the plaintiff, by force of *one will*, or *one deed*, or *one agreement*, or *one transaction*, or *one event;* or else by force of *one series* of wills, or deeds,

bill. The answer of the defendant cannot aid him. Thomas *v.* Warner, 15 Verm. R. 110. Wright *v.* Dane, 22 Pick. 55. Cole *v.* Savage, Clark's Ch. R. 361. Hutchinson *v.* Brown, Ib. 408. Gibson *v.* McCormick, 10 Gil. & Johns. 65. Lucas *v.* McBlair, 12 Ib. 1. Harrison *v.* Hart, 2 Bibb, 4.

[1] Mitford's Chanc. Pract. 43. 1 Daniell's Chanc. Pract. 40. 2 Mad. Pract. 205. Lube's Analysis, 263. 11 Ves. 296, 373. 1 Hogan's Rep. 29. 6 Sim. 481. 1 Daniell's Chanc. Pract. 480. 3 P. Wms. 276. 22 Pick. 55.

[2] Read Stephen's Pleading; the rules there mentioned are equally serviceable to an Equity draftsman.

or agreements, or transactions, or events *continuously* proceeding from *one origin.*[1]

N. B. If lands or properties be made together the subject-matter of *one Bill*, which are liable to the claims made by the plaintiff, by force of different and *distinct origins*, the Bill is called multifarious, as will be shown hereafter, and may be rendered inoperative by the application of a defendant to the Court; as such distinct subject-matters should have distinct Bills, although claimed only from one and the same defendant.

2. That each statement is to be arranged in the Bill in that priority in regard to other statements, as the *date* of its contents or its *relevancy* to other statements points out.

N. B. That any part of a Bill in request may very easily be found.

3. That where a statement is capable of being interpreted *two ways*, it is at the option of the defendant to take which interpretation he pleases.[2]

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[1] Attorney-General *v.* Moses, 2 Mad. 294. Brookes *v.* Whitworth, 1 Mad. 86. 22 Pick. 55. 11 Ves. 240. 3 Bro. C. C. 481. 3 Younge & Collyer, 683. 6 Johns. Rep. 565. 2 Sch. & Lef. 280. Story's Eq. Pl. § 271, b. 5 Ired. Eq. 313. Nail *v.* Mobley, 9 Ga. 278. Robinson *v.* Cross, 22 Conn. 171. McCall *v.* Bellows, 1 Allen, 269. Larkins *v.* Bidd, 21 Ala. 252. Bugbee *v.* Sargent, 23 Me. 269. 3 Md. Ch. 46.

[2] Cresset *v.* Kettleby, 1 Vernon, 219. Case must be alleged as it will be proved. 6 Munford, 416. 6 Johnson, 564. 1 Cowen. 734. 4 Johnson's Ch. Rep. 281. 3 Rand, 263. 5 Munf. 314. 5 Rand, 543. 5 Johns. Ch. Rep. 82. 3 Paige, 478.

N. B. Consequently a statement should never be framed so as merely to import that the plaintiff *believes*,[1] but should import that the plaintiff believes and asserts the statement, as importing one important fact, and such a fact only as the plaintiff means it to import. For if a fact is not stated so as to show to a certainty its nature, and that it is asserted and relied upon, the defendant is not bound to notice it otherwise than as he pleases; and can occasion the plaintiff the greatest trouble therefore on such a statement.

4. That only facts which are *relevant* and *essential*, clearly relevant and essential, as actual ingredients of the plaintiff's case, are at any time to be stated; and if a statement be clearly useless, through importing an *irrelevant fact*, or clearly *wordy* to an excess, such statement, if a defendant chooses to apply to the Court, may be struck out altogether, if useless, or else so much struck out of it as is clearly excessive.[2]

N. B. This fault occasions a Bill to be called *impertinent;* and also, if a statement imports

[1] 1 Vesey, 56. McDowell *v.* Graham, 3 Dana, 73.

[2] Gilbert's For. Roman. 209. Portsmouth *v.* Fellows, 5 Mad. 450. Nesbit *v.* Brown, Dev. Eq. 30—Rule XXVI., *post.* Story's Eq. Pl. § 863. For impertinence generally, see Teuch *v.* Cheese, 1 Beav. 571. Hawley *v.* Wolverton, 5 Paige, 522. Hood *v.* Inman, 4 Johns. Ch. 437. The best test to ascertain whether matter be impertinent, is to try whether the subject of the allegation could be put in issue and would be proper matter to be put in evidence between the parties. Woods *v.* Morrell, 1 Johns. Ch. 103. On scandal, see 1 Dan. Ch. 397.

scandal on a person's character, to an extent not actually necessary to the case of the plaintiff, then a Bill is said to be *scandalous and impertinent*, and the person hurt may, by applying to the Court, have such a statement struck out altogether, or such parts of it as are scandalous and impertinent, with payment of costs.[1]

5. Each statement should contain but *one chief fact;* so that the length of a statement is occasioned only by the insertion of those minor facts which are essential through being actually the very component parts of the *chief fact* itself.

N. B. If two *chief facts* be included in one statement, and therefore connected together, it is extremely difficult to make both appear, as relied on as *distinct points* in the case; for the one will be supposed as only stated to manifest the other clearly, and to be used only for that purpose: whereas, if each be put as a distinct statement, it appears applicable quite as much to one statement as to another, and may therefore be used generally to benefit and assist any other statement to which it can be made to apply. Therefore to have but one chief fact in each statement is important.

[1] Wagstaff *v.* Bryan, 1 Russ. & My. 28. Joseph *v.* Simpson, 10 Price, 35. Mason *v.* Mason, 4 Hen. & Munf. 414. Wood *v.* Morrell, 1 Johns. Ch. R. 103. Hart *v.* Small, 4 Paige, 333. Scudder *v.* Bogert, 1 Edw. Ch. R. 372. Livingston *v.* Livingston, 4 Paige, 111.

It is also necessary that each statement should detail all essential *minor facts*, for this reason: because it is only by these that it is shown *how* the chief fact exists; and therefore the minor facts really supply the very grounds which alone make the existence of the chief fact appear certain and credible. For presumption of the Court will not supply essential ingredients; thus, *names, parties, amounts, place, extent, value, form, method of execution*, or *delivery* of a *chief fact*, are minor facts; but a party's *purpose, death, marriage, possession, liability, property, claims, relationship, deeds, wrongs, omissions, losses, acts*, or a thing's *consequences, import, legality, insufficiency, loss*, and *defects*, should be stated as *chief facts*.[1]

This *Stating Part* of the Bill usually contains several statements, each supplying such a chief fact as, together with others, *demonstrates* a present, sufficient, perfect *title* in the plaintiff; so that the Court is warranted, from the present force and completeness of his title, to take upon itself to enter into his case, to see if he can have the *relief* he prays for by his *Bill*.[2]

This part, therefore, shows *how* the plaintiff is

[1] Cuthbert *v.* Creasy, 6 Mad. 189. Story's Eq. Pl. § 28.

[2] Norbury *v.* Meade, 3 Bligh, 211. If equity depends on their *title*, legatees must allege a will. Martin *v.* M'Bryde, 3 Ired. Eq. 531. Van Cortlandt *v.* Beekman, 6 Paige, 492. Grantees must allege a deed. King *v.* Trice, 3 Ired. Eq. 568. 1 Dan. Ch. Pr. 365. Allegations in stating part must be positive and not by way of recital. McIntyre *v.* Trustees Union College, 6 Paige, 239.

in possession of the peculiar legal character mentioned in the Introduction, namely: — *That by a bond duly sealed, and executed, and dated* ——, *whereof the condition was* ——, *your Orator became a creditor of the said* ——, &c. Or, if no such peculiar character exists, this part carries out the plaintiff's title; thus, if he claim as *heir:* — *That A. B., on or about the* —— *day of* ——, *in the year of our Lord* ——, *was seized of and entitled to certain lands situate in* ——, *and known as* ——. *That in the said lands the said A. B. had an estate* ——. *That the said A. B. was married to* ——, *on the* —— *day of* ——, *in the year of our Lord* ——. *That the children born in such marriage were* ——. *That A. B. died on the* —— *day of* ——, *in the year of our Lord* ——, *seized of and entitled to the said lands as aforesaid* ——. *That the said A. B. previous to his death made a will* (or as fact is), *bearing date* ——, *which was duly attested as by law required, and has been duly proved in the proper Court. That such will left the said lands totally uncharged and unaffected, being to the effect* ——. *That your Orator is heir at law to the said A. B., because* —— (or in some such words as the case requires), exemplifying of what lands ancestor *was possessed at death, how possessed, and how plaintiff is heir.*

After sufficient statements as to title have been made, then follow in this *Stating Part* several

statements, each supplying such a *chief fact* as, together with others, manifests a case of sufficient *equity* to warrant the Court in granting the plaintiff *the relief* he prays for by his Bill.[1]

N. B. This portion of the *Stating Part* is the most difficult in the Bill to frame, and that in which the most learned and skilful draftsmen very often err; nay, the very judges do sometimes differ as to the sufficiency of this portion of the Bill; because not only must essential minor facts demonstrate each chief fact, but also such chief facts must be stated as manifest that proper *notice* was given to and had by the parties complained of, concerning the matters complained of; and also that *good consideration* and sufficient *liability* attached to the parties complained of, touching the matters complained of; and that such parties are liable at least by the acts of other persons named, who by force of the acts stated are the *agents* of the parties complained of.[2] These statements, showing *equity*, do therefore depend entirely on the patience, skill, and learning of the draftsman for their efficacy; and it would be impossible to give any set of examples that could apply generally, as each case has generally its own peculiar facts of *equity;* but what equity means is attempted to be shown hereafter.

After a Bill has been considered and drawn,

[1] Flint *v.* Field, 2 Anstruther, 543.

[2] LeNeve *v.* LeNeve, Leading Cases in Eq.

even then a *reperusal* of it is always *most prudent*, to see that in this portion of the *Stating Part* every statement is made that renders the Bill *consistent* with common sense, *as a whole.*

When a defendant's name happens for the *first time* in the Bill, there are added to his name the words "a defendant hereto," or if the only defendant, "the defendant hereto;" and he is afterwards spoken of as *the said defendant*, instead of by his names, except when there are many defendants, and he is alone intended to be spoken of.

After a set of statements is finished which manifest an *equity* to exist as to plaintiff, it is advisable, at the end of each of such sets, to submit to the Court, as a statement, that such an equity does exist, and that the plaintiff is entitled to it, and that he now *claims* such equity.[1]

N. B. Mind that each *claim* is consistent one with another, and that each claim can be satisfied completely out of the one subject-matter of the suit, or out of some portion thereof.

In this part is stated:[2] — *And your Orator submits to your Honor that an injunction to restrain the said defendants and agents from* ——— *should be awarded to your Orator by this Honor-*

[1] And to add also that he is willing and ready to ———, making an offer to act as equity requires on his part. Hall *v.* Maltby, 6 Price, 240.

[2] When an injunction is necessary.

able Court, in consideration of the premises, and such injunction is here sought by your Orator.

What an equity is, most undeniably depends on very minute circumstances, and can best be arrived at (as appears to me) by mentioning, firstly, what are the *chief equities* that have been recognized by the Court, which seem each to belong to no general comprehensive rule, but to form a class of itself.

If a party *threaten* A with an *act* which the party intends to do, then, if A can show facts in statement which manifest that such *act*, if done as threatened, will *wrong* A, then A has an equity which will induce the Court to restrain the party by *injunction* from doing such threatened act, or continuing to do it; and a Bill for this purpose is called a Bill *quia timet.*[1]

If parties about to marry join in a deed, and duly execute the same, for the purpose of benefiting *infants*, who are the legitimate children of either party possessing the subject-matter of the deed, or infants that may be born to the parties by such marriage, when consummated, then such children, at any time during their infancy, may (if possessed of a vested interest), by means of a *next friend*,[2] apply to the Court to

[1] Ranelaugh *v.* Hayes, 1 Vern. 189, 190. 1 Ves. 283. Flight *v.* Cook, 2 Ves. 619. Green *v.* Pigot, 1 Bro. C. C. 103. Brown *v.* Dudbridge, 2 Bro. C. C. 321. Story Eq. Jur. § 825.

[2] Any person may act as a next friend to infants, who will un-

have such deed carried into effect and complied with, if any facts can be shown by a Bill that manifest an intention of the parties to the deed to vacate the deed, or transgress its covenants.[1]

A husband is not allowed to sue for his wife's property for himself, though such property be not secured to her separate use, until he has settled a jointure on her, or unless she consents expressly that he may; and his Bill must show such jointure or express consent.[2]

If A be surety with another, on the behalf of B, then A can, if an action at law is successful against him alone (as a surety) for the whole amount of his liability, induce the Court to cause the other surety to contribute his due proportion of the liability.[3]

If a penalty be incurred, so as to be recoverable at law, and an action be brought for the pen-

dertake the responsibility of paying all costs, if his Bill on behalf of the infants is mismanaged. Story's Eq. Pl. § 59.

[1] Hope *v.* Clifden, 6 Ves. 508. Powis *v.* Burdett, 9 Ves. 433. Welford on Pleadings in Equity, 18. 1 Grant's Chanc. Pract. 413. Story's Eq. Jur. § 827.

[2] Brown *v.* Elton, 3 P. Wms. 202. Middlecome *v.* Marlow, 2 Atk. 520. Sleech *v.* Thorington, 2 Ves. 561. Cockel *v.* Phipps, Dick. 391. Stackpole *v.* Beaumont, 3 Ves. 98. Druce *v.* Denison, 6 Ves. 385. Story's Eq. Jur. § 1403, *et seq.* Tevis's Rep. *v.* Richardson's Heirs, 7 Monroe, 660. Van Duzer *v.* Van Duzer, 6 Paige, 366. Kenny *v.* Udall, 5 Johns. Ch. 464. Andrews *v.* Jones, 10 Ala. 400.

[3] Mayhew *v.* Crickett, 2 Swan. 192. Dering *v.* Earl of Winchelsea, 1 Cox, 318. Claythorne *v.* Swinburne, 14 Ves. 169. Collins *v.* Griffiths, 2 P. Wms. 314. Cook's Case, 2 Freeman, 97. 1

alty, a Court of Equity will restrain such action, and decree performance of the covenant instead, where the penalty is not a direct object of the deed, but only a collateral object.[1]

An act done through *undeniable* mistake, or by *unavoidable* accident, may be relieved against in Equity.[2]

As to other cases, the rule that seems to supply what *equity* is, may be said to be the following:

That a party has an *equity*, when by any act of another he is *wronged* (without power of having legal remedy) in his own property that he claims; and in regard to which *act* he has made no written agreement in any way approving such *act*, and in regard to which *act*, also, no implied

Chanc. Rep. 34. 1 Equity Abridg. 114, Pl. 9. Kemp *v.* Finden, 12 Mees. & W. 421. Story's Eq. Jur. § 492, *et seq.* Waters *v.* Riley, 2 Har. & G. 305. Pinkston *v.* Taliaferro, 9 Ala. 547. Byers *v.* M'Clanahan, 6 Gill & J. 250. Taylor *v.* Savage, 12 Mass. 98. Allen *v.* Wood, 3 Ired. 386.

[1] Sloman *v.* Walter, 1 Brown's Chanc. Cases, 418. Hele *v.* Hele, Cases in Chanc. 2d Part, 88. Doneraile *v.* Chartres, 1 Rodgers, P. C. 134. Skinner *v.* Dayton, 2 Johns. Ch. 435. Astley *v.* Weldon, 2 Bos. & Pull. 346, 350. Hardy *v.* Martin, 1 Cox, 26. Benson *v.* Gibson, 3 Atk. 395. Story's Eq. Juris. § 1314, *et seq.*

[2] 1 Chanc. Cases, 72, 83, 126. 1 Vern. 32, Luxford's case cited. 2 Vern. 243. 1 Ves. 126. 1 P. Wms. 355. 1 Cases in Chanc. 11. 1 Atk. 287. 1 Ves. 344. 5 Ves. 238. 7 Ves. 19. Tucker *v.* Madden, 44 Me. 206. Hileman *v.* Wright, 9 Ind. 126. Linn *v.* Barkey, 7 Ind. 69. Davidson *v.* Grier, 3 Sneed, 384. Ruffner *v.* McConnell, 17 Ill. 212. Story's Eq. Jur. § 110, *et seq.* Cases Collected, 1 Madd. Ch. Pr. ch. 2, § 2, p. 41. See Baynard *v.* Norris, 5 Gill, 477. Story's Eq. Jur. § 75, *et seq.*

agreement of his can be made out by any act of previous *notice* given to him concerning it; nor any act of his own or his agents can be brought in evidence, testifying *approval, use, forbearance,* or *instigation* of such *act.*

No writing whatever is to be set out *verbatim,* at any time, in its own words, in a Bill, but only its import and legal effect given, and its dates, parties, indorsement, sums, execution, and attestation described, excepting those parts which form the very foundation itself of the plaintiff's case, and on which he mainly relies as an actual ingredient of his case; and such *essential* parts are to be set out in their own words (together with such other parts referred to by them), to as full an extent only as a clear, precise exhibition of the meaning of those essential parts actually requires.[1]

N. B. Each writing intended to be relied on should be *pleaded* (that is, set out in short, as above).

When a writing is pleaded, and therefore intended to be used in evidence, then the usual sentence employed to put it in evidence is this: —

As in and by the said ——, *when produced, will more fully and at length appear, and to which*

[1] Welford on Pleadings in Equity, 101. 1 Dick, 362. 3 Bro. C. C. 480. Rule XXVI., *post.* Only legal effect of deeds; Hopkins *v.* Young, 11 Mass. 307. Osborne *v.* Lawrence, 9 Wend. 135. 1 Dan. Ch. Pr. 415.

your Orator, for greater certainty, craves leave to refer.

An act of parliament (whether public or private) must be pleaded like any other writing, if its import is intended to be relied on literally; but such pleading of an act of parliament does not require the above sentence to put it in evidence, unless a *private* act of parliament.

To set out more of any writing *verbatim* than is actually necessary to the plaintiff's case is *impertinence.*[1]

After a writing has been pleaded, it is usual to state to the effect that the persons, sums, and matters in the said last-mentioned ——, named and described, are the same persons, sums, and matters as are in the Bill alluded to, and named and described by similar names and descriptions; and if a *deed* or *bond* is the writing, to state also, that it was *duly sealed and executed, and still is in full force.*

To make the case depend mainly on letters or writings *stated,* is a great advantage, as their evidence is ever ready, and a party's handwriting is easily established as a general rule.[2]

[1] Rules XXVI. and XXVI., *post.* If the Bill contain matter criminal, impertinent, or scandalous, such matter may be expunged, and the plaintiff and counsel ordered to pay costs to the party aggrieved; but no action will lie against the counsel. 2 Maddock's Chancery, 3d edit. 207.

[2] Birce *v.* Bletchley, 6 Mad. 17. 1 Daniell's Chanc. Pract. 371, 3d edit.

The *Stating Part* ends with a statement to the effect, —

That your Orator, previously to this suit being commenced, that is to say, on the —— day of ——, and at other times, applied and caused also applications to be made to each of the said defendants and his agents, by letter and otherwise, requesting him and them to act towards your Orator in such a way as is equitable and just, and as is hereby prayed, and to desist from the unreasonable and unjust practices herein mentioned, and your Orator had well hoped that such his reasonable requests would have been complied with.

IV. *Confederacy.*

The *fourth part* of the *Bill* is called the *Confederacy*, and is in these words, usually: —

But now so it is, may it please your Honor, that the said defendants, combining and confederating together, and with divers other persons at present unknown to your Orator, but whose names, when discovered, your Orator prays he may be at liberty herein to insert and make parties defendant hereto, with proper and apt words to charge them, and contriving how to wrong and injure your Orator in the premises, absolutely refuse to comply with such requests.

N. B. This part is of no actual importance, although a fixed, formal part, as any particular

confederacy must be particularly pleaded, if intended to be relied on.[1]

V. *Charging Part.*

The fifth part of the Bill is called the *Charging Part*,[2] and forms the last part of the *premises*.

This part is usually in these words: —

And the said defendants sometimes pretend that ———. *Whereas your Orator charges the direct contrary thereof to be the truth, and charges that* ———, *and charges also that* ———.

This part consists of statements expressing, as mere pretences of the defendants, each chief fact the plaintiff knows or firmly believes they will use and try to establish against him, and charges, in opposition, such facts as show such pretence to be *false* or *useless*, appending as many distinct charges only to each pretence as the pretence

[1] 1 Mad. 414. 1 Daniell's Chanc. Pract. 375. Story's Equity Pleadings, § 29. That this part of the Bill may be omitted, see 8 Ves. 404. 3 Mad. 11. The practice of inserting this charge arose from the idea that without it parties could not be added to the Bill by amendment. Welford's Eq. Pl. 102. Rule XXI., *post*.

[2] Lube's Analysis, 266. That this part of the Bill is unnecessary, see Welford on Pleadings in Equity, 102. 11 Ves. 575. Story's Eq. Pl. § 33. As to the Charging Part, see 3 P. Wms. 269. 2 Atk. 337. 3 Swanst. 174, note (*a*). Van Hey. Eq. Dr. 5. Gresley on Evidence, 14, 15. The equitable ground for relief on the part of the plaintiff must appear in the *Stating Part* of the Bill; for if the equity only appears in the Charging Part, the Bill will be demurrable. 2 Anst. 543.

seems to require to render it nugatory, or as the case allows of.

If the plaintiff knows of no defence that will be set up, still he should state here: — *And the said defendants sometimes pretend that your Orator is not entitled to the relief sought by this Bill of complaint, but only to a portion of such relief. Whereas your Orator charges the direct contrary thereof to be the truth, and charges that* ———, and then state in the charge some *act, deed,* or *writing* of theirs, or of one of them, which manifests of itself some ground for belief that they have acted clearly as if the plaintiff was entitled to and ought to have the relief he prays, or some portion of it. Some statement to manifest this charge is nearly always possible to be made, as the defendants, or some of them, never can have acted thoroughly with *due diligence* throughout the transactions stated, but must have committed some act of *negligence, forbearance,* or *writing,* or must have in their *possession* something tending to all appearance to show the plaintiff entitled to relief, or else that his previous statements are correct, and thereby entitled to relief. If even the last-mentioned sources do not exist, to supply a ground for a charge, still the plaintiff should charge some suppositious fact, having such relevancy to the case, and so likely to exist, that it cannot be thought on perusal impossible or impertinent, and which,

when answered by the defendants, must afford some valuable information to aid the plaintiff's case.

After the last charge has been stated, it is usual to add words to the following effect, but suited to the case: —

And charges further that there are now in the separate possession of each of the defendants, or under his control, some writings, deeds, books, papers, memoranda, letters, copies of letters, receipts, tickets, vouchers, printed papers, and papers with writing thereon, whereof copies have been sent as letters or notes, which have been used as, or one or part of one writing, deed, book, &c. (the same as before, but in the singular number), *having relation to or making allusion to the matters in question, or some one or more of them, whereby the truth of the statements and charges aforesaid, or some of them, would clearly and fully appear, and of each of which writings, deeds, books, papers, memoranda, letters, notes, copies of letters, receipts, tickets, vouchers, printed papers, and papers with writing thereon, as aforesaid, in the possession or under the control of each of the said defendants as aforesaid, your Orator here seeks from each of the said defendants descriptive and full particulars, well arranged and framed, so as to form an intelligible schedule, with all proper dates and descriptions therein distinctly set forth, so that the parties and matters*

alluded to by the contents of the said schedule may be plainly and succinctly manifest.

Whether a fact is to be stated in the *Stating Part* or the *Charging Part* of the Bill, may be decided by the following criterion. If it is a fact fundamentally material to the plaintiff's case, actually essential to it, beyond all doubt, as a portion of its very consistence, it should be in the *stating* part, but not otherwise.

VI. *Averment of Jurisdiction.*

The sixth part of the Bill is called the *Averment of Jurisdiction*,[1] and is commonly in the particular words following, or to a similar effect: —

All which actings, doings, refusals, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orator in the premises. In consideration whereof, and forasmuch as your Orator is remediless at and by the strict rules of the common law, and cannot have adequate relief save in a Court of Equity, where matters of this and like nature are properly cognizable and relievable ——.

[1] Welford on Pleadings in Equity, 104. Mitford, 44. 12 Pick. 34. Barton's Suit in Equity, 35, note. 1 Sch. & Lef. 204. See Rule XXI., *post*. The Averment alone will not give jurisdiction to the Court unless a case be shown in the Bill from which it is apparent that the jurisdiction properly belongs to it. Therefore, the omission of this clause will not render the Bill defective. 1 Daniell's Chanc. Pract. 573, n. (3d ed.)

VII. *Interrogating Part.*

The seventh part is called the *Interrogating Part*, and is required by the Orders of Court to be in the following particular words, or to like effect: —

To the end, therefore, that the said defendants may, if they can, show why your Orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full and direct and perfect answer make to such of the several interrogatories hereinafter mentioned and set forth, as by the note, hereunder written, they are respectively required to answer; that is to say,[1] —

1. *Whether* ———.
2. *Whether* ———.

N. B. The Interrogating Part is composed of nothing more than each statement, and pretence, and charge, in the *Stating Part* and *Charging Part* of the Bill, repeated, with such additions only as render each a *question* instead of an *assertion;* such question being numbered, and beginning with the word *Whether.*

After the word *Whether*, any words may be added that seem appropriate, but the best regular

[1] See Orders 16, 17, and 19 of 26th August, 1841, and Rules XLI.–XLV., *post.*

form to adopt is, *Whether it is not a fact that*, or else, *Whether it is not true that*, as such a form does not require the statement, pretence, or charge, to be in any way altered, but merely added *verbatim* in continuation.

To the end of each statement, so changed into a question, are usually added *inquiries* of the following nature, or such a nature as each statement, pretence, or charge suggests.

And if nay, how with truth is the contrary to be made out, and how otherwise should the fact be stated (or *charged*) *to have taken place, and be in force, or otherwise, and with what exceptions, if any exist, and by what other* ——, *and where, and by whom, and for what purpose, and what other purpose, and where is such* ——, *and by whose authority, and of what amount.*

Any inquiry or any number of inquiries may be used, as are at all relevant, and tend when answered to supply information concerning the *fact stated or charged* (in case it should be *denied* to be as stated or charged), by asking after the circumstances attending it, if not as stated or charged, the only restriction being that *special inquiries* must have relation only to the *fact stated or charged*, and should not supply, or suggest, or tend to seek precise information concerning any important fact not stated or charged, but should ask generally only as to what any fact in denial, if any there be, is, and what are its

attendant circumstances, and what its nature and manifest effect.[1]

The object sought by this *Interrogating Part* is to save the plaintiff from the necessity of having to supply *evidence* as much as possible, by questioning a defendant as to each statement, pretence, and charge made against him, to see how far he *admits* them, as each admission of a defendant is sufficient evidence against *him* of the fact he admits; or if he denies any statement, pretence, or charge, to force him to state what grounds he has for such denial; that the plaintiff may see whether the matters supplied in denial are *consistent* enough, or in any way *harmful* enough to force the plaintiff to support his case by his own evidence; therefore it is that the interrogatories first inquire as to each statement, pretence, and charge, and then seek by a cross-examination to obtain such particulars from a defendant denying as are likely to detect *falsities* or *inconsistencies*, or else to show *other grounds* establishing the plaintiff's case beyond those he has stated.

The general result, however, seems to be, that defendants deny every fact they possibly can with safety from detection, and do only admit such facts as seem to be stated so as to confer a bene-

[1] Bullock *v.* Richardson, 11 Ves. 373. Faulder *v.* Stuart, Id. 296; Muckleston *v.* Brown, 6 Ves. 62. 3 Paige's R. 606. 11 Cowen, 734. 1 Johns. Ch. Rep. 65. 6 Johns. Rep. 543. 1 Cowen, 734. Lubé's Analysis, 270.

fit on them; so that a Bill must be *very specious* to get many admissions or any important information from a defendant *answering*.

A *claim* is not interrogated to, but omitted in this part, because the plaintiff's *stating* his claim is undeniable evidence that he makes such claim, and so cannot be disputed.

VIII. *Prayer of Relief.*[1]

The eighth part of the Bill is called the *Prayer of Relief*, and begins with: — *And that the said defendant, A. B., upon being served with a copy of this Bill, may be bound by all the proceedings in this cause: And that the other defendants hereto may answer the premises: And that* ——: *And that the said defendants* ——— *may be restrained by the injunction of this Honorable Court from*[2] ———; and ends with the following con-

[1] As to the extent and efficacy of this part of the Bill, see Gibson *v.* Haines, 1 Hare, 318. Wilkinson *v.* Beal, 4 Mad. 408. Jones *v.* Montgomery, 3 Swanst. 208. Hern *v.* Mill, 13 Ves. 114. Story's Equity Pleading, § 42. 2 Paige, 396. 6 Munford, 251. 1 Rand, 219. 1 Smith's Chanc. Pract. 84. 1 Eden's Rep. 26. 1 Johns. Rep. 547. 2 Atk. 141. 2 Peters, 595. 13 Vesey, 119. 1 Johns. Ch. Rep. 116. 12 Vesey, 63. 2 Russ. & Mylne, 88. 1 Wheaton's Rep. 200. 1 Paige, 244. Welford on Pleadings in Equity, 106. 11 Ves. 570. 3 Atk. 110. 14 Ves. 585. 6 Sim. 281. 1 Cox, 58. 2 Bro. P. C. 495. Bunb. 192. 2 Sim. & Stu. 219. 2 Dick. 707. 2 Sch. & Lef. 729. For form of prayer for relief, see Story's Eq. Pl. § 40, n. Colton *v.* Ross, 2 Paige, 396, and cases cited.

[2] 1 Ambler, 70. 3 Atk. 262. 1 Jac. 335. Prayer for special relief not essential. Wilkinson *v.* Beal, 4 Mad. 408. Grimes *v.*

cluding words: — *And for such further and other relief as to this Honorable Court shall seem meet.*[1]

This prayer is nothing more, in fact, than all the *claims* stated in the Bill put orderly together with such other words added as make such claims a consistent, connected whole, and arranged in such order that they seem as consequences, the one of the other.

When the circumstances of the case admit, there is in general added to the above prayer (just before its concluding words) what is called an *alternative relief*, that is to say, a relief which differs so far from the first relief sought, as to be the same, but with a modification only; or else a relief which is quite as much warranted and supported by the statements in the Bill, in all neces-

French, 2 Atk. 141. Foster *v.* Cooke, 1 Hawks, 509. Lloyd *v.* Brewster, 4 Paige, 537. Thomason *v.* Smithson, 7 Porter (Ala.), 144. Peck *v.* Peck, 9 Yerger, 301. Allen *v.* Coffman, 1 Bibb, 469. Cook *v.* Mancius, 5 Johns. Ch. 89. Brown *v.* McDonald, 1 Hill, (S. C.), 302. Gibson *v.* McCormick, 10 Gill & Johns. 66. Townshend *v.* Duncan, 2 Bland. 45. Thomas *v.* Hite, 5 B. Monroe, 593. But see Story's Eq. Pl. § 41.

Relief must be consistent with that specifically prayed. Chalmers *v.* Chambers, 6 Har. & John. 29. Hobson *v.* M'Arthur, 16 Peters, 182. Franklin *v.* Osgood, 14 John. 527. Scudder *v.* Young, 25 Maine, 153.

[1] Importance of prayer for general relief. English *v.* Foxall, 2 Peters, 595. Hobson *v.* M'Arthur, 16 Peters, 195. Danforth *v.* Smith, 23 Vermont, 247. Hilleary *v.* Hurdle, 6 Gill, 105. If omitted, complainant limited to relief specially prayed for. Palk *v.* Clinton, 12 Ves. 62. Weymouth *v.* Boyer, 1 Ves. 426. 5 Porter (Ala.), 10. Thomason *v.* Smith, 7 Porter, 144. Peck *v.* Peck, 9 Yerger, 301.

sary points, as the first relief sought; the prayer for relief is said to be an *alternative prayer* when such other relief is sought, and this second relief begins with the words, *Or that* ——, and ends with the words above.[1]

The chief point to be observed as to the prayer is, to see that it is consistent, and in no way *multifarious;* that is to say, that it does not seek for relief which can only be granted by force of two totally distinct *subject-matters* being mixed up together, and treated as if included by the Bill. Such a prayer is fatal, as it renders the Bill totally inoperative; for such distinct subject-matters ought to have been appropriated to separate Bills.

The prayer alone is to decide whether the Bill be multifarious or not.[2]

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[1] Bennet *v.* Vade, 2 Atk. 325. Grimes *v.* French, 2 Atk. 141. 1 Johns. Rep. 559. 2 Leigh, 441. 3 Russ. 178, note. 17 Ves. 173. 6 Ves. 52. 2 Russ. & Mylne, 88. Colton *v.* Ross, 2 Paige, 396. Lloyd *v.* Brewster, 4 Paige, 537. M'Connell *v.* M'Connell, 11 Verm. 290.

Prayer in alternative is under restrictions. Thomas *v.* Hobler, 8 Jur. N. S. 125. Rawlings *v.* Lambert, 1 Johns. & H. 458. Evan *v.* Avon, 29 Beavan, 144.

[2] Dick *v.* Dick, 1 Hog. 290. Upon the subject of multifariousness, see Marcos *v.* Pebrer, 3 Sim. 466. Salvidge *v.* Hyde, 1 Jacob, 151. Bignold *v.* Audland, 11 Sim. 30. Manners *v.* Rowley, 10 Sim. 470. Welford on Pleadings in Equity, 90. Story's Eq. Pl. § 292. Multifariousness; comments on the cases. Campbell *v.* Mackay, 1 Mylne & Craig, 617. General subject. Saxton *v.* Davis, 18 Ves. 80. Att.-Gen. *v.* St. John's Coll. 7 Sim. 241. West *v.* Randall, 2 Mason, 181. Banks *v.* Walker, 2 Sandf. 344.

This prayer will be found to import (as a matter of necessity), when its sentences are considered, a desire for *discovery* of information, and such *relief* as is mentioned in the prayer; but when the Bill actually prays in terms for an *account* or *discovery of*, or discovery of any kind, and also prays in terms for *relief*, the prayer is then said to be for *discovery and relief;* but is said to be for *relief* only, when there is clearly no particular discovery necessary, nor sought for;

Gaines *v.* Chew, 2 How. 619. Oliver *v.* Piatt, 3 How. 333. Jackson *v.* Forrest, 2 Barb. 576. Newland *v.* Rogers, 3 Barb. 432. Fellows *v.* Fellows, 4 Cowen, 682. Brinkerhoff *v.* Brown, 6 Johns. Ch. 139. Boyd *v.* Hoyt, 5 Paige, 65. Swift *v.* Eckford, 6 Paige, 22. Silcox *v.* Nelson, 1 Geo. Dec. 24. Clamorgan *v.* Guise, 1 Mo. 99. White *v.* Curtis, 2 Gray, 471. 3 Story, 25. Robinson *v.* Guild, 12 Metcalf, 323.

The Bill must contain not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief, or it is not multifarious. Cornwell *v.* Lee, 14 Conn. 524. Parish *v.* Sloan, 3 Ired. Eq. 607. Donelson's Adm's *v.* Posey, 13 Ala. 752. Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369. As to joining surviving partner; Butts *v.* Gurney, 5 Paige, 254. Wells *v.* Strange, 5 Geo. 22. Distinct causes of action, but nearly related. Gardner *v.* Ogden, 22 N. Y. Rep. 327. Morton *v.* Weil, 33 Barber, 30. Wade *v.* Rusher, 4 Bosw. 537. Cauley *v.* Lawson, 5 Jones's Eq. 132. Fleming *v.* Gilmer, 35 Ala. 62. Not indispensable that each party should have an interest in *all* the matters. 4 Younge & Coll. 444. Parr *v.* Att.-Gen., 8 Clarke & Fin. 435. Worthy *v.* Johnson, 8 Ga. 238. Or that their interests should be coextensive. Buckeridge *v.* Glasse, 1 Craig & Phill. 126. Sole plaintiff having distinct characters and conflicting rights. Blease *v.* Burgh, 2 Beav. 221. Not multifarious, if remedy at law is by several actions. Swift *v.* Larrabee, 31 Conn. 225. Crews *v.* Burcham, 1 Black, 352.

and for *discovery* only, when a discovery only is sought for: and no other sort of relief.[1]

IX. *Prayer of Process.*

The ninth part of the Bill is called the *Prayer of Process*, and is in these words[2] usually (but is left to the solicitor to add to the Bill): —

May it please your Honors to grant unto your Orator, *not only a writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said* ——, *to restrain him and them from* ———, *but also* a writ or writs of subpœna, to be directed to the said C. D., E. F., [*name each defendant required to appear and answer*], and the confederates, when discovered, thereby commanding them and every of them, at a day certain, and under a certain pain therein to be limited, personally to be and appear before your Honors, in this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises, *and further to stand to, and perform, and divide such further order, direction, and decree therein, as to your Honors shall seem meet.* And that the said defendant, A. B., upon being served with a copy of this Bill, may be bound by all the proceedings in this cause. And your Orator shall ever pray.[3]

[1] 1 Johns. Ch. Rep. 117. 2 Peters, 595. 14 Johns. Ch. Rep. 527. 4 Rand, 95.

[2] Story's Eq. Pl. § 44, n.

[3] 1 Smith's Chancery Practice, 85.

N. B. The words in Italics, in the first part, are to be omitted, when no injunction is prayed for; and also the words in Italics at the end, to be omitted, when the Bill is only for *discovery*, or *to perpetuate* the *testimony of a witness;* also as to A. B. being served with a copy of Bill, when no defendant is prayed to be so served.[1]

Those only are defendants to a Bill who have process prayed against them by name, in this part of the Bill.[2]

And here it is necessary to observe who ought to be made parties to a Bill.[3]

[1] Ambury *v.* Jones, 1 Younge, 199. Gibson *v.* Haines, 1 Hare, 318.

[2] Windsor *v.* Windsor, 2 Dickens, 707. 2 Johns. Ch. Rep. 245. 1 Hopk. 555. 1 P. Wms. 593. Mitf. by Jer. 45. Coop. Eq. Pl. 16. 4 Ired. Eq. 175. 5 Geo. 251. Whitney *v.* Mayo, 15 Ill. 251.

[3] Cockburn *v.* Thompson, 16 Ves. 328. Mitford on Pleading, 145. 11 Wheat. 304. 12 Mass. 16. Calvert on Parties. 3 Met. 474. 19 Pick. 162. Story's Equity Pleadings, §§ 44, 72–238. Lubé's Analysis, 25. 1 Smith's Practice, 98. 2 Mason's C. C. R. 181. 4 Wash. C. C. R. 32. Welford on Pleadings in Equity, 32–81, where most of the late English decisions will be found. General rule, all materially interested: Bond *v.* Hendricks, 1 A. K. Marsh. 440. Verplanck *v.* M. I. Co., 2 Paige, 438. Lyle *v.* Bradford, 7 Monroe, 113. Whiting *v.* Bank of U. S., 13 Peters, 6–14. McConnell *v.* McConnell, 11 Vermont, 290. Evans *v.* Chism, 18 Me. 220. Carey *v.* Hoxey, 11 Geo. 648. Story's Eq. Pl. §§ 72–238. 24 Me. 20. Prentice *v.* Kimball, 19 Ill. 320. Assignments: Fitch *v.* Creighton, 24 How. 159. Gaines *v.* Hennen, Id. 553. Wade *v.* Rusher, 4 Bosw. 537. Coe *v.* Beckwith, 31 Barb. 339. Dixon *v.* Buell, 21 Ill. 203. 32 Me. 343. 1 Dan. Ch. Pr. 248, n. 4 Florida, 18. 11 Cush. 111. Cases of joint interests: Boughton *v.* Allen, 11 Paige, 321. Brinkerhoff *v.* Brown, 6 Johns. Ch. 150. 2 Iowa, 55. 3 Id. 443. Suits in behalf of the public: People *v.* N. York, 32 Barb.

After a minute analyzation of the cases and works referred to, the following seems to me to be the most safe *general* rule to be observed by a plaintiff, as warranted by such authorities: —

All persons *themselves* (or their actual *representatives*) ought to be parties, who have in themselves, during the period of the suit's existence, such a present, perfect, legal, or equitable interest (or actual possession), actually established and clearly fixed on some part of the identical *subject-matter* of the suit, that any claim in the Prayer of Relief, if granted as prayed, must inevitably alter, harm, or change such interest (or possession), or its value.

Whom to make plaintiffs, has been mentioned in page 11; and the Orders of Court also direct thus:

"That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the Bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the Bill, whether

35. Collins *v.* Ripley, 8 Clarke, 129. Exceptions to the general rule, see Rules XLVII., XLVIII. Party out of jurisdiction: West *v.* Randall, 2 Mason, 196. Sims *v.* Guthrie, 9 Cranch, 19–25. Parties too numerous: 2 Mason, 193–196. Carey *v.* Hoxey, 11 Geo. 651. 19 Barb. 517. Those who are presumed to represent the interest of all: Mann *v.* Butler, 2 Barb. Ch. 362. Whitney *v.* Mayo, 15 Ill. 255. Small *v.* Atwood, 1 Younge, 407. Defendants presumed to represent all: Adair *v.* New River Co., 11 Ves. 444. Parker *v.* Nightingale, 6 Allen, 341.

the same be an original, or amended, or supplemental Bill, omitting the interrogating part thereof; and such Bill, as against such party, shall not pray a subpœna to appear and answer, but shall pray that such party, upon being served with a copy of the Bill, may be bound by all the proceedings in the cause. But this Order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the Bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit.[1]

"That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate as rents and profits parties to the suit. But the Court may, upon consideration of the

[1] Order 23, Aug., 1841.

matter on the hearing, if it shall so think fit, order such persons to be made parties.[1]

"That in suits to execute the trusts of a Will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, when he desires to have the will established against him.[2]

"That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."[3]

X. *Signature.*

The tenth part of the Bill is the *Signature*, that is, signature by counsel.[4]

N. B. The signature is made up of the counsel's name, the date of his signing, and his place of business, where the signature is made.

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[1] Order 30, 1841. [2] Order 31, 1841. [3] Order 32, 1841.

[4] This is required as a security that the Bill does not contain improper matter. 1 Dick. 68. Introduced by Sir T. More: 1 Har. Law Tracts, 302. Kirkley *v.* Barton, 5 Maddock, 378. 5 Vesey, 547. Order 17, 1635, in Beames's Orders. 1 Sim. & S. 136, note. 1 Dick. 16. 2 Younge & Collyer, 3. 2 Ves. & Bea. 358. 2 Com. Dig. *Chancery, E.* 1. 2 Supp. Vin. Abr. 275. Rules XXIV. and LXXXVIII., *post.*

XI. *The Note.*

The eleventh part of the Bill is called *The Note*, and runs thus: —

The defendant, C. D., is required to answer the interrogatories numbered respectively 1, 2, 3, *&c.*

N. B. By Order of Court it is ordained, that the interrogatories which each defendant is required to answer, shall be specified in *a note*, at the *foot of the Bill*, in the form or to the effect above given.[1]

The above form is repeated as to each defendant who is required to answer, altered only by having his name inserted, instead of the defendant already before mentioned by it.

Conclusion.

By way of conclusion, I have here arranged, in proper order, such minutiæ of importance as would have rendered the prior part of the work too prolix in its details, if such minutiæ had been there inserted.

Description of Plaintiff.

If the instructions left for drawing the Bill are so far incomplete (which they often are), that any essential information as regards the plaintiff,

[1] Order 17, 1841.

or his case, or any other matter, is not supplied, still the instructions must be made the most of, and the Bill framed, as far as possible, as if such necessary information had been supplied, by putting in the draft all the formal words, and leaving blanks for such further information to be inserted as the case evidently requires, and then putting a *cross* in the margin of the draft, opposite the beginning of each line having such blanks in it.[1]

Description of Defendants.

The *names* of the defendants are never repeated in a Bill after they have been once set out, except when one or two defendants out of many have alone to be mentioned in regard to a particular fact, and then the names of such one or two defendants must be given, to particularize him or them as the defendants alluded to.

The residences or trades of defendants are not to be set out in the Bill.[2]

On Title of Plaintiff.

If the *title* of the plaintiff is not likely to be disputed by the defendants for their own sakes, a critical statement of the title is not then so imperatively necessary as when the title will be dis-

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[1] See p. 10. [2] See p. 10. 5 Ired. Eq. 196.

puted, and may be stated succinctly instead of in full.[1]

On Interrogatory Part.

A statement or charge, when put into the form of a *question* (with such inquiries added as seem expedient), forms one interrogatory.

N. B. Each interrogatory is to begin a new line, and to have for its first word, *Whether;* also, when the interrogatory is ended, add to it, for its last word, *and*, to connect the next interrogatory with it in sense, though not in form, as here shown: —

1. *Whether it is not a fact that*[2] ———, *and on the —— day of —— last past, signed an indenture bearing date the said —— day of ——, and being of the form and to the purport and effect as in the premises is in that behalf mentioned,*[3] *and if nay, how with truth, &c.* ———; *and*

2. *Whether it is not true that the said indenture was altered on the same —— day of ——, by the said ——, to the effect hereinbefore set forth in*

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[1] See p. 10. 1 Preston on Abstracts, 5–35. 2 Sugden on Vendors and Purchasers, 132–153.

[2] Follow the language of the statement or charge, which is supposed here to be of some such form as given above. See Rule XLIII., *post.*

[3] Never give long *extracts* in full, as an interrogatory, but refer thus to the statement or charge containing the extract.

that behalf, by some such words being added by the said ——, *as* ——, *and added in the manner following, that is to say* ———; *and* ———.

An interrogatory is not warrantably used, unless it is founded on some statement or charge set out in the Bill, and also puts exactly the same *material matters* in issue as are contained in the statement or charge on which it is founded.[1]

On Parties.

It is sufficient to bring before the Court the first person having a vested estate of inheritance.[2]

This Court never goes beyond the tenant in tail in possession, nor requires reversioner after him to be made a party.[3]

Intermediate tenants for life should be parties.[4]

In most cases, the person having the legal title in the subject-matter must be a party, though he has no beneficial interest, that the *legal right may be bound* by the decree of the Court.[5]

[1] See p. 31.

[2] Cockburn *v.* Thompson, 16 Ves. 326. Story's Eq. Pl. § 144, n. 1 Dan. Ch. Pr. 274. Cases in which an alien may sue, see Story's Equity Pleading, §§ 51, 52, 53. 2 Maddock's Chancery, 214, (3d edit.) See Rule XLVII., *post.*

[3] Fletcher *v.* Tollett, 5 Ves. 10. Eagle Fire Ins. Co. *v.* Cammet, 2 Edw. 127.

[4] Gore *v.* Stacpoole, 1 Dow P. C. 18. 1 Dan. Ch. Pr. 274.

[5] See p. 43. Mitford, 145. Johnson *v.* Rankin, 2 Bibb, 184. Nelson *v.* Churchill, 5 Dana, 341. Fish *v.* Howland, 1 Paige, 20.

When a person who ought to be a party is out of the jurisdiction of the Court, that fact being stated in the Bill, and admitted by the defendants (or proved at the hearing), is in most cases a sufficient reason for not bringing him before the Court; and the Court will proceed without him against the other parties, as far as *circumstances will permit.* It is usual, however, to state in the Bill the name of the party out of the jurisdiction, to connect his case with the other parties; and also to pray process against him.[1]

Form of a Bill.

The only parts of the Bill that are kept distinct and unconnected (like paragraphs) from other parts, are the *Heading*, *Address*, *Note*, and *Signature;* all the other parts are connected together (excepting each interrogatory), so as to form one whole continuous context.[2]

Amendment of Bill.[3]

When a Bill is once on the file of the Court, it is in the possession of the Court, and cannot

[1] Mitford, 134. See Rule XLVII.; also Rule XXIII.

[2] The suit is named after the plaintiff first named in the Bill and the defendant first named in the Bill; if more than one plaintiff, then the words *and another*, or *and others*, are added after the plaintiff's name; and a similar rule applies to the defendant.

[3] Amendments must be signed by counsel. 1 Russ. & Mylne, 157. 2 Moll. 303. 1 Sim. & Stu. 136, note. 5 Mad. 378. 1 Jae.

be altered but by an order obtained from the Master or the Court, for the purpose.[1]

An application to amend must be supported by the joint affidavit of the plaintiff *and* his solicitor.[2]

& Walk. 254. Beat. 315. 2 L. R. 386. As to what defects may be amended in the Bill, see Welford on Pleadings in Equity, 165–187. Story's Equity Pleadings, § 882. Plaintiff may make a new case by amendment; Beat. 318. 2 L. R. 386. 2 Moll. 303, S. C. 2 Sch. & Lef. 1. But not after the plea and replication, so as to vary the case. 8 Sim. 72. And the defendant may be obliged to answer all the interrogatories contained therein, although some of them were answered in the original Bill. 3 Mad. 66, 72. 2 Ir. Eq. Ca. 218. 3 Mylne & Craig, 66. Rule XXVIII., *post.* Matter introduced by amendment must not be matter which has happened since the filing of the Bill: but, for exceptions, see Buck *v.* Buck, 11 Paige, 170. 1 Barb. Pr. 207. And where, from change of interest or any other circumstance, parties become interested in the subject-matter of the suit after the Bill is filed, they may be made parties to the Bill by amendment or by supplemental Bill. Leyland *v.* Leyland, 6 Law Times, N. S. 342. Instances of amendment of Bill; Noyes *v.* Sawyer, 3 Verm. 160. Arendell *v.* Blackwell, 1 Dev. Eq. 354. Stephens *v.* Terrel, 3 Monr. 131. Gayle *v.* Singleton, 1 Stew. 566, (Ala.) Ontario Bk. *v.* Schermerhorn, 10 Paige, 109. Ayres *v.* Valentine, 2 Edw. Ch. 451. Buckley *v.* Corse, Saxton, 504. West *v.* Hall, 3 H. & J. 221. Walker *v.* Hallett, 1 Ala. N. S. 379. Jennings *v.* Springs, 1 Bailey's Eq. 181. But an amendment will not be permitted unless it appears that the plaintiff will be entitled to relief on the case made by the Bill after amendment. Mitchell *v.* Lenox, 1 Edw. Ch. 428. Nor where the matter of the proposed amendment might with reasonable diligence have been inserted in the original Bill. N. Am. Coal Co. *v.* Dyett, 2 Edw. Ch. 115. For time when amendments may be made, see Green *v.* Tanner, 8 Metcalf, 411. Story's Eq. Pl. §§ 886, 887. For exceptions to the rule. Vermillyea *v.* Odell, 4 Paige, 121.

[1] 3 & 4 Will. 4, c. 94, § 13. Order 13, 1831. Order 19, 1828. Story's Equity Pleadings, § 332.

[2] 3 Sim. 23.

N. B. All amendments, before *any sufficient answer* is filed to a Bill, are allowed upon an *order* obtained as of course from the Master, for the purpose; and one order allows any number of simultaneous amendments to be made, and any number of orders may be obtained, as occasion may require, one after the other, before any sufficient answer has been filed; but when the latest sufficient answer to a Bill has been filed, viz., the answer of that defendant *within the jurisdiction* who has the latest time to answer in, then only two applications are usually allowed, and each of such applications to amend can only be made, and order obtained, in such a way and within such a time as the orders above dictate; and these two applications are made to the Master.[1]

All amendments must be made within three weeks from the date of the order obtained.[2]

The amended Bill and original Bill form but one and the same record in the estimation of the Court.[3]

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[1] 1 Smith, 216. Lube's Analysis, 82. A defendant not within the jurisdiction is not to be considered a defendant as to this point. King of Spain *v.* Hullett, 3 Sim. 338.

[2] Order 14, 1828. But see, 2 Paige, 67. 6 Johns. Ch. Rep. 79. 7 Gill & Johns. 369.

[3] 1 Paige, 124. 1 Paige, 200. Vere *v.* Glynn, 2 Dick. 441. Hinde's Chanc. Pract. 22 (as to address of amended Bill being the same as that of original Bill, even though judge be changed). T. & F. Ins. Co. *v.* Jenkins, 8 Paige, 589.

After an order has been obtained to amend, still the alterations allowed are to some extent restricted by certain rules, namely, that the alteration must be by way of amendment, and to correct errors in the Bill, or else to supply in addition such parties and facts, as, like those already stated in the Bill, were in existence *previously* to the Bill being filed, and which could then have been inserted, had they then seemed necessary, or if knowledge of them or recollection of them had then happened; but in no case should amendments state facts or parties not in existence previously to the filing of the Bill[1] (through the rule given above). Only such facts and parties should be added as do not tend to show such a totally different ground for relief than the Bill itself showed, as filed, that they occasion the very *intent* itself of the original *prayer* to be altered; for such alteration of *intent of prayer* always harms the plaintiff's case on the hearing, and any benefit at all can only be arrived at through the most troublesome, difficult, and expensive means; as the Bill may become demur-

[1] Knight *v.* Matthews, 1 Mad. 566. 3 Johns. Ch. Rep. 423. 3 Atk. 370. 3 Younge & Collyer, 461. 10 Sim. 238. Should be the subject of a supplemental Bill. Atk. 291. Harr. 60. 3 Wash. 354. But see Kipp *v.* Hanna, 2 Bland. 26. Belloat *v.* Morse, 2 Hayw. 157. Bradford *v.* Felder, 2 M'Cord Ch. 170. Candler *v.* Pettit, 1 Paige, 168. Buck *v.* Buck, 11 Paige, 170. 1 Barb. Pr. 207. Leyland *v.* Leyland, 6 Law Times, N. S. 342.

rable in consequence, and if not demurrable, still impeded by many objections taken; but a plaintiff, by amendment, may quite alter *his case*, by improvement, although he should never alter the *intent* of his prayer; but the *form* of words in the prayer may be altered.[1]

Amendments are oftenest occasioned by the answer discovering facts that require to be put in issue with a full statement in opposition; or by the answer denying certain facts to be as stated in the Bill, and so rendering other facts necessary to be stated, to carry out the denied statement most fully; or by the answer showing inaccuracies to be in the Bill, as to names, dates, sums, or other minutiæ, and then the Bill is amended by correcting, adding, or striking out such parts as seem advisable to be corrected, added, or omitted, with proper charges and interrogatories as may be advisable; and this is done by means of the draft being so altered as the case requires, in such places as the case requires, in *red ink*, and afterwards signed by counsel, if the counsel making amendments is not the same counsel who signed the original draft.[2]

An amendment by striking out a plaintiff and

[1] Butterworth *v.* Bailey, 15 Ves. 358. Mavor *v.* Dry, 2 Sim. & Stu. 113. Smith *v.* Smith, G. Cooper, 141.

[2] Burch *v.* Rich, 1 Russ. & Myl. 156. Webster *v.* Threlfall, 1 Sim. & Stu. 135. Pitt *v.* Macklew, 1 Sim. & Stu. 136. Story's Equity Pleadings, § 883.

making him a defendant cannot be made without consent of defendants (or else of the Court), if they have answered, as it lessens their *security for costs;* and if a party have been made plaintiff without his consent, then the solicitor who made him plaintiff will have to pay costs, through him, in his stead, *if occasion arise.*[1]

Sort of Bills most in Use.

Upon reviewing the various books of reports, I find that the sorts of Bills that have been mostly used are: —

A Bill for a Special Injunction and Relief, having for its object the restraining parties from continuing to do *acts in trade* (or other acts) in the manner hitherto done, to the unjust prejudice of the plaintiff; or else to restrain parties from carrying into execution the *threats* they have made to act in a particular manner, that will be to the unjust prejudice of the plaintiff, and for relief in regard thereto.

N. B. Such as acts or threats of *erecting, pull-*

[1] Titterton *v.* Osborne, 1 Dick. 350. Motteux *v.* Mackreth, 2 Dick. 735. 1 Ves. 142. Lloyd *v.* Makeham, 6 Ves. 145. Witts *v.* Campbell, 12 Ves. 492.

There is greater strictness with regard to amending Bills for injunction than other Bills. 1 Johns. Ch. Rep. 434. 6 Johns. Ch. Rep. 81. 1 Paige, 424. Except as to the prayer. 3 Swanst. 489. The petition must state what the proposed amendments are, and show their materiality, and why such matter was not stated before. 2 Johns. Ch. Rep. 426. 3 Anst. 807.

ing down, altering, pirating, wasting, using, imitating, or *damaging,* or *transferring stock.*[1]

A Bill for Discovery, and an Injunction to restrain Proceedings at Law, having for its object the restraining parties from taking out execution, if they be successful in an action at law already commenced, or threatened to be commenced, until they have discovered to the plaintiff the information necessary to him to defend himself against such action at law, or the result of the same, with due justice to himself.

N. B. Such as the discovery of *deeds, writings,* or *facts* known with *precision* only to the plaintiff at law, and not to witnesses nor plaintiff in equity.[2]

A Bill for Discovery and Relief, having for its object a discovery of books, papers, and writings, and a just account of how various moneys *received* have been applied or disposed of, and

[1] 2 Paige, 209. 3 Peters, 219. 10 Wheaton, 51. 6 Peters, 15. Lubé's Analysis, 67. 1 Paige, 98. 1 Johns. Cas. 64. 9 Johns. Rep. 507. 2 Sumner, 400. 11 Conn. 51. 8 Paige, 75. 5 Paige, 125. 1 Sumner, 89. Amb. 70. The United States Court cannot enjoin proceedings in a State Court. 4 Cranch, 179. 6 Cranch, 51. 1 Ves. & Bea. 314. 8 Ves. 520. L. & R. 38. Nor can a State Court enjoin a judgment in the Circuit Court of the United States. 7 Cranch, 276. Dane's Abr. ch. 26, art. 13.

A Bill may be brought on behalf of an infant *en ventre sa mere,* and an injunction to stay waste may be obtained. 2 Vern. 711.

[2] As to cases where a Bill for a discovery has been granted, see 3 Conn. 135. 3 Anst. 634. 2 Vern. 716. 1 Ch. Cas. 66. 3 Younge & Collyer, 255.

relief, in case the account shows the plaintiff entitled to receive money.

N. B. This Bill is the fitting one to file against trustees, or executors, having the superintendence of lands, mines, funds, or any pecuniary transactions.

Or this Bill is used by one creditor when he sues in his own behalf alone, or on the behalf of himself and all other creditors, against a debtor or his executor, for an account of the debtor's estate and dealings, and that the estate may be administered by the Court equitably among all the creditors who may come in and claim by the suit.

Or this Bill is used by one partner against his partners, when he demands a dissolution of the partnership and adjustment of accounts.

Or this Bill is used for the duly carrying out a testator's intention, as shown by his *will*, as regards *private* charities, children, legatees.

In truth, if the books are to be the tests of what *equity* is capable of, it appears to me, that unless the Equity Courts and Equity Bar were ever vigilant to detect where a remedy lies *at law*, and to refuse proceedings in equity, in consequence, that equity would (if its proceedings were but suited to small estates or properties as well as to large ones) be the fountain of justice primarily and universally resorted to, in every case, for redress; for, over and above other ad-

vantages, it has this, namely, that it has power to frame its decrees so *circumstantially* as to give *complete* redress.

To show what peculiar and paramount authority equity has, there is created and fostered by it an estate totally repugnant to all principles of *law*, and wholly discouraged by the law altogether (and daily practice shows how highly this estate is prized), namely, the *separate estate* of the wife, over which estate she alone (and not her husband or his creditors) has exactly the same dominion, in all respects, *while a wife*, as if she were a *feme sole*, and is restrained only in her disposition of it by the terms of the *will* or *deed* of settlement engifting her with such estate.[1]

Another instance of equity's beneficial effect is the estate of the *cestui que use* (the person for whom a trustee holds), which is also repugnant to the principles of *law*.

Form of the Answer.

An Answer is a formal writing confined in its contents to the setting forth such circumstances of a case in dispute, as *a Bill in Chancery*, by its *apparent validity*, renders *necessary*.

The object of an answer is to *nullify* the case

[1] Tullett *v.* Armstrong, 1 Beav. 1. 4 Mylne & Craig, 377. Rich *v.* Cockell, 9 Ves. 375.

made by the Bill, and not to set out circumstances of any case or fact that is *independent* of the one made by the Bill, or quite *inoperative* on it.[1]

I. *Title.*

The first part of an Answer is its *Title*, which usually is as follows, where the answer is that of only one of the defendants to the Bill: —

The answer of (*christian and surname*), *one of the defendants, to the bill of complaint of* (*christian and surname*), *complainant.*

Or else is as follows, where there is only one defendant: —

The answer of (*christian and surname*), *defendant to the bill of complaint of* (*christian and surname*), *complainant.*

Where there are more than one plaintiff, the christian and surnames of each are given, and the word *complainants* is used in the Title, instead of *complainant.*[2]

The *Title* of an Answer is so far a very important part of it, that it must contain a correct description of the *defendant*, the sort of *Bill*, and the sort of *Answer* to be used; and, if found

[1] Story's Eq. Pl. §§ 849, 845. If the defendant does not file his Answer at the expiration of the period allowed him, or obtain further time for that purpose, the plaintiff is at liberty to attach him. Goldsmith's Equity, 132. Rule VII., *post.*

[2] In what cases it is proper for several defendants, who appear by the same solicitor to put in separate answers, see Pentz *v.* Hawley, 2 Barb. Ch. 552.

erroneous in any of these particulars, should be taken off the file, by a motion to be made by the plaintiff for that purpose, as he would be deprived, by such an incorrect Title, of that *certainty* which it is essential to possess, in order to support a charge of *perjury* against a defendant, where such an offence has been committed, the power of indictment for perjury being the only penalty *in terrorem* a plaintiff has, whereby to coerce the truth from a contumacious defendant.[1]

If the Bill has been amended, or is a peculiar Bill, then the word *amended*, or other appropriate expression, is to be prefixed to the word *Bill*, in the Title; or if the Answer has been reported by a Master as "insufficient," the Title of the

[1] Examples to illustrate this observation are the following: —

An Answer was taken off the file where the words "to the Bill of complaint" were omitted in the Title of the Answer. Cooper, 249.

Also, where the name of the plaintiff was incorreetly given, he being deseribed as Edward Griffiths, instead of Edmond Griffiths. 11 Ves. 62.

A Title purporting that the Answer was to a Bill of complaint of five eomplainants, when the Bill had six plaintiffs, was taken off the file. 1 Mad. 83. Story's Eq. Pl. § 869.

A Title purporting that the Answer was the joint and several Answer of two defendants, and it was sworn to by one defendant only, was taken off the file. 1 Mad. 265.

Where an Answer was entitled as to the original Bill of a *deceased* plaintiff, the Answer was taken off the file. 12 Sim. 45.

The place where and the time when an Answer is taken must be mentioned in the eaption, or it may be taken off the file. Barry & Keogh's Chanc. Pract. 262.

second Answer is then to have the word *further* prefixed to the word *Answer*.

The common forms used are the following:—

The Answer of J. S. C., Knight, her Majesty's Attorney-General, one of the defendants to the Bill of complaint of E. C. and R. his wife, complainants.

The Answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, one of the defendants to the Bill of complaint of J. K. and M. O., L. S. and S. V., complainants.

The Answer of S. B., widow, one of the defendants to the original and amended Bill of complaint of M. X., complainant.

The joint and several Answers of A. B., C. D., and E. F., three of the defendants to the original and amended Bill of complaint of R. K., deceased, and also their Answer to the Bill of revivor and amended Bill of R. P., complainant.

The joint and several Answers of J. K., and E. his wife, H. G., J. P., and of L. F. and T. F., infants under the age of twenty-one years, by G. M., their guardian, six of the defendants to the Bill of complaint of G. S., complainant.

The supplemental Answer of J. F., G. H., and N. F., three of the defendants to the Bill of complaint of the Reverend F. L. and R. L., complainants.

Where a defendant is misnamed in a Bill, the Title of his Answer should correct the error, thus:—

The Answer of A. B. (*in the Bill called D. B.*), *&c.*, as before, as the case requires.

The Title is put as a *distinct* paragraph, at the top of the Answer.

II. *Preliminary Saving.*

The second part of an Answer is the *Preliminary Saving*, which runs on the following words: —

This defendant now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said Bill of complaint contained, for answer thereunto, or unto so much and such part or parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant answering, saith ———.

Where the Answer is a joint Answer, the commencement runs thus: —

These defendants now and at all times hereafter saving and reserving to themselves and each of them (the same as above), *as these defendants are advised is or are material or necessary for them or any of them to make answer unto, they, these defendants, severally answering, say, that* ———.[1]

[1] Where the Answer is that of an *infant*, this formal saving is omitted altogether; but these pages apply only to ordinary Answers of ordinary defendants, and give full particulars of no other kind.

The above formal sentences have in a similar manner inserted in them, in proper places, such appropriate words as show the sort of *Answer* and *Bill* they are used in regard to; and such words usually are as follows: —

For further answer to the said Bill of complaint, where the Answer is a second answer; — or,

For further answer to the said original Bill, and for answer to the said amended Bill, where not only the Answer is a second answer to the original Bill, but an Answer, also, to the Bill as amended; — or,

In the said complainant's original and amended Bill of complaint, where the original Bill has been amended before any Answer has been filed.

In continuation with the above Preliminary Saving, is added the first *fact* of the case made by the Bill and known to the defendant, and is expressed in that sort of language as the interrogatory (mentioned in the note at the foot of the Bill, as being required of a defendant to answer) occasions, much care being taken to avoid all magniloquent or altisonant words being used, as they are fit only for novel or poetic language, and not for legal phraseology.

The safest language to be employed in answering is that set forth by the Bill in its interrogatory; and such language should be employed to as great an extent as is possible, by using no

variation from it, except by simply inserting a word here or there, as the necessity of having to *answer* requires; for if the defendant *admit*, then he should confine his admission to the *limit* of the statement in the Bill, by using its language; for thus he safely guards himself from committing himself more (to his own cost) and from benefiting a plaintiff more than the case actually requires; also, if he *deny*, he must do so, not by using a denial of so comprehensive an import that by force of *reasoning* it negatives the whole interrogatory, but the statement itself in the interrogatory must be denied, even though a general denial be also employed; for the fact stated is the one which the plaintiff has prominently selected as most important to his case, and, as an ingredient in it, delineates the *character* of his case, thereby giving notice to the defendant of his intention; and on that account the plaintiff is entitled to know specifically what *portions* of his case are denied, that thereby the extent of evidence he must produce may be manifest. The language of the Bill should therefore be used in the answer.[1]

III. *Examination Part.*

With this part of the Answer, called the *Examination Part*, the difficulties of drawing the Answer commence.

[1] 2 Hare, 189.

The object of the Answer, in this *Examination Part*, is only to *nullify*, as much as possible, the case *made by the Bill*, and nothing more; therefore, only such circumstances are to be expressed in this Examination Part, as the Bill, by the import of the words in its interrogatories selected for the defendant, rigidly requires, as being relevant to the case made by the Bill against the defendant; and, of course, in no more full nor precise terms than the Bill just requires and renders necessary. The object of the plaintiff, by the interrogatories he has selected for the defendant to answer, is to obtain DISCOVERY of such a nature as will establish the case made by the Bill against the defendant, answering to the extent aimed at by the prayer of the Bill, and at the personal cost of the defendant; for this end, the rules of the Court enable a plaintiff to have from a defendant what is called a full discovery, that is, an answer so sufficient as to meet the requisitions of each relevant inquiry contained in the interrogatories selected for the defendant by the note of the Bill.[1]

By this privilege allowed to the plaintiff over this *Examination Part* of an Answer, are the various difficulties occasioned to a draftsman; for the plaintiff files *exceptions* in writing, setting out either what passages he considers *imperti-*

[1] Order 16, 26th August, 1841.

nent (where passages inserted in an Answer are uncalled for by the interrogatories, or irrelevant to the case made by the Bill), or else what interrogatories he considers are not *sufficiently* answered (through no answer being given to them to as full an extent as the inquiries in those interrogatories seek for and specify); and then he obtains the *report* of the Master upon those exceptions, if the defendant do not submit to the exceptions, and to answer more fully the interrogatories specified in them as being insufficiently answered; in either of which cases, if the plaintiff be successful, much trouble and expense are occasioned to a defendant; and also a severe trial of the patience and reputation of the draftsman results.

To guard against the first-mentioned difficulty, it should be remembered, that *impertinence* is any fact, matter, or circumstance, or any language, which is not only not called for by the Bill's interrogatories, but is also without any effect on the case made by the Bill as against the defendant, and is therefore totally *irrelevant*.

The sort of *impertinence* most usually inserted by young draftsmen is what may be denominated *moral impertinence*, that is, statements which give circumstances showing the "moral depravity," or the "moral injustice," of the plaintiff's conduct, or the "moral kindness," or "moral hardships," attendant on the defendant's case or

conduct. Now this sort of impertinence, even if it assert and prove, beyond all doubt (when taken to be true), the morality, kindness, forbearance, or politeness of a defendant, or the profligacy, harshness, or petty spite of a plaintiff, is, if it prove that only and no more, so thoroughly without force or efficacy with a judge, that a plaintiff is allowed to apply to have such *impertinence* expunged from the Answer, and that the defendant may pay all the costs attendant as a consequence on such iniquitous pleading, because politeness, morality, or kindness is each a nullity, having nothing at all to do with the *scintilla juris* of the case; the only restraint imposed on a plaintiff touching impertinence is, that he must apply to have such impertinence *expunged* before he makes use of the Answer in any way; and the Master before whom the exceptions are heard is to look into the actual relevancy of the passages excepted to.[1] But if the impertinence amount to absolute *scandal*, that is to say, the vilifying the personal character or general reputation of a plaintiff, beyond what the circumstances of the case actually render *necessary* for justice, and so unavoidable, then the plaintiff may apply to have such scandal expunged at any time when he first detects it in

[1] Order 11, April, 1828.

the Answer; but necessary detraction from character or reputation ceases to be scandal.[1]

Also, if a defendant answer an interrogatory he is not required to answer, by only stating he is ignorant of the matters referred to, such a statement is impertinence.[2]

The other sort of impertinence very frequently committed is setting out deeds or writings *in hæc verba*, beyond what is necessary and not called for by the Bill; especially when the Bill gives correctly the deed or writing in *hæc verba;* for then the Answer should not repeat, but merely admit that the deed or writing is as in the words in the Bill in that behalf mentioned, but to which deed or writing the defendant, for greater certainty, craves leave to refer.

The impertinence most difficult to avoid, however, and which requires much discretion to be employed, is that of stating circumstances which, though *beneficial to a defendant* in one point of view, are yet irrelevant, because not operating on the *case made by the Bill*.[3]

[1] See Russ. & Myl. 28. 6 Ves. 456. 2 Ves. 23, 630. Pract. Reg. 383. Beam. Ord. 25. Story's Eq. Pl. §§ 862, 863.

[2] Order 16, 25th Aug. 1841.

[3] Scandal, in Bills or other pleadings, is said to consist not only in setting forth matter uncalled for, and imputing *crime*, but also in the use of language unfit to be offered to the Court, or which is contrary to good manners. Impertinence arises from what is termed *stuffing* the pleadings with matter totally immaterial to the point. Nothing *relevant*, even if not material, or if prolixly set forth, is scandalous. And if a pleading be scandalous, it is im-

To surmount the other difficulty, namely, INSUFFICIENCY, it should be remembered, that a defendant need not answer (unless he prefer) more

pertinent, of course; but the converse does not hold. 11 Ves. 526. 1 Grant's Chanc. Pract. 307.

It appears that interrogatories and depositions will not be referred for impertinence alone, without scandal. White *v.* Fussell, 19 Ves. 113.

An exception for impertinence fails if any part of the passage included in it be not impertinent. 1 Russ. & Myl. 28.

An Answer to the usual interrogatories in a Bill against an executor, as to the particulars of personal estate, and for what it sold, a schedule annexed to the Answer, in which every particular article of personal estate was set forth, and what it sold for, was, on exceptions, held to be impertinent; it being only necessary to state the whole amount for which it sold. The Vice-Chancellor stated that the defendant might have satisfied himself by alleging that the household furniture was sold by public auction, at such a time and place, and by such a person, and produced such a sum. Beaumont *v.* Beaumont, 5 Mad. 51.

Statements in an Answer are impertinent, if they are neither called for by the Bill, nor material to the defence, with reference to the order or decree which may be made on the Bill; and statements in an Answer to a Bill of revivor, which merely show irregularity and misconduct in the former proceeding in the suit, are impertinent. Wagstaff *v.* Bryan, 1 Russ. & Myl. 28. Devaynes *v.* Morris, 1 Myl. & Craig, 213. See, also, Metcalfe *v.* Metcalfe, 1 Keen, 74.

Upon the general question of what is and what is not scandal and impertinence, see Alsager *v.* Johnson, 4 Ves. 217. Lord St. John *v.* Lady St. John, 11 Ves. 256. Corbett *v.* Tottenham, 1 Ball & B. 59. Norway *v.* Rowe, 1 Meriv. 347. Parker *v.* Fairlie, 1 Sim. & Stu. 295. 15 Ves. 477. 2 Mad. 176. 5 Mad. 450.

Bill filed for the common injunction to stay proceedings at law. The defendant referred the Bill for impertinence. The Master reported it not to be impertinent. Held that the plaintiff was entitled to his injunction, as of course, no Answer having been filed. 3 Swanst. 232, note.

A plaintiff cannot refer an answer for impertinence, after repli-

interrogatories than are specified as required of him by the note at the foot of the Bill.[1] Also, that he need answer no interrogatory that by its import, if answered, would become a link in a series of facts that might directly lead to a penalty, forfeiture, or indictment.[2]

Also, a defendant is at liberty to state in his Answer, that he declines answering any interrogatory or part of an interrogatory which he might have protected himself from answering, if he had *demurred* to it.[3] But the plaintiff gen-

cation, or an undertaking to speed the cause; but it is stated that he may refer for scandal at any time, — 3 Swanst. 232, note, *sed quære*, — if not too general; and see, also, *Re* Burton, 1 Russ. 380. A plaintiff cannot refer for impertinence an affidavit filed in any support of a motion, if, after that affidavit was filed, he has filed any affidavit in opposition to the motion. Keeling *v.* Hoskins, 2 Russ. 319. *Contra* as to scandal. See 1 Russ. 380, in the Matter of Burton.

After a reference for insufficiency, an Answer cannot, it seems, be referred for impertinence. Per Lord Eldon, 6 Ves. 458. An Answer was referred for scandal, on the motion of another defendant. Coffin *v.* Coffin, 6 Ves. 514. It seems, also, to be competent to a person not a party to the record to reply. Ibid. Although it was said by the Lord Chancellor, in Jeffery *v.* M'Cabe, 1 Russ. & Myl. 739, that it was too late to except to an Answer for impertinence, when the time has expired, after which, according to the new orders, the Answer is to be deemed sufficient, the contrary was decided by the Vice-Chancellor, in Bradbury *v.* Booker, 5 Sim. 325. See *ante*, page 36, note, and Rules XXVI. and XXVII. *post*. Van Rensselaer *v.* Brice, 4 Paige, 174. Wood *v.* Mann, 1 Sumn. 579. Price *v.* Tyson, 3 Bland, 392. Woods *v.* Morrell, 1 Johns. Ch. 103.

[1] Order 16, Aug. 1841. [2] See Wig. 123, 132, 347.

[3] Order 38, Aug. 1841. Maury *v.* Mason, 8 Porter (Ala.), 213. Story's Eq. Pl. § 847.

erally excepts to an Answer having such a statement, that the Master may decide.

Neither need he answer entirely when the fact inquired into is anterior to seven years ago;[1] but may then state his knowledge in as *general* terms as he may deem expedient, provided he does not show that he can give *better information;* also, if a fact be of more recent date than seven years, but is manifested by the Bill itself, or by the answer, not to be the defendant's *own act,* then he need supply no more details than to him seem advisable, provided they be so expressed as to appear the very utmost of his knowledge; also, he may refuse to answer in detail, when he cannot answer an inquiry in an interrogatory as the Bill requires him to do, by its formal words preceding the interrogatories, which require a defendant (and a defendant is, by the rules of the Court, bound in consequence) to frame his Answer from materials supplied from the following sources: —

The best and utmost of a defendant's knowledge, remembrance, information, and belief.[2]

But it is only by a defendant stating that he

[1] Dan. Chanc. Pract. 256.

[2] Norton *v.* Warner, 3 Edw. 106. Of facts not within his own knowledge, he must answer as to information *and* belief. Bolton *v.* Gardner, 3 Paige, 273. Brooks *v.* Byam, 1 Story, C. C. 296. Carey *v.* Jones, 8 Geo. 516. When the defendant has means of acquiring information; Morris *v.* Parker, 3 John. Ch. 301. Swift *v.* Swift, 13 Geo. 140. Davis *v.* Mapes, 2 Paige, 105.

is a stranger to the matters and things mentioned in an interrogatory, and is totally ignorant and cannot speak from his knowledge, remembrance, information, and belief, that he is at liberty to leave an interrogatory selected for him further unanswered.[1]

Where none of the above exemptions exist in favor of a defendant, and he is himself to answer critically in detail, then he must either ADMIT the statement in the Bill interrogated to and selected for him to answer "to be true, and as in the Bill is mentioned in that behalf" (which is the best way to answer, where a fact is clearly and manifestly unimportant to the defendant's DEFENCE, although the statement in the Bill be not true in all its parts, but yet substantially so, for the plaintiff can never prosecute for an admission made by a defendant of the plaintiff's own statement being true); or else he must ANSWER *fully* each *inquiry* which is included in or added to that interrogatory selected for him.

If he ADMIT a statement to be true, and as in the Bill is mentioned in that behalf, then the mere expressing such an admission is a sufficient answer to the whole interrogatory on that state-

[1] Defendant may also object to answering an immaterial allegation. 1 Dan. Ch. Pr. 730, n. 5, (3d. ed.) Utica Ins. Co. *v.* Lynch, 3 Paige, 210. Butler *v.* Catling, 1 Root, 310. Gilkey *v.* Paige, Walk. Mich. Ch. 520. As to materiality of an allegation in a Bill, and tests of it, see Story's Eq. Pl. § 853. Knypers *v.* R. D. Church, 6 Paige, 570. Beall *v.* Blake, 10 Geo. 460.

ment, however *minute or numerous the inquiries may be which it is made up of;* so that an admission is the easiest and shortest way to answer a Bill, but still requires the utmost caution to be used, to avoid admitting more of the interrogatory than is really intended to be admitted, and is *harmless;* for where an admission is even accidentally erroneous in its extent, and admits even a greater sum to be due or to have been received than is really so, still such an admission binds the defendant to the sum admitted;[1] unless instantly very critical affidavits be got up, and a motion made before the Answer has been in any way acted on.

When an admission is made, then some draftsmen insert immediately afterwards the facts in justification and avoidance of the effect of such admission, but it seems preferable, in my opinion, to reserve such facts for that part of the Answer next treated of, called the DEFENCE, as will be seen hereafter; for it is much more easy to answer an interrogatory *sufficiently* when this *Examination Part* is kept exclusively and solely for the purpose of setting out such full *discovery* as is inquired after by the interrogatories, than when its sentences wear the twofold character of *discovery* and *defence;* for it is a most truly hazardous undertaking to answer *sufficiently* a particular interrogatory, and then directly afterwards

[1] E. Ind. Co. *v.* Keighley, 4 Mad. 16.

as *sufficiently* to do justice to the defendant's own personal *defence*, which defence must after all be so adapted and constituted as the GENERAL RESULT deducible from the *discovery* given in the whole of the Examination Part requires (to render it both consistent and effectual); therefore, I repeat, that it is advisable not to insert in the *Examination Part* more of a defendant's *defence* than the direct import of the words of the inquiries literally force to be done.

Where a defendant does not elect to "admit' a statement in the Bill, because too prejudicial to his own defence, he must answer in such a way as amounts to a *full denial* to that statement; for a defendant must in *effect*, at least, clearly admit or deny, but is then at liberty to explain such admission or denial in such a way as to him may appear expedient.

With a defendant's DENIAL the paramount difficulty in giving a *sufficient* answer begins; for the plaintiff, by the rules of the Court, is allowed the privilege of filing (as has been before mentioned) exceptions to an Answer, on the ground of *impertinence*, if details be *too* wordily given, or on the ground of *insufficiency*, if each minute inquiry in the Bill be not as fully and as circumstantially answered as the inquiry demands.

The most frequent cause of *insufficiency* is the anxiety to give no more information than the Bill, by its own force, can formally and justifiably ex-

act, to prevent the plaintiff getting more by his Bill, at the defendant's personal loss and cost, than its scope really entitles him to, and also not to assist him by any valuable advantage or benefit incautiously extended to him by any oversight or over-liberality of expression in a defendant's Answer.

To make the *Examination Part* capable of being surmounted, in this particular, by ordinary diligence, it must be borne in mind that when a defendant *answers* at all, he is forced by the rules of the Court, if the plaintiff knows how to use them, to *answer* FULLY; because he has selected such a mode of defence, and has apparently either waived using the less irksome mode of a demurrer or plea, or else is forced by the *apparent validity* of the Bill so to defend himself; even if he answer as to an interrogatory not selected for him by the Bill, he must answer *fully;* or even if the fact inquired into be so totally irrelevant to the *case made by the Bill* as to amount to impertinence, yet the defendant must answer as to it, to *some extent*, for the defendant ought to have had such statement and its interrogatory *expunged* from the Bill, in the first instance, as *impertinence*.[1]

To answer FULLY means (as I have always found) the giving the plaintiff either an *admis-*

[1] Story's Eq. Pl. §§ 605, 606, 847. Exceptions to the rule. Story's Eq. Pl. §§ 607, 846. Barry & Keogh's Ch. Pr. 245.

sion of the fact *as he has stated it*, and no more, or else giving him such *discovery* as to the fact, in all those minute circumstances attending it, as not only constitute and exhibit what the *legal entirety* of the fact is, and show it to vary from the import of the Bill in that behalf given, but as also show such *legal entirety* to militate in "substance" against that import of the Bill in that behalf given. Such an explanation of what is meant by *fully* answering is at least practically correct, because it meets with this practical support in the usual routine of business; namely, that a *defendant* himself is only necessitated to give details when he DENIES the circumstances or effect of a statement in the Bill, and the *Bill itself* only requires *him* to give details, when he in effect answers NAY to any of its interrogatories.[1]

This having to answer *fully* imposes on a defendant the following duty, except where he is an *infant* or an *Attorney-General*, whose answers cannot be excepted to.[2]

If he *deny*, he must deny not only the *particu-*

[1] Bank of Utica *v.* Messereau, 7 Paige, 517. Parkinson *v.* Trousdale, 3 Scam. 367. Wigram on Discovery, 85–122. Brooks *v.* Byam, 1 Story, 226. Taylor *v.* Luther, 2 Sumn. 228. Bradford *v.* Geiss, 4 Wash. C. C. R. 513. Woods *v.* Morrell, 1 Johns. C. R. 103. Answer must be positive; Devereaux *v.* Cooper, 11 Verm. 103. Must be direct, not argumentative; N. E. Bank *v.* Lewis, 8 Pick. 113, 119. Robertson *v.* Bingley, 1 M'Cord, 333.

[2] 13 Ves. 274. 4 Bro. C. C. 256. Story's Eq. Pl. § 871.

lar statement itself, as contained in the Bill, in the words of the Bill,[1] but must also extend his denial so that *no probable* existence of the stated fact which is clearly and *prima facie* and ostensibly *probable*, is included in that denial; for a plaintiff is not deprived of his *equity* by the mere mechanical circumstances constituting the existence of the fact being contrary to the statement in the Bill, but is only deprived of his equity when the true circumstances of the fact are such as warrant and dictate that a *different* conclusion than the one conveyed by the Bill must be drawn regarding that stated fact; so that a plaintiff may except to any Answer as *insufficient*, which only shows the statement in the Bill to be so far untenable, that the Answer *in effect* denies the whole truth of the statement, but only so deficiently sets out circumstances in denial, as to convey an incomplete view as to what the true effect of the denial practically is; even if a Bill merely clothed a statement itself in the language of an interrogatory, without other inquiries being added or inserted, yet such a full discovery in denial as above mentioned must have been given; but almost every modern Bill anticipates a denial, and adds to, or inserts in, an interrogatory such

[1] 2 Dan. Chanc. Pract. 260. General denial not sufficient. Miles *v.* Miles, 7 Foster, 447. Must not be by negative pregnant. High *v.* Batte, 10 Yerger, 385. Robinson *v.* Woodgate, 3 Edw. Ch. 422. Patrick *v.* Blackwell, 21 Eng. L. & Eq. 248.

further inquiries as will meet a denial, and require full particulars as to *how* (if the Bill be untrue) the contrary thereof is the truth.

On *inquiries* being used (which they always are), they have this prejudicial effect on the *plaintiff's case*, however beneficial they may be in all other respects; they manifest the *extent of discovery* a plaintiff demands as *necessary* for his case, and a defendant, therefore, need not answer beyond the requisitions conveyed by such inquiries, unless by doing so he imports into his Answer matter *operative* enough on the plaintiff's case to assist in *nullifying it.*

To answer these inquiries added to or inserted in an interrogatory is a great or trifling perplexity, according to the way in which they are framed; for it is only their verbiage being intricately divided or artfully made up of significant *little words*, such as *how*, *when*, *where*, &c., or being put in the alternative by an *or*, or in a twofold sense by an *and*, that the chief impediments in answering *sufficiently* are created; for such *little words*, on being overlooked, or unintentionally left unanswered, by the mere forgetfulness of a moment, render the Answer insufficient; for though extremely small, even ridiculously so, yet the effect of the import of these *little words* on the case is generally of miraculous importance.

Also, words which seem to an ordinary reader *synonymous* are often used in an interrogatory,

and are purposely and speciously put together; and if they have the slightest difference of import from each other in *law* or *equity*, they must be separately answered, if of the least importance to the case made by the Bill, and if the plaintiff should rigidly require it, by filing exceptions.

To give a *general rule* how these inquiries are to be answered appears impracticable; but the surest way, at first, to get a facility of detecting and understanding their demands (for a solicitor with his client, or for a student) is, to take each inquiry as if it were a distinct question of itself, and repeat after it aloud, to complete its sense, the *material words* it is used in reference to, and thus get a full sentence before him, taking care to omit, for the present, all the little words intervening between the selected inquiry and the material words; and so treat each inquiry till the whole interrogatory is answered.

To illustrate this method of answering, the following example is selected.

Suppose the interrogatory to be this:—

Whether an indenture of lease was not made of such date by such parties and to such effect as hereinbefore particularly mentioned, or some other and what indenture, of some other and what date, or parties to such or the like, or some other and what effect.

Such an interrogatory, in the estimation of a hostile plaintiff, would be made up of the follow-

ing inquiries, which should be answered by the contrivance of *separating* the inquiries, and *completing* the sense of each, thus: —

Whether an indenture of lease was not made of such "date" as hereinbefore particularly mentioned?

By such parties as hereinbefore particularly mentioned?

To such effect as hereinbefore particularly mentioned?

Then, if the defendant in effect answer *nay* to the above, he has to answer, also, —

Or if some "other" indenture of lease was not made?

And "what" indenture of lease (if yea) of other date?

And of what "date"?

Of some "other" parties?

And "what" other parties (if yea)?

And to "such" effect as hereinbefore particularly mentioned?

Or (if nay) to a "like" effect as hereinbefore particularly mentioned?

Or (if nay) to some "other" effect?

And "what" other effect (if yea)?

The answers to the above inquiries should embody in them the language of the inquiries.

The commencement of each statement in answer to an interrogatory (after the first) begins thus: —

"*And this defendant answering, further saith, that* ———."

The commencement of each statement in answer to an interrogatory (after the first) is this in a joint answer: —

"*And these defendants severally answering, further say, that* ———."

Or thus, when one only of the joint defendants answers: —

"*And this defendant, A. C., severally answering, further saith, that* ———."

Or thus, when they are all ignorant of a fact: —

"*And these defendants severally answering, further say, that they do not nor do any nor either of them, to the knowledge or belief of the others or other of them, know and have never been informed, save by the said complainant's Bill, and cannot set forth as to their belief or otherwise.*"

When the Bill suggests to the Court the plaintiff's rights, and insists that a defendant should yield him an answer as to them, in shape of an *account*, *schedule*, or *list*, then the commencement of the statement in answer is nevertheless the same as above; but instead of the word *whether* being used in the Bill as in other interrogatories, the words "*and that the said defendant may discover and set forth*" are generally used in the Bill.

When the Bill requires an *account* or a *sched-*

ule or *list* to be set out in the Answer, a compliance with such a requisition is effected by means of such a description of *account, schedule,* or *list* as the Bill requires being appended *itself* to the end of the Answer, and by its being previously referred to in the body of the Answer as being so annexed, and as being part of the Answer; the usual words employed for this purpose are: —

"*And this defendant further saith, he hath in the schedule* (or *first schedule*) *to this his Answer annexed, or underwritten, and which he prays may be taken as part thereof, set forth, according to the best and utmost of his knowledge, remembrance, information, and belief, a full, true, and particular schedule or list of all and every, &c.*"

If the schedule is of deeds or writings *necessary* to be produced, the above ends thus (but much care is necessary on this point): —

"*And this defendant is ready and willing to produce and leave the same in the hands of his clerk in Court, for the usual purposes.*"

To express *facts* is the office of each statement in answer, and not to express what *conclusion of law or equity* facts convey; for a defendant is at liberty, at the hearing of the cause, to use in argument as many defences as are consistent with each other, and yet distinct from each other, but supported by the *facts* he states; but if he should state his facts, and also the conclusion or

argument to be founded on them, he binds himself down thereby to use that conclusion or argument only as his defence from those facts; and if he gives conclusions, opinions, or any dicta (without facts) of what the law is, or any purely argumentative sentences, he thereby renders that part of an Answer *insufficient;*[1] and clearly *impertinent*, if without effect on the case made by the Bill.

When a defendant insists in his Answer that it is not a plaintiff's right to have the *particular sort* of discovery inquired after by the Bill, it is usual to state as much and no more in the Answer, and thereupon the plaintiff files exceptions for *insufficiency* as to that point, and the Master generally reports in his favor; so that the Master's report must be excepted to by the defendant before the point meets with a full, deliberate determination.

An Answer, when reported insufficient, or which has become so by other proceedings, is estimated as no Answer, and is a mere nullity until a further sufficient Answer is filed in addition.[2]

[1] 1 Dan. Ch. Pr. 726, (3d ed.)

[2] 2 Va. B. 251. Dick. 316. Ordinarily, a defendant who is in custody for want of an Answer is, on putting in an Answer, entitled to be discharged, without waiting for the report that it is sufficient. 16 Ves. 418. Farquharson *v.* Balfour, Turn. & Russ. 184.

The Master's report should be actually filed before any pro-

The plaintiff excepts to each Answer till it is become sufficient; and if a third Answer be reported insufficient by the Master, then the defendant is examined by the Master himself upon interrogatories framed for the purpose, as to the points left unanswered.[1]

The general conclusion to be drawn, therefore, as regards *sufficiency*, appears to be this: that each interrogatory mentioned in the note of the Bill as selected for the defendant must be answered by him, yet only *fully* answered when the following four facts exist; namely, when the interrogatory is relevant to the case made by the Bill, and also denied by the defendant, and also is concerning his own act, and bearing a date not anterior to seven years ago; but each interrogatory selected must have some answer, or notice taken of it in the Answer.

The following extrinsic circumstances, however, render any first Answer sufficient; namely,

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ceeding upon it is taken by the plaintiff; as, for instance, obtaining an order for an injunction. Wynne *v.* Jackson, 2 Sim. & Stu. 226. 2 Simons, 33.

The Master allowed exceptions to an Answer for insufficiency, and fixed a time for putting in a further answer. After that time expired, the defendant moved for further time; motion refused, the defendant being in contempt under this order, the Court observing that the defendant ought to have applied for further time before the time fixed by the Master had expired. Wheat *v.* Graham, 5 Sim. 570.

[1] Order 10, April, 1828.

if exceptions to it be not delivered within eight weeks from the day of the Answer being filed.[1]

Also, if the exceptions be not referred within six days after a period of eight days has elapsed from their delivery.[2] Also, if the Master reports the Answer sufficient, or if his report be not obtained on the exceptions two weeks from the date of the order to refer, or within the time required by the Master.[3]

Likewise if the Bill be amended after Answer filed, and before exceptions have been delivered, or disposed of.

If the Answer be used by the plaintiff in any way as conveying to him beneficial information before exceptions are delivered or disposed of.

A second or third Answer becomes sufficient by similar means, but must be *referred* within three weeks from its being filed upon the old exceptions.[4]

IV. *The Defence.*

The other part of the Answer is practically called the *Defence*,[5] and in it are usually stated all those circumstances which constitute the *defendant's case*, in contravention and nullification of the *plaintiff's case* made by the Bill; also the circumstances in justification and avoidance of an

[1] Order 4, April, 1828. [2] Order 5, ibid. [3] Order 12, ibid.
[4] Order 5, ibid. [5] Wig. 10.

admission or denial are here included; also this part of the Answer may contain any *point*, *fact*, or *suggestion to the Court*, which the defendant wishes to submit to the particular attention of the Court, by formally insisting on its being taken into consideration; thus the want of parties to the Bill is here stated to exist, when the facts warrant it; also if a demurrer has not been filed, or has been *overruled*, yet in this *Defence Part* a defendant may still insist on and claim the benefit of the demurrable points after he has answered the interrogatories on those points, and such claim is thereby available to him on the hearing of the cause. The same remarks apply as to a plea; but if a defendant, instead of *answering* an interrogatory, *demurs* or pleads to the whole statement contained in the interrogatory, and includes these defences together in his Answer, by answering all the rest of the Bill required of him except those parts *demurred* or *pleaded* to, then the demurrer or plea is so distinct a defence that it is to be argued firstly, and the Answer *excepted* to or not by the plaintiff afterwards, as the argument may justify.[1]

[1] Story's Eq. Pl. § 850. The Answer used to support a plea is not an Answer as alluded to in these pages, as it has some peculiarities distinguishing it from an ordinary Answer, in this respect: it is an answer only to those inquiries in the Bill which lead at all to influence the validity of the plea. Wig. 44.

The Title of an Answer in which a demurrer or plea was joined,

This part is, in reality, the proper part of the Answer, in which every circumstance ought to be stated that the defendant is *personally* to be benefited by, and which is not included in the language of the Bill, care being taken to state nothing, however beneficial it may seem in other points of view, that does not in some way or other directly lead to *nullify* the case made by the Bill, or else operate on it so as to save the defendant from *costs* or other *liability* to the plaintiff.

The only control a plaintiff has over the *Defence* is filing exceptions for *impertinence* or *scandal* in it.

The last point of great importance to be remembered is, that the *Answer* only is the source for ascertaining on what matters a defendant may give evidence; for only on matters on the face of his Answer is he allowed to give evidence,[1] as he is bound so to give a plaintiff notice by his Answer, that the facts constituting his defence appear.[2]

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would express such a fact by inserting appropriate words, thus: —

The Demurrer of the defendants C. D., G. D., and E. his wife, to part, and their Answer to the other part, of the Bill of complaint of D. B., complainant.

[1] Russ. & Myl. 527. An Answer responsive to the Bill is evidence for the defendant. Bank of U. S. *v.* Beverly, 1 How. 134. See note, p. 86.

[2] 1 Dan. Ch. Pr. 726, (3d ed.)

The formal ending of an Answer runs in these words: —

"*And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said Bill charged, without this*[1] *that, there is any other matter, cause, or thing in the said complainant's said Bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays to be here dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.*"

It is not usual to omit this formal conclusion, but if omitted, the Answer is still sufficiently complete.[2]

An infant omits in his Answer the formal commencement, the denial of combination, and also the formal conclusion.

Until an Answer be filed, it is no record.[3]

The plaintiff can prevent an Answer being filed, until *the costs* of a previous CONTEMPT have

[1] A counsel gives no more of the conclusion than down to this word.

[2] 2 P. Wms. 86.

[3] Bea. 168.

been paid or tendered to him,[1] by giving instructions to that effect to his Clerk of Records and Writs.

After an Answer has been filed, if then any errors for the first time be discovered *by the defendant*, the following rule exists; not to allow the Answer to be amended, but to allow a supplemental Answer (as it is called) to be filed, to explain.[2]

A supplemental Answer cannot be excepted to without leave, and the application must be made before two months elapse after the Answer is filed.[3]

An Answer thoroughly *evasive* in every respect may, for such a fault, be taken off the file.[4]

An Answer is only binding on, and is only evidence at law or in equity against, that defendant, or each of those defendants, who sign it,[5]

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[1] 1 Dan. Ch. Pr. 768, (3d ed.)

[2] 1 Ves. & Bea. 186. 11 Ves. 53. 10 Ves. 401. 8 Ves. 79. 2 Ves. & Bea. 25, 163. Ambl. 292. 2 Atk. 294. Amendment of Answers. Smith *v.* Babcock, 3 Sumner, 583. Jackson *v.* Cutright, 5 Munf. 308. McWilliams *v.* Herndon, 3 Dana, 568. Stephens *v.* Terrel, 3 Monr. 131. West. Reserve Bk. *v.* Stryker, 1 Clarke (N. Y.), 380.

[3] 10 Sim. 483.

[4] 15 Ves. 405. Scotts *v.* Hume, Litt. Sel. Ca. 379. Taylor *v.* Luther, 2 Sumner, 228. Smith *v.* Searle, 14 Ves. 415. Blaisdell *v.* Stevens, 16 Verm. 179.

[5] Answer must be signed by defendant and sworn to. Story's Eq. Pl. §§ 874–876. Fulton Bank *v.* Beach, 2 Paige, 307. Denison *v.* Bassford, 7 Paige, 370. Davis *v.* Davidson, 4 McLean,

and is then only evidence against him or them as to the admissions contained in it. The Bill is also necessary to be produced *at law*.

Having now given what I have found to be the *practice* on *ordinary* Answers, I add, by way of conclusion, that the theory and peculiarities of equity pleading will be found simple and easy to be remembered, not difficult of understanding, and a most beneficial source of practice.

136. See Rule LIX. But signature and oath may be waived by complainant, and signature is not required, if the Answer be taken by commissioners; see above cases. If the Answer is under oath and responsive to the allegations in the Bill, it is evidence for the defendant, and will prevail, unless overcome by the testimony of two witnesses, or of one witness and clear corroborating circumstances. 2 Story's Eq. Jur. § 1528, and cases cited. Bank U. S. *v.* Beverly, 1 How. 134. Clarke's Exec. *v.* Van Reimsdyk, 9 Cranch, 153. Union Bank *v.* Geary, 5 Peters, 99. If not under oath, it is to be treated merely in the nature of a plea of denial, by way of special traverse. Smith *v.* Clark, 4 Paige, 368. 1 Dan. Ch. Pr. 750 (3d ed.), and cases cited above. See, however, Story's Eq. Pl. (7th ed.) § 875 a. If plaintiff waive the oath, he must do it in his Bill before Answer. Bingham *v.* Yeomans, 10 Cush. 58.

RULES OF PRACTICE

IN

SUITS IN EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES.[1]

Preliminary Regulations.

I.

The Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing Bills, Answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.[2]

II.

The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which

[1] As in force, October, 1865; taken from an *official* copy.

[2] Act 1842, ch. 188, § 5.

are grantable of course and applied for, or had by the parties or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III.

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.[1]

IV.

All motions, rules, orders, and other proceedings made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book

[1] United States *v.* Flowery, 8 Law Rep. 258. Act 1793, ch. 22, § 1. Act 1802, ch. 31, § 4.

shall be open, at all office-hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing Bills, Answers, pleas, demurrers, and other pleadings; for making amendments to Bills and Answers; for taking Bills *pro confesso;* for filing exceptions, and for other proceedings in the

clerk's office, which do not, by the rules hereinafter prescribed, require an allowance or order of the Court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the Court. But the same may be suspended, altered, or rescinded by any judge of the Court, upon special cause shown.

VI.

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the Court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the Court *ex parte*, and granted, as if not objected to or refused, in his discretion.

PROCESS.

VII.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the Bill; and unless otherwise provided in these rules, or specially

ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the Court.[1]

VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of

[1] Hollingsworth *v.* Duane, Wallace (C. C.), 141. United States *v.* Wayne, Wallace (C. C.), 134. Picquet *v.* Swan, 5 Mason, 35.

all costs, or upon a special order of the Court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.[1]

IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the Court.

X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

[1] Act 1797, ch. 20, § 6. Act 1826, ch. 124. Toland *v.* Sprague, 12 Pet. 300. Griffin *v.* Thompson, 2 How. 244. McFarland *v.* Gwin, 3 How. 717. Gwin *v.* Breedlove, 2 How. 29.

Service of Process.

XI.

No process of subpœna shall issue from the clerk's office in any suit in equity, until the Bill is filed in the office.[1]

XII.

Whenever a Bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the Bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpœna against all the defendants.

[1] Ex parte Graham, 3 Wash. 456. Toland *v.* Sprague, 12 Pet. 300. Act 1793, ch. 22, § 6. Act 1826, ch. 124. Act 1797, ch. 20, § 6.

XIII.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.[1]

XIV.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise;

[1] A subpœna or any other process made returnable on Sunday is irregular. Gould *v.* Spencer, 5 Paige, 541.

The service of a subpœna on the husband is good, unless relief is sought against the estate of the wife; in which case the service must be upon both. Ferguson *v.* Smith, 2 Johns. Ch. Rep. 139. Leavitt *v.* Cruger, 1 Paige, 421.

A subpœna served upon a defendant's clerk or agent is good. 2 Paige, 298. Or upon the solicitor of a party. 3 Paige, 360.

Service of subpœna on some partners, defendants, ordered to be deemed good service upon other partners, defendants, who could not be found. Miller's Orders in Chancery, 108, note.

in the latter case, the person serving the process shall make affidavit thereof.[1]

XVI.

Upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the Court, and shall state the time of the entry.[2]

Appearance.

XVII.

The appearance-day of the defendant shall be the rule-day to which the subpœna is made returnable; provided he has been served with the process twenty days before that day; otherwise, his appearance shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

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[1] Act 1789, ch. 20, § 27 (1 Stats. at Large, 87). Life and Fire Ins. Co. of N. Y. *v.* Adams, 9 Pet. 573. United States *v.* Montgomery, 2 Dall. 335. Kennedy *v.* Brent, 6 Cra. 187; 2 Cond. 345. United States *v.* Moore's Adm'rs, 2 Mar. Dec. 317. Ex parte Hoyt, 13 Pet. 279. Oswald *v.* State of N. Y. 2 Dall. 415; 1 Cond. 6. Wortman *v.* Conyngham, 1 Pet. C. C. 241. Anon. 2 Gall. 101. Blight's Ex'r *v.* Fisher, 1 Pet. C. C. 41.

[2] Boudinot *v.* Symmes, Wallace, 139. Knox *v.* Summers, 3 Cra. 496; 1 Cond. 607. Gracie *v.* Palmer, 8 Whea. 699; 5 Cond. 561. Carrington's Heirs *v.* Brent et al., 1 McLean, 174. Kittredge *v.* Emerson, 3 Leg. Obs. 166. S. C. 7 Law Rep. 312.

Bills taken pro Confesso.

XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the Court upon motion for that purpose, to file his plea, demurrer, or Answer to the Bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance: in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the Bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the Bill may be decreed by the Court at the next ensuing term thereof accordingly, if the same can be done without an Answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or Answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an Answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his Answer, or otherwise complying with such order as the Court or a judge thereof may direct, as to pleading to, or fully answering the Bill, within a period to be fixed by the Court or judge, and undertaking to speed the cause.[1]

[1] In Bilton *v.* Bennett, 4 Sim. 17, husband and wife were defend-

XIX.

When the Bill is taken *pro confesso*, the Court may proceed to a decree at the next ensuing term thereof, and such a decree rendered shall be absolute, unless the Court shall, at the same term, set aside the same, or enlarge the time for filing the Answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake to file his Answer within such time as the Court shall direct, and submit to such other terms as the Court shall direct, for the purpose of speeding the cause.[1]

Frame of Bills.

XX.

Every Bill, in the Introductory Part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the Bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United

ants. The husband put in a separate Answer, which was treated as a nullity, and the Bill was taken *pro confesso* against them. Leavitt *v.* Cruger, 1 Paige, 422. *Ante*, Rule XII.

[1] Kemball *v.* Stewart, 1 McLean, 332. Fellows *v.* Hall, 3 McLean, 281.

States for the District of ——. A. B., of ——, and a citizen of the State of ——, brings this, his Bill, against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your Orator complains and says that ———," &c.

XXI.

The plaintiff, in his Bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the Bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the Charging Part of the Bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the Bill; also, what is commonly called the jurisdiction clause of the Bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the Bill shall not be demurrable therefor. And the plaintiff may, in the narrative or Stating Part of his Bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse to the case made by the plaintiff for relief. The prayer of the Bill shall ask the special relief to which the plaintiff supposes him-

self entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.[1]

XXII.

If any persons, other than those named as defendants in the Bill, shall appear to be necessary or proper parties there, the Bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the Court, or that they cannot be joined without ousting the jurisdiction of the Court as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the Bill may pray that process may issue to make them parties to the Bill, if they should come within the jurisdiction.

XXIII.

The prayer for process of subpœna in the Bill shall contain the names of all the defendants

[1] Harrison *v.* Nixon, 9 Pet. 483. Wilson *v.* Graham, 4 Wash. 53. English *v.* Foxall, 2 Pet. 595. Walden *v.* Bodley, 14 Pet. 156. Hobson *v.* McArthur, 16 Pet. 180. Boone *v.* Chiles, 10 Pet. 177. Young *v.* Grundy, 6 Cranch, 51; 2 Cond. 300. State of Georgia *v.* Bralisford, 2 Dall. 40; 5 Cond. 3.

named in the Introductory Part of the Bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the Court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *exeat regno*, or any other special order pending the suit, is asked for in the Prayer for Relief, that shall be sufficient without repeating the same in the Prayer for Process.[1]

XXIV.

Every Bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.[2]

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[1] Hitner *v.* Suckley, 2 Wash. 465. Read *v.* Consequa, 4 Wash. 174. Eckert *v.* Bauert, 4 Wash. 370. Ward *v.* Seabring, 4 Wash. 472. Doe *v.* Johnston, 2 McLean, 323. Mason *v.* Gardiner, 4 Br. C. C. 378. Anderson *v.* Heirs, 3 ibid. 429. Bond *v.* Duke of Newcastle, 3 ibid. 386, and notes. 1 Barb. Ch. Pr. 53. 1 Dan. Ch. Pr. 268, 568, citing Hyde *v.* Foster, 1 Dick. 102. 1 Dan. Ch. Pr. 566. Ibid. 261 to 270. Parker *v.* Blackburn, 2 Vern. 369. Pulteney *v.* Shelton, 2 Ves. 147. Hunt *v.* Lever, 5 Ves. 147. 1 Dan. Ch. Pr. 263.

[2] *Ante*, pp. 42, 47. And if the name of a counsel is subscribed to a pleading, it is presumptive evidence that the pleading was perused and signed by such counsel. Doe *v.* Green, 2 Paige, 348. An amended Bill must be re-signed by counsel. 2 Mad. Ch. 207. *Ante*, page 47, note. Dwight *v.* Humphreys et al., 3 McLean, 104.

XXV.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of Bills and Answers, the regular taxable costs for every Bill and Answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every Bill or Answer.

Scandal and Impertinence in Bills.

XXVI.

Every Bill shall be expressed in as brief and succint terms as it can reasonably be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a Master by any judge of the Court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the Court or a judge thereof shall otherwise order. If the Master shall report, that the Bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.[1]

[1] Gaines *v.* Chew, 2 How. 619. Oliver *v.* Piatt, 3 How. 333.

XXVII.

No order shall be made by any judge for referring any Bill, Answer, or pleading, or other matter or proceeding depending before the Court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the Bill shall be returnable, or after the Answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the Master to examine and report for the same on or before the next succeeding rule-day, or the Master shall certify that further time is necessary for him to complete the examination.[1]

M'Lean *v.* Bank of Lafayette, 3 McLean, 415. Nelson *v.* Hill, 5 How. 127, 132. Att'y-Gen. *v.* Cradocks, 3 Mylne & Craig, 85. Whaley *v.* Dawson, 2 Schs. & Lef. 367. Ward *v.* Cooke, 5 Madd. 122. See *ante*, pp. 65, 66, and notes. Exceptions for scandal or impertinence must point out the exceptional matter with certainty. Whitmarsh *v.* Campbell, 1 Paige, 645. They must be supported *in toto*, and not contain any of the pleadings which are relevant and proper. 4 Paige, 174, 382. Desplaces *v.* Goris, 1 Edw. Ch. Rep. 350. If a Bill, or other pleading, contains scandalous or impertinent matter, the counsel whose name is to the pleading is liable to the adverse party for the costs on the exceptions for impertinence. 2 Paige, 347.

[1] Griswold *v.* Hill, 1 Paine, 390.

Amendments of Bills.

XXVIII.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his Bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, mis-description of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course), after a copy has been so taken, before any Answer or plea, or demurrer to the Bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole Bill as amended, and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.[1]

XXIX.

After an Answer, or plea, or demurrer is put

[1] Read *v.* Consequa, 4 Wash. 175. Peirce *v.* West's Ex'r, 3 Wash. 354. Holmes *v.* Trout's Heirs, 1 McLean, 1. Longworth *v.* Taylor, 1 McLean, 514. Walden *v.* Bodley, 14 Pet. 156.

in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the Court, to amend his Bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the Court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his Bill, except upon a special order of a judge of the Court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the Bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX.

If the plaintiff, so obtaining any order to amend his Bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended Bill, as the case may require, in the clerk's office, on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

Demurrers and Pleas.

XXXI.

No demurrer or plea shall be allowed to be filed to any Bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and if a plea, that it is true in point of fact.[1]

XXXII.

The defendant may, at any time before the Bill is taken for confessed, or afterwards, with the leave of the Court, demur or plead to the whole Bill, or to part of it; and he may demur to part, plead to part, and answer as to the residue; but in every case in which the Bill specially charges fraud or combination, a plea to such part must be accompanied with an Answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.[2]

XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the

[1] Syms *v.* Lyle, 4 Wash. 301. Milligan *v.* Milledge, 3 Cra. 220; 1 Cond. 503.

[2] Livingston *v.* Story, 9 Pet. 632. State of R. I. *v.* State of Mass., 14 Pet. 210. Ferguson *v.* O'Harra, 1 Pet. C. C. 493.

plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.[1]

XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the Court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the Bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the Court, be reasonably done; in default whereof, the Bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.[2]

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[1] Gallagher's Ex'rs *v.* Roberts, 1 Wash. 320. United States *v.* Arthur, 5 Cra. 257. Sprigg *v.* Bank of Mt. Pleasant, 10 Pet. 257. Gormon *v.* Lenox's Ex'rs, 15 Pet. 115. Jackson *v.* Rundlet, 1 Wood & Min. 381. Kirkpatrick *v.* White et al., 4 Wash. 593.

[2] Shelton *v.* Tiffin, 6 How. 163. Livingston *v.* Story, 9 Pet. 632. Sims *v.* Lyle, 4 Wash. 303. Bank of United States *v.* White, 8 Pet. 262.

XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his Bill upon such terms as it shall deem reasonable.[1]

XXXVI.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the Bill as it might by law have extended to.

XXXVII.

No demurrer or plea shall be held bad and overruled upon argument, only because the An-

[1] Courts of Chancery in England require the plaintiff to give security for costs, 1. When he is out of the jurisdiction of the Court. 2 P. Wms. 452. 6 Mad. 46. 2 Myl. & K. 41. 2. When he cannot be found at his place of residence. 3. Where the plaintiff has by his Bill misstated his place of residence. 2 Myl. & K. 404. Excepting, 1. Where the plaintiff is a resident abroad, in the king's civil or military service. Dick. 154. 2 Myl. & K. 404. 2. If a co-plaintiff resides within the jurisdiction. Dick. 282. 6 Ves. 612. 3. His imprisonment or insolvency. 6 Mad. 214. 1 Keen, 119. 4. The defendant's proceeding in the cause after he is aware of the fact entitling him to call for security. 2 Ves. sen. 24. Dick. 147.

Nor will the Court order the *prochein amy* of an infant plaintiff to find security for costs on the ground of the poverty of the *prochein amy*. Fellows *v.* Barrett, 1 Keen, 119. Hunt *v.* Rousmaniere's Adm'rs, 2 Mason, 342.

swer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.[1]

XXXVIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day, when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his Bill shall be dismissed as of course, unless a judge of the Court shall allow him further time for the purpose.[2]

Answers.

XXXIX.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the Bill, shall no longer apply in cases where he might by plea protect himself from such Answer and discovery. And the defendant shall be entitled in all cases by Answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the Bill, of which he may be entitled to avail himself by a plea in bar; and in such Answer he shall

[1] Ferguson *v.* O'Harra, 1 Pet. C. C. 493.

[2] Hughes *v.* Blake, 6 Whea. 453; 5 Cond. 136. Poultney *v.* City of Lafayette, 3 How. 81.

not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an Answer in support of such plea, touching the matters set forth in the Bill to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further Answer or discovery of his title than he would be in any Answer in support of such plea.[1]

XL.[2]

A defendant shall not be bound to answer any

[1] Clarke *v.* White, 12 Pet. 178. Young *v.* Grundy, 6 Cra. 51; 2 Cond. 300. Russell *v.* Clark's Ex'rs, 7 Cra. 69; 2 Cond. 417. Clark's Ex'rs, *v.* Van Reimsdyk, 9 Cra. 153; 3 Cond. 319. See also Bank United States *v.* Beverly, 1 How. 134. Boone *v.* Chiles, 10 Pet. 177. Wood *v.* Mann, 1 Sum. 579. Livingston *v.* Story, 11 Pet. 351. Higbie *v.* Hopkins, 1 Wash. 230. Hughes *v.* Blake, 6 Whea. 453; 5 Cond. 136. Union Bank of Georgetown *v.* Geary, 5 Pet. 99. Carpenter *v.* Prov. Wash. Ins. Co. 4 How. 185, 217. Lenox *v.* Prout, 3 Whea. 520; 4 Cond. 310. Leary *v.* Parmell, 1 Cooke, 110, in 2 Cond. 294. Read *v.* Consequa, 4 Wash. 174. Ibid. 335. Herman *v.* Herman, 4 Wash. 555. Ferguson *v.* O'Harra, 1 Pet. C. C. 493. Ocean Ins. Co. *v.* Fields, 2 Story, 59, 73. Camac *v.* Francis, 3 Wash. 108. Leeds *v.* Mar. Ins. Co. of Alexandria, 2 Whea. 380; 4 Cond. 170. Osborn *v.* Bank of the United States, 9 Whea. 738; 5 Cond. 741. Van Reimsdyk *v.* Kane, 1 Gal. 630. Field *v.* Holland, 6 Cra. 8, 24.

[2] Repealed by Rule XCIII.

statement or charge in the Bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the Bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the Bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

XLI.

The interrogatories contained in the Interrogating Part of the Bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the Bill, in the form or to the effect following; that is to say, — "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.;" and the office copy of the Bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole Bill.

XLII.

The note at the foot of the Bill, specifying the interrogatories which each defendant is required

to answer, shall be considered and treated as part of the Bill; and the addition of any such note to the Bill, or any alteration in or addition to such note after the Bill is filed, shall be considered and treated as an amendment of the Bill.

XLIII.

Instead of the words of the Bill now in use, preceding the Interrogating Part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your Orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories herein-after numbered and set forth, as by the note here underwritten they are respectively required to answer; that is to say: —

"1. Whether," &c.

"2. Whether," &c.

XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might

have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the Bill, from which he might have protected himself by demurrer.

XLV.

No special replication to any Answer shall be filed. But if any matter alleged in the Answer shall make it necessary for the plaintiff to amend his Bill, he may have leave to amend the same with or without the payment of costs, as the Court, or a judge thereof, may in his discretion direct.[1]

XLVI.

In every case where an amendment shall be made after Answer filed, the defendant shall put in a new or supplemental Answer on or before the next succeeding rule-day after that on which the amendment or amended Bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the Court; and upon his default the like proceedings may be had as in cases of an omission to put in an Answer.

Parties to Bills.

XLVII.

In all cases where it shall appear to the Court

[1] Duponti *v.* Mussy, 4 Wash. 128. Peirce *v.* West's Ex'rs, 1 Pet. C. C. 351. Vattier *v.* Hinde, 7 Pet. 252.

that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the Court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before the Court, the Court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.[1]

[1] Mech. Bank of Alexandria *v.* Seton, 1 Pet. 299. West *v.* Randall, 2 Mason, 181. Hoxie *v.* Carr, 1 Sum. 173. Osborn *v.* Bank United States, 9 Whea. 738. Van Reimsdyk *v.* Kane, 1 Gall. 371. Elmendorf *v.* Taylor, 10 Whea. 152; 6 Cond. 47. Milligan *v.* Milledge, 3 Cra. 220; 1 Cond. 503. Carneal *v.* Banks, 10 Whea. 181; 6 Cond. 64. Wormley *v.* Wormley, 8 Whea. 429; 5 Cond. 473. Harrison *v.* Urann, 1 Story, 64. West *v.* Randall, 2 Mason, 181. Russell *v.* Clark's Ex'rs, 7 Cra. 69; 2 Cond. 417. Vatteer *v.* Hinde, 7 Pet. 252. Boon's Heirs *v.* Chiles, 8 Pet. 532. Harding *v.* Handy, 11 Whea. 103; 6 Cond. 236. Harrison *v.* Rowan, 4 Wash. 202. DeWolf *v.* Johnson, 10 Whea. 367; 6 Cond. 140. Conolly *v.* Taylor, 2 Pet. 556. Joy *v.* Wirtz, 1 Wash. 517. Morgan's Heirs *v.* Morgan, 2 Whea. 290; 4 Cond. 120. Finley *v.* Bank United States, 11 Whea. 304; 6 Cond. 319. Gernon *v.* Boccaline, 2 Wash. 198. Dandridge *v.* Washington's Ex'rs, 2 Pet. 370. Mandeville *v.* Riggs, 2 Pet. 482. Caldwell *v.* Taggart, 4 Pet. 190. Conn. *v.* Penn. 5 Whea. 424; 4 Cond. 719. Marshall *v.* Beverly, 5 Whea. 313; 4 Cond. 660. Riddle *v.* Mandeville, 5 Cra. 322; 2 Cond. 268. United States *v.* Howland, 4 Whea. 108, 117; 4 Cond. 404. Hunt *v.* Wicliffe, 2 Pet. 201.

XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.[1]

XLIX.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as do the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents

[1] West *v.* Randall, 2 Mason. Mandeville *v.* Riggs, 2 Pet. 482.

and profits, parties to the suit; but the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.[1]

L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

LI.

In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

LII.

Where the defendant shall, by his Answer, suggest that the Bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after Answer filed, to set down the

[1] Milligan *v.* Milledge, 3 Cra. 220; 1 Cond. 503. Potter *v.* Gardiner, 12 Whea. 498; 6 Cond. 606. S. C. 3 Mason, 178. Simms *v.* Guthrie, 9 Cra. 19; 3 Cond. 281. Greenlief *v.* Queen, 1 Pet. 138.

cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry to be made in the clerk's order-book, in the form or to the effect following, that is to say; — "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the Answer, he shall not, at the hearing of the cause, if the defendant's objections shall then be allowed, be entitled as of course to an order for liberty to amend his Bill by adding parties. But the Court, if it thinks fit, shall be at liberty to dismiss the Bill.[1]

LIII.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or Answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.[2]

[1] Story *v.* Livingston, 13 Pet. 360. Harrison *v.* Rowan, 4 Wash. 202. Dwight *v.* Humphreys, 3 McLean, 104. Greenleaf *v.* Queen, 1 Pet. 138.

[2] Story *v.* Livingston, 13 Pet. 358. Mech. Bank of Alexandria *v.* Seton, 1 Pet. 299.

Nominal Parties to Bills.

LIV.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the Bill, unless the plaintiff specially requires him so to do by the prayer of his Bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the Court shall otherwise direct.[1]

LV.

Whenever an injunction is asked for by the Bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by a judge thereof in vacation, after a hearing which may be *ex*

[1] Wormley *v.* Wormley, 8 Whea. 429; 5 Cond. 474. Kerr *v.* Watts, 6 Whea. 550; 5 Cond. 173. Mech. Bank of Alexandria *v.* Seton, 1 Pet. 299. Joy *v.* Wirtz, 1 Wash. 517.

parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the Court, or until it is dissolved by some order of the Court.[1]

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a Bill of revivor, or a Bill in the nature of a Bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which Bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service

[1] Simms *v.* Guthrie, 9 Cra. 19; 3 Cond. 281. Dunn *v.* Clarks, 8 Pet. 1. Read *v.* Consequa, 4 Wash. 180. Worcester *v.* Truman, 1 McLean, 483.

of the same process, the suit shall stand revived, as of course.[1]

LVII.

Whenever any suit in equity shall become defective, from any event happening after the filing of the Bill (as, for example, by a change of interest in the parties), or for any other reason a supplemental Bill, or a Bill in the nature of a supplemental Bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the Court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental Bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental Bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the Court.[2]

LVIII.

It shall not be necessary in any Bill of revivor, or supplemental Bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

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[1] Jenkins *v.* Elbridge, 3 Story, 299. Clarke *v.* Matthewson, 2 Sum. 262. Bank United States *v.* White, 8 Pet. 262. Vattcer *v.* Hinde, 7 Pet. 252. Thomas *v.* Harvie's Heirs, 10 Whea. 146; 6 Cond. 44. Kennedy *v.* State Bank of Georgia, 8 How. 609. Dexter *v.* Arnold, 5 Mason, 303.

[2] Kennedy *v.* Georgia State Bank, 8 How. 610. Jenkins *v.* Elbridge, 3 Story, 299.

Answers.

LIX.

Every defendant may swear to his Answer before any justice or judge of any Court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any Master in Chancery appointed by any Circuit Court, or before any judge of any Court of a State or Territory.[1]

Amendment of Answers.

LX.

After an Answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon Bill and Answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the Court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, sup-

[1] Read *v.* Consequa, 4 Wash. 335. Herman *v.* Herman, 4 Wash. 555.

ported, if required, by affidavit. And in every case where leave is so granted, the Court, or the judge granting the same, may in his discretion require that the same be separately engrossed and added as a distinct amendment to the original Answer, so as to be distinguishable therefrom.[1]

Exceptions to Answers.

LXI.

After an Answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the Court or a judge thereof; and if no exception shall be filed thereto within that period, the Answer shall be deemed and taken to be sufficient.[2]

LXII.

When the same solicitor is employed for two or more defendants, and separate Answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be

[1] Rhode Island *v.* Mass. 13 Pet. 23. Caster *v.* Wood, 1 Bald. 289. Walden *v.* Bodley, 14 Pet. 156.

[2] Read *v.* Consequa, 4 Wash. 335. Brooks *v.* Byam, 1 Story, 296, 300, referring to Hodgson *v.* Butterfield, 2 Sim. & Stu. 236.

allowed for such separate Answers or other proceedings, unless a Master, upon reference to him, shall certify that such separate Answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII.

Where exceptions shall be filed to the Answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended Answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the Court; and shall enter, as of course, in the order-book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the Answer shall be deemed sufficient: provided, however, that the Court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete Answer thereto on the next succeeding rule-day; otherwise the plaintiff shall,

as of course, be entitled to take the Bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better Answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the Court, or of a judge thereof, upon his putting in such Answer and complying with such other terms as the Court or judge may direct.

LXV.

If, upon argument, the plaintiff's exceptions to the Answer shall be overruled, or the Answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the Court, or the judge thereof, at the hearing upon the exceptions.

Replication and Issue.

LXVI.

Whenever the Answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause

shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the Court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.[1]

Testimony, how taken.

LXVII.[2]

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time,

[1] Peirce *v.* West's Ex'rs, 1 Pet. C. C. 351. Vatteer *v.* Hinde, 7 Pet. 252. Duponti *v.* Mussy, 4 Wash. 128.

[2] Amended Dec. Term, 1854, so as to authorize the clerk to name commissioners. Amended March 17, 1862, in respect to taking testimony by oral interrogatories. For amendments, see *post*, p. 141.

the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the Court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.[1]

LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a Court or a judge thereof shall, under all the circumstances, deem it reasonable.[2]

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[1] Cocker *v.* Franklin Hemp and Bagging Company, 1 Story, 169. Ketland *v.* Bissett, 1 Wash. 144. Gilpins *v.* Consequa, 3 Wash. 184. Bell *v.* Davidson, 3 Wash. 328. Dodge *v.* Israel, 4 Wash. 323. Gass *v.* Stinson, 3 Sum. 98. Gilpins *v.* Consequa, 1 Pet. C. C. 86. Armstrong *v.* Brown, 1 Wash. 43. Munns *v.* Dupont, 3 Wash. 31. Lonsdale *v.* Brown, 3 Wash. 404. Boudereau *v.* Montgomery, 4 Wash. 186. Rhoades' Lessee *v.* Selin, 4 Wash. 715. Willings *v.* Consequa, 1 Pet. C. C. 301.

[2] Pettibone *v.* Derringer, 4 Wash. 215. Banert *v.* Day, 3 Wash. 423. Read *v.* Bertrand, 4 Wash. 558. Thomas & Henry *v.* United States, 1 Mar. Dec. 367. United States *v.* Hair-pencils, 1 Paine,

LXIX.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the Court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the Court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-book, or indorsed upon the deposition or testimony.[1]

Testimony De Bene Esse.

LXX.

After any Bill filed, and before the defendant

400. Buckingham *v.* Burgess, 3 McLean, 368. The Argo, 2 Gall. 314. Conk. Trea. (ed. 1842), pp. 571–574.

[1] The Schr. Ruby, 5 Mason, 451. Wood *v.* Mann, 2 Sum. 316. Gass *v.* Stimson, 2 Sum. 605–8. Where a party has not received due notice of the examination of a witness, the irregularity is cured by a neglect to complain of it in season. Skinner *v.* Dayton, 5 Johns. Ch. Rep. 191.

hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the Court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the Court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

Form of the Last Interrogatory.

LXXI.

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered and stated in substance thus: "Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer." [1]

[1] Richardson *v.* Golden, 3 Wash. 109. Dodge *v.* Israel, 4 Wash. 323. Rhoades' Lessee *v.* Selin, 4 Wash. 715.

Cross Bill.

LXXII.

Where a defendant in equity files a cross Bill for discovery only against the plaintiff in the original Bill, the defendant to the original Bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross Bill. The Answer of the original plaintiff to such cross Bill may be read and used by the party filing the cross Bill, at the hearing, in the same manner and under the same restrictions as the Answer, praying relief, may now be read and used.

Reference to and Proceedings before Masters.

LXXIII.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master, to whom it is referred to take the same, to inquire and state to the Court what parts, if any, of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.[1]

[1] Field *v.* Holland, 6 Cra. 8; 2 Cond. 285, 291. Heirs of Dubourg *v.* United States, 7 Pet. 625. Pendleton *v.* Evans's Ex'rs, 4 Wash. 391. Story *v.* Livingston, 13 Pet. 367.

LXXIV.

Whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the Master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the costs of the party procuring the reference.

LXXV.

Upon every such reference, it shall be the duty of the Master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the Master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the Court, or a judge thereof, for an order to the

Master to speed the proceedings and to make his report, and to certify to the Court or judge the reasons for any delay.

LXXVI.

In the reports made by the Master to the Court, no part of any state of facts, charge, affidavit, deposition, examination, or Answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or Answer, shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or Answer, were so brought in or used.[1]

LXXVII.

The Master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other

[1] Harding *v.* Handy, 11 Whea. 103; 6 Cond. 236, 243. Kelsey *v.* Hobby, 16 Pet. 269.

witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.[1]

LXXVIII.

Witnesses who live within the district may,

[1] Harding *v.* Handy, 11 Whea. 103. The Master is to determine what books or papers shall be produced. 1 Ir. Eq. Rep. 432. 1 Russ. & Myl. 25. But cannot dispense with or relax the general rules and orders of the Court. 3 Myl. & Craig, 244. A defendant bound to produce papers is bound to deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them. 1 Myl. & Craig, 304. 2 Sim. & Stu. 309. 2 Myl. & K. 732. For cases in which the Court has ordered the production of papers, *vide* 4 Sim. 238. 4 Sim. 27. 1 Myl. & K. 61, 79, 680. 5 Sim. 552. 1 Myl. & Craig, 243. 6 Sim. 6, 192, 608. 2 Myl. & K. 732. 1 Swanst. 7. 3 Myl. & K. 572.

Cases in which the Court has refused to order the production of documents. 2 Myl. & K. 380. 2 Sim. & Stu. 309. 2 Sim. 489. 3 Sim. 396. 4 Sim. 461. 4 Russ. 190, 193. 1 Myl. & K. 98. 6 Mad. 48. 4 Mad. 391. 4 Ves. 66. 7 Ves. 411. 6 Sim. 180. 1 Myl. & Craig, 243.

A party producing books, under an order of the Court, for the adverse party, may seal up those parts which do not relate to the subject of the litigation, and it is a contempt of the Court for the adverse party to open the parts thus sealed. 2 Paige, 494.

upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a Master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, Master, or examiner requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court: and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of Court, which being certified to the clerk's office by the commissioner, Master, or examiner, an attachment may issue thereupon by order of the Court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce*, when produced in open Court, if the Court shall in its discretion deem it advisable.[1]

LXXIX.

All parties accounting before a Master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties,

[1] Story *v.* Livingston, 13 Pet. 359. Gass *v.* Stimson, 2 Sum. 605. Jenkins *v.* Elbridge, 3 Story, 300.

who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the Master's office, or by deposition, as the Master shall direct.

LXXX.

All affidavits, depositions, and documents, which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the Master.

LXXXI.

The Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the Master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

LXXXII.

The Circuit Courts may appoint standing Masters in Chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a Master *pro hac vice*

in any particular case. The compensation to be allowed to every Master in Chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the Court.[1]

Exceptions to Report of Master.

LXXXIII.

The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not,

[1] Field *v.* Holland, 6 Cra. 8; 2 Cond. 285.

then at the next sitting of the Court, which shall be held thereafter by adjournment or otherwise.[1]

LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs,—the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

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[1] Dexter *v.* Arnold, 2 Sum. 108. Chappedelaine *v.* Decheuaux, 4 Cra. 306; 2 Cond. 116. Harding *v.* Handy, 11 Whea. 103; 6 Cond. 236. Story *v.* Livingston, 13 Pet. 359. Brockett *v.* Brockett, 3 How. 691. Oliver *v.* Piatt, 3 How. 333. Kelsey *v.* Hobby, 16 Pet. 269. Coates's Ex'rx *v.* Muse's Adm'rs, 1 Mar. Dec. 529.

TIME.—It has been decided that a lunar month is meant when the word "month" is used in reference to the new Orders of Chancery in England. 2 Sim. & Stu. 476. Hob. 139. 3 T. R. 623. Doug. 446. Seton on Dec. 140.

With respect to the word "days," when any act is required to be performed within a specified time, one day is to be included and the other excluded. Angel *v.* Westcombe, 1 Myl. & Craig, 50. Ansdell *v.* Whitfield, 6 Sim. 356.

If the last of any specified number of days happens on a *Sunday*, the Sunday is not to be reckoned in the computation of the time. 5 Sim. 565. 1 Myl. & Craig, 48. The extension of this rule if the last day falls upon a holiday, is undecided. 5 Sim. 147.

Exceptions may be taken to a Master's report, for scandal and impertinence, at any time before the impertinent matter is actually expunged. Evans *v.* Owens, 2 Myl. & K. 382.

Decrees.

LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a judge thereof, upon petition, without the form or expense of a rehearing.

LXXXVI.

In drawing up decrees and orders, neither the Bill, nor Answer, nor other pleadings, nor any part thereof, nor the report of any Master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows; namely." [Here insert the decree or order.][1]

Guardians and Prochein Amis.

LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the Court, or by any judge thereof,

[1] Whiting *v.* Bank of United States, 13 Pet. 6. Dexter *v.* Arnold, 5 Mason, 303.

for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the Court may direct, for the protection of infants and other persons.[1]

LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for; shall be signed by counsel; and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.[2]

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[1] A married woman being plaintiff, and her *prochein ami* having died, it was ordered that she should name a new *prochein ami* within two months, or that in default the Bill should be dismissed. Barlee *v.* Barlee, 1 Sim. & Stu. 100.

After a decree the *prochein ami* of an infant plaintiff died. On motion of a defendant, a reference to the Master was directed, to appoint another *prochein ami*. Bracey *v.* Sandiford, 3 Mad. 468.

[2] Daniel *v.* Mitchell, 1 Story, 198. Baker *v.* Whiting, 1 Story, 218. Jenkins *v.* Elbridge, 3 Story, 299. Emerson *v.* Davies, 1 Wood & Min. 21. Hunter *v.* Town of Marlboro', 2 Wood & Min. 168. Blagg *v.* Phœnix Ins. Co. 3 Wash. 58. United States *v.*

LXXXIX.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.[1]

XC.

In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.[2]

Halberstadt, Gilpin, 262, 268. Walker *v.* Smith, 1 Wash. 202. Gerbier *v.* Emery, 2 Wash. 413. Marshall *v.* Union Ins. Co. 2 Wash. 411. United States *v.* Keen, 1 McLean, 429. Scott *v.* Blaine, 1 Bald. 287.

[1] This Rule coincides with the powers of the Court of Chancery in England, where it is held that the *general orders* of the Court are to be considered as laying down *general* rules, but not as being so imperative that they can, under no circumstances, be departed from. 6 Sim. 212. 2 Sim. 427. 1 Mad. R. 526.

[2] Story *v.* Livingston, 13 Pet. 359, 368. R. I. *v.* Mass. 12 Pet. 657, 735, 739. S. C. 14 Pet. 210, 256. Emerson *v.* Davies, 1 Wood & Min. 21. Smith *v.* Burnham, 2 Sum. 612.

XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.[1]

XCII.

These Rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these Rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity Suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no further force or effect. And the clerk of this Court is directed to have these Rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the judges thereof.

March, 1842.

XCIII.

REPEAL OF RULE XL. DEC. TERM, 1850.

Ordered, That the fortieth Rule, heretofore

[1] Haight *v.* Proprietors Morris Aqueduct, 4 Wash. 601.

adopted and promulgated by this Court, as one of the Rules of Practice in suits in Equity in the Circuit Courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the Bill, unless the complainant desires to do so, to obtain a discovery.

[Dec. Term, 1854.

Amendment of the 67th Chancery Rule.

(*Vacated by the rule of March 17, 1862.*)

Ordered, That the 67th Rule, governing equity practice, be so amended as to allow the presiding judge of any Court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said Court general power to name commissioners to take testimony, in like manner that the Court or judge thereof can now do by the said 67th Rule.

Amendment of the 67th Rule in Equity.

March 17, 1862.

Ordered, That the last paragraph in the 67th Rule in Equity be repealed, and the Rule be amended as follows: —

Either party may give notice to the other, that he desires the evidence to be adduced in the

cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the Court, or before an examiner to be specially appointed by the Court, the examiner to be furnished with a copy of the Bill and Answer if any, and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law Courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer in special instances, and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; *provided*, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the Court as he shall think fit, and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions, and the Court shall have power to deal with the

costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses, in case of refusal to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said Court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the Court, to be there filed of record, in the same mode as prescribed in the 30th section of the Act of Congress, September 24, 1789.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the Court in term time, or to a judge in vacation, for special reasons, satisfactory to the Court or judge.]

XCIV.

Dec. Term, 1863.

In suits in equity for the foreclosures of mortgages in the Circuit Courts of the United States, or in any of the Courts of the Territories, having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the 8th Rule of this Court, regulating the equity practice, where the decree is solely for the payment of money.

APPENDIX.

APPENDIX.

RULES OF EVIDENCE IN CHANCERY.

I. *Generally what is sufficient or proper.*

Under what circumstances the field notes of a surveyor are proper evidence that a particular piece of land is not included in a patent. *Richardson* v. *Carey*, 2 Rand, 87.

Evidence of a subscribing witness that though he does not remember attesting the paper, it is done in his handwriting; that the name of the party is not in his (the party's) handwriting, but that it had been the invariable practice of the witness never to attest a paper unless he saw the party sign or heard him acknowledge it, and he is confident the case in question is not an exception, is sufficient to admit the paper on a trial at law or hearing in chancery. *Brown* v. *Anderson*, 1 Monroe, 199.

Jurors cannot be admitted to give evidence to impeach a verdict which they have rendered. They may be examined to prove there was no verdict, or that the verdict rendered was not so intended. *Doran* v. *Shaw*, 3 Id. 415.

Nor can the jurors, for the purpose of setting aside their verdict, be examined to prove the improper interference of the attending sheriffs by stating to them facts and giving them instructions. But in a prosecution of the sheriffs for their improper conduct in the jury rooms, the jurors are competent witnesses. *Ibid.*

Inadmissible testimony will not be received because none other can be procured, and a claim so supported is not to be received against an estate, though the executor believes it just. *Coit* v. *Owen*, 3 Desau. 175.

The positive testimony of several witnesses of unimpeached character will outweigh very strong and concatenated circumstances in opposition to them. *Littlefield* v. *Clark*, Id. 165.

Trustees will not be allowed to be sworn as witnesses to defeat a trust deed. *Wilson* v. *Wilson*, 1 Desau. 230.

On a bill by the heirs, against the agent of an administratrix, for an account, the evidence of the administratrix, who had been released by the plaintiff, is not sufficient against the answer of the defendant. *Meson* v. *Roosevelt*, 5 John. Ch. 534.

The certificate of a notary public that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence; but the deposition of the notary, or some equivalent testimony, ought to be produced. *Kidd's Adm'r* v. *Alexander*, 1 Rand, 456.

Strict legal proof is not required against absent defendants; and therefore a will may be proved, in such a case, by evidence inferior to that which would be required when a defendant appears and defends the suit. *Morrison* v. *Campbell*, 2 Rand, 206.

A receipt is not in all cases conclusive, but that usually given for the purchase-money and indorsed on a deed for land, is evidence of the lowest order. *Lingan* v. *Henderson*, 1 Bland, 249.

II. *Rules of Evidence; Onus probandi.*

The rules of evidence and rules of decision are the same in courts of law and in courts of equity. *Morrison's Ex'rs* v. *Hart*, 2 Bibb, 5; *Dwight* v. *Pomeroy*, 17 Mass. 303; *Lemaster* v. *Burckhart*, 2 Bibb, 28.

The rules of evidence as to the explanation or contradiction of writings by parol testimony, are the same in law and equity. *Reed* v. *Clark*, 4 Munroe, 20.

One who sells a slave as the agent of the owner, when afterwards sued by the vendee for deceit in falsely affirming his authority, has the *onus probandi* of his agency on himself and must show it. *Jackson's Ex'rs* v. *Halliday's Adm'rs*, 3 Monroe, 366.

No evidence can be required to prove the existence of a fact which must have happened according to the invariable and constant course of nature, or to prove any general law or other public matter which the courts are bound to notice. *Canal Company* v. *Railroad Company*, 4 Gill & John. 7.

It is the duty of the courts to take judicial notice of a public statute. The various modes in which public statutes are carried into effect by the executive officers of government are mere facts, and must be proved as facts. If relied upon to avoid an equity, upon which an injunction was rightfully granted, upon the motion to dissolve, the court cannot notice them. *Ibid.*

If the answer of a defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter alleged in avoidance. *Napier* v. *Elam*, 6 Yerg. 108.

No witness is bound to answer a question which would either criminate himself, render him infamous, or subject him to a penalty or forfeiture. *Matter of Kip*, 1 Paige, 601.

A witness who is neither a nominal nor real party to the suit is not excused from giving evidence, although his evidence might be used against him in a civil suit, unless it will subject him to some loss or disadvantage in the nature of a penalty or forfeiture. *Ibid.*

Where usury is pleaded in an answer in chancery, and facts and circumstances constituting it specially set forth, evidence proving an usurious contract different from that alleged in the answer, is inadmissible. *Beach* v. *Fulton Bank*, 3 Wend. 573.

When a slave is sold and delivered, although without a bill of sale, it is to be presumed *prima facie* that the seller has parted with his title. If therefore he contend that he reserved the title in himself until the purchase-money shall be paid, the *onus probandi* lies on him. *Randolph* v. *Randolph*, 3 Munf. 99.

Testimony on a point not in issue by the pleadings, is irrelevant and to be disregarded. *Cowan* v. *Price*, 1 Bibb, 173.

Every fact material to the complainant's right to recover, and neither presumed to be within the defendant's knowledge, nor admitted, must be proved. Thus, that the complainants are the heirs of the deceased under whom they claim. *Owings* v. *Patterson*, 1 A. K. Marsh, 325.

The rules of evidence, as to parol evidence against the written agreement of the parties, are the same in chancery as at law. *Baugh* v. *Ramsey*, 4 Monroe, 157.

III. *Admissions and Declarations.*

Confessions of a party are competent, but should be received with great caution. *Lagan* v. *M'Chord's Heirs*, 2 A. K. Marsh, 225.

The declarations or admissions of an assignor, after assignment, are not competent testimony against the assignee. *Turpin's Adm'rs* v. *Marksbury*, 3 J. J. Marsh, 627.

The admissions of one defendant are not evidence against another. *Harrison* v. *Edwards*, 3 Litt. 340.

The answer of one defendant in chancery cannot be used as evidence against his co-defendant; and the answer of an agent is not evidence against his principal; nor are his admissions *in pais*, unless where they are a part of the *res gestæ*. *Leeds* v. *Marine Ins. Co.* 2 Wheat. 380.

The admission of a grantee in his answer to a cross bill, that the grantor, complainant in the original bill, had conveyed the property to defraud his creditors, will not operate to the prejudice of the grantor. *Hardin* v. *Baird*, 1 Litt. Sel. Ca. 340.

Where a fraudulent combination is established, the acts and declarations of any one of the parties thereto may be proved against the others. But only such acts as constitute a part of the *res gestæ* ought to be received. *Apthorp* v. *Comstock*, 2 Paige, 482.

Admissions made in the course of a negotiation for a compromise which fails, are good evidence against the party making them. *Church* v. *Steele*, 1 A. K. Marsh, 329.

Declarations of a person not a party in interest, nor a party to the suit, and who is a witness in the cause, are not competent evidence. *Phillips* v. *Thompson*, 1 John. Ch. 140.

Where a bill for a divorce on the ground of adultery, is taken *pro confesso*, or the defendant, in his answer, admits the adultery charged, and reference is made to the master, under the third section of the act of the State of New York concerning divorces, to take proof of the adultery, and to report thereon, &c., by the proof to be taken by the master is meant legal proof generally; and he may therefore receive proof of the *confessions* of the defendant, which must, however, be connected with and supported by other proof before the court will decree a divorce *a vinculo matrimonii*. *Betts* v. *Betts*, 1 John. Ch. 197.

But by the 51st rule of the Court of Chancery of New York, evidence of the confessions of the defendant is not admissible at all on a feigned issue awarded to try the fact of adultery. Whether this rule has not gone too far in rejecting this species of proof altogther, *quære*. *Ibid.*

Admission of an adversary's right, when it depends on matters of law as well as of fact, will not prejudice the party making it. *Leforce* v. *Robinson*, Litt. Sel. Ca. 22.

Foreign laws may be proved by witnesses as matters of fact. *Bursh* v. *Wilkins*, 4 John. Ch. 520.

Admissions of an agent made without authority are not evidence against the principal. *Robinson* v. *Morgan*, Litt. Sel. Ca. 56.

The declarations of a party to a sale or transfer, going to destroy, or take away the vested rights of another, cannot, *ex post facto*, work that consequence, nor be regarded as evidence against the vendee or assignee. *Phœnix* v. *Ingraham's Assignees*, 5 John. 426.

A husband's declarations that a child, born in wedlock, is not his, are not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after marriage, and a separation between his wife and him soon after took place by mutual consent. *Bowles* v. *Bingham*, 2 Munf. 442.

A crime, such as bigamy or crim. con., is not to be fixed on a person but by the highest evidence: but the fact of matrimony for the purpose of obtaining alimony, may be proved by cohabitation, name, reputation, and other circumstances. *Purcell* v. *Purcell*, 4 Hen. & Munf. 511.

The declaration of an agent should form a part of the *res gestæ* in order to be competent evidence against either party. *M'Clure* v. *Purcell*, 3 A. K. Marsh, 63.

Proof of subsequent declarations and acts of the donor (though not admissible taken singly) may be received under total absence of testimony, applying to the time of the contract, and in connection with corroborating circumstances, to show that a writing was misunderstood or misrepresented at the time of the signature. *Jones* v. *Robertson*, 2 Munf. 187.

The admissions of a person in possession of land, made under a mistake of law, and which are wholly inconsistent with his written evidence of title, cannot be received for the purpose of destroying his title to the land. *Hawley* v. *Bennett*, 5 Paige, 104.

IV. *Secondary Evidence; herein of copies.*

Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and been absent for four years without having heen heard from, is sufficient to let in secondary proof of his handwriting. *Sping* v. *South Carolina Ins. Co.* 8 Wheat. 269; *Ellis* v. *Huff*, 29 Ill. 451; *Matteson* v. *Noyes*, 25 Ill. 592; *Miller* v. *Metzger*, 16 Ill. 393.

Copy of a will certified by the clerk of the county court admitted in evidence, upon proof that the original, at the dissolution of those courts was deposited in the office of the clerk of the district court, which was afterwards burnt. *Franklin* v. *Creyon*, Harp. Eq. 243.

Certified copies from the land office are deemed legal evidence. *Cunningham* v. *Browning*, 1 Bland, 308.

A certificate of the printer that an order of publication was published as directed, was deemed sufficient. *Lengan* v. *Henderson*, Id. 240.

Proof of the publication of an order for creditors to come in, of an order of notification, *nisi*, &c., may be made by the printer's certificate, or by the production of the newspapers. *Spurrier* v. *Spurrier*, Id. 475.

Before secondary evidence of the contents of a lost paper is admissible, it must appear by ancillary proof that all reasonable and practicable search has been made to find the original. *Holbrook* v. *Trustees, &c.* 28 Ill. 187; *Whitehall* v. *Smith*, 24 Ill. 167; *Rankin* v. *Crow*, 19 Ill. 630; *Cook* v. *Hunt*, 24 Ill. 550; *Dickinson* v. *Breeden*, 25 Ill. 187; *Matteson* v. *Noyes*, 25 Ill. 591.

V. *Presumptive Evidence.*

(a) *Generally.*
(b) *Of payment and satisfaction.*
(c) *Of grant or conveyance.*
(d) *Of marriage, or death.*

(a) *Generally.*

The court will presume the legitimacy of a child on slight proof, after the lapse of thirty years, and the death of the father of the child. *Ex'rs of Johnson* v. *Ex'rs of Johnson*, 1 Desau. 596.

After a lapse of forty years, and the death of all the original parties, a trust proved by strong circumstances once to have existed, was presumed to be extinguished. *Prevost* v. *Gratz* 6 Wheaton, 481.

(b) *Of payment and satisfaction.*

After a lapse of twenty years without any acknowledgment of the debt the payment of a writing obligatory may be presumed. *O'Brien* v. *Coulter*, 2 Blackf. 421.

Under some circumstances, the payment of the damages assessed in a mill case ought to be presumed; especially if a great length of time has elapsed during which the owner of the land to whom such damages were assessed acquiesced in the building of the mill, without claim or objection on his part. *Young* v. *Price*, 2 Munf. 534.

Payment of a legacy, by an executor, cannot be presumed from mere lapse of time, during which there is no representative of the legatee entitled to demand and receive it; especially where, though there have been dealings between the executor and the distributee of the legatee, yet the executor, in settling his accounts, has not claimed credit for payment of the legacy. *Burwell's Ex'rs.* v. *Anderson's Adm'rs*, 3 Leigh, 348.

A payment to the holder of an obligation may be presumed, when it does not appear at what time or on what consideration it was made, to have been made on account of the obligation. *Butler* v. *Tuplett*, 1 Dana, 154.

In case of a bond and mortgage, the presumption of payment from lapse of time cannot be rebutted by showing the insolvency of the debtor; for as to the mortgagee and his debt, the mortgagor is not insolvent; because the creditor could, at any time, resort to the mortgaged premises for payment. *Hunt* v. *Forman*, 2 Id. 471.

A bond dated more than twenty years before it was exhibited for payment, shall be taken *prima facie* as paid. *Tinsley* v. *Anderson*, 3 Call, 429.

Giving a bond and mortgage furnishes a presumption of the liquidation of all accounts before their dates between the parties. *Cheroning* v. *Proctor*, 2 M'Cord's Ch. 15.

Less than twenty years, where there have been great neglect and mutations of property, will raise the presumption of payment. *Winstanley* v. *Savage*, 2 Id. 439.

Although lapse of time is no bar to an express trust, yet payment or other satisfaction may be presumed from it. *Ivy* v. *Rogers*, Dev. Eq. 58.

Satisfaction of an open trust is not presumed from lapse of time, but a settlement between the trustee and *cestui que trust* changes the character of the trust, and subjects it to the presumption of satisfaction. Therefore, where a settlement was made between an administrator and an infant distributee nearly of age, and not afterwards disaffirmed by the infant, it was held, that the lapse of twenty-two years raised the presumption of satisfaction. *Petty* v. *Harman*, Id. 191.

After twenty years without suit, satisfaction or extinguishment shall be presumed. *Barnett* v. *Emerson*, 6 Munroe, 608.

Where the purchaser of mortgaged premises had admitted the existence of the lien within twenty years, and promised to dis-

charge the mortgage, it was held sufficient to rebut the presumption of payment, arising from the lapse of time. *Park* v. *Peck*, 1 Paige, 477.

Such admissions of the purchaser are also legal evidence against all his judgment creditors, whose judgments have been recovered subsequent to such admissions. *Ibid.*

When a father, being indebted to his children, afterwards conveys property to them which is more than equal to the amount of the debt, this conveyance shall be presumed to be in satisfaction of the debt, if there are no circumstances to prove a contrary intention. *Keely* v. *Keely's Ex'r*, 6 Rand, 176.

Although the property conveyed and the debt are not *ejusdem generis*, the one may be a satisfaction of the other, if the intention of the testator be apparent, that such should be the effect. *Ibid.*

A lapse of thirty years affords a presumption that a legacy has been paid; but that presumption may be repelled by circumstances. *Arden* v. *Arden*, 1 John. Ch. 313. But see *Kane* v. *Bloodgood*, 7 Id. 90.

Where a deed in fee reserved the right of "cutting and hewing timber, and grazing in the woods not appropriated or fenced in," and it appeared that the premises had been inclosed for upwards of thirty years, and the right during that period had not been claimed or exercised, *it seems* it will be presumed to have been released or discharged. Such right may be lost by long negligence and disuse, and presumptions of their release or discharge are favored for the sake of quieting possession, and whether a quit rent not demanded or paid for above sixty years will not be presumed extinguished by lapse of time, *quære*. *Ten Brœck* v. *Livingston*, 1 John. Ch. 357.

(c) *Of a grant or conveyance.*

A grant may be presumed when an entry, survey, and thirty years' possession are shown. *Simpson* v. *Hawkins*, 1 Dana, 326.

After twenty years' possession, an executory contract impairing a conveyance may be presumed; and after thirty-seven years the presumption may be acted upon with confidence, and will not be rebutted by the continued non-residence of the vendor. *Woodson's Adm'rs.* v. *Scott*, Id. 472.

A conveyance from the trustees to the *cestui que trust* may be presumed from length of possession. But if the *cestui que trust* had

but a life-estate, unless she had issue, and she died childless, no such presumption can aid her alienee of the fee. *Waggener* v. *Waggener*, 3 Monroe, 547.

It cannot be presumed that the trustee released to the *cestui que trust* a greater interest than he was entitled to. Id. 548.

The courts of a county having caused a court-house and jail to be erected in or about the year 1754, and courts having been continuously held in such court-house until the year 1801, it ought, in a court of equity, to be presumed that the title to two acres of the land built upon and adjacent, were duly vested in the court and their successors; although no *deed* from the original proprietor can be produced. *Boykin's Devisees* v. *Smith*, 3 Munf. 102.

When negroes are sent with husband and wife upon marriage, by the wife's father, the law will presume they were given by the wife's father to the son-in-law, and fix the property in the son-in-law, unless the presumption is rebutted by proof showing that a loan only was intended. *Stewart* v. *Cheatham*, 3 Yerg. 60.

After a long possession in severalty, a deed of partition may be presumed. *Hepburn* v. *Auld*, 5 Cranch, 262.

Where a farm had been occupied and cultivated under a steady and uniform rent for upwards of eighty years, and permanent improvements made on the premises: *Held*, that it might be presumed that a lease in fee, under the acknowledged rent, was originally given, or that there was an original agreement for such a lease. *Hans* v. *Schuyler*, 4 John. Ch. 1.

And equity may make such presumption as well as a court of law and jury. *Ibid.*

(d) *Of marriage, or death.*

In a bill alleging parties to be husband and wife, proof of a formal solemnization or contract of marriage is not necessary. Cohabitation, acknowledgment by the parties, reception as man and wife, and common repute, are sufficient to raise a presumption of marriage. *Jenkins* v. *Bisbee*, 1 Edw. 377.

Cohabitation and having children is evidence of marriage. *Telts* v. *Foster*, Taylor, 121.

To justify the presumption of death from seven years' absence, the absence must be from the country of the absentee's residence. *Spurr* v. *Trimble*, 1 A. K. Marsh, 279.

Ignorance in a family of the existence of one of the children,

who had gone abroad at the age of twenty-two unmarried, and had not been heard of for upwards of forty years, is sufficient, with other circumstances to warrant a presumption of his death. *M'Comb* v. *Wright*, 5 John. Ch. 263.

VI. *Further Evidence, —when admitted.*

After granting the prayer of a petition in chancery, further evidence may be admitted on a hearing upon the bill in form. *Southworth* v. *Lathrop*, 5 Day, 237.

As a general rule, where a re-hearing is granted in equity, the court will not permit an examination of testimony at large. No proof will be admitted, but what was heard or ought to have been heard upon the original hearing. *Scales* v. *Nichols*, 2 Yerg. 140; *Dale* v. *Roosevelt*, 6 John. Ch. 255.

Where there is newly-discovered testimony, such as would authorize a bill of review; or where there has been surprise by the court unexpectedly relying on evidence at the hearing, which could be satisfactorily explained by the other testimony; the court will permit the testimony in these cases, and perhaps others of a like nature, to be taken, if it is satisfied, by affidavit, of its materiality. *Ibid.*

After a decree in the cause, it requires a very special case to justify the court in opening the proofs, even to establish a new fact, which a party has neglected, through inadvertence, to prove. *Denham* v. *Winans*, 2 Paige, 24.

A new trial, or re-hearing, is never granted to enable a party to obtain cumulative testimony, or for the purpose of contradicting witnesses examined by the adverse party. *Ibid.*

Evidence cannot be produced in court which has not been offered to the master. After his report on affidavits, directions may be given to exhibit other evidence before him. *Nash* v. *Vaylor*, 2 Hayw. 174.

Upon a re-hearing, evidence duly taken in chief, but omitted by negligence or other cause, to be read, is admissible; so also evidence of new matter relating only to papers since found, and which may be proved *viva voce* at the hearing; so testimony to show the incompeteney of a witness in a former deposition. But new testimony to the merits is inadmissible. *Dale* v. *Roosevelt*, 6 John. Ch. 255.

VII. *Judgments and Decrees.*

A judgment obtained against an executor or administrator of a deceased person is not evidence on a bill filed in the Court of Chancery against the heirs or devisees of the deceased for the sale of the real estate of such deceased. *Duvall* v. *Green*, 4 Har. & John. 270.

When a creditor who claims under a judgment at law comes into equity to enforce his judgment, that judgment is *prima facie* evidence against the debtor, or mere strangers, unless they can impeach it on the ground of fraud, by showing that a full defence was not made, and can produce new proof showing that the debt is not due. *Garland* v. *Rives*, 4 Rand, 282.

The decision of a court of competent jurisdiction against the validity of a particular claim to real estate, is evidence against a subsequent purchaser of that claim. *Reardon* v. *Searcy's Heirs*, 1 Lill. 56,

A judgment obtained by one administrator against the other, touching the estate of the intestate, is no evidence against the heirs, although the admistrator who was plaintiff never acted. *Quinn* v. *Stockton*, 2 Id. 343.

A judgment against the administrator is not proof of the demand in a suit against the donee of slaves in the lifetime of the intestate, but the defendants in such bill may show the covenant before recovered, or had before been satisfied by the intestate. *Richard's Adm'r* v. *Porter's Heirs*, 6 Monroe, 4.

How far a judgment or decree against executors may be used in evidence against the devisees of the testator, *quære*. *Carnon* v. *Turner*, 6 Har. & John. 65.

A decree taken by publication against an absent defendant is not evidence of the truth of the statements of the bill in any collateral contest. *Colb* v. *Thompson*, 1 A. K. Marsh, 511.

A judgment against the executor is no evidence against the heirs or devisees of the real estate. *Mason's Devisees* v. *Peters's Adm'r*, 1 Munf. 437.

A judgment against an officer for seizing and selling the property of a third person to satisfy an execution, is no evidence as between the plaintiff and defendant in the execution that it was not the property of the defendaut. *Jones* v. *Henry*, 3 Litt. 428.

The final decree of a court of equity may be given in evidence, in another suit, although such decree has not been formerly enrolled. *Bates* v. *Delevan*, 5 Paige, 299.

VIII. *Affidavits.*

(a) *Their form and incidents generally.*
(b) *Filing and Jurat.*
(c) *In support of bill or answer.*
(d) *On motion.*

(a) *Their form and incidents generally.*

On a rule to show cause against a purchaser, why he should not comply with his bid, his answer by way of affidavit is admissible evidence. *Gordon* v. *Sims*, 2 M'Cord's Ch. 152.

An affidavit taken by a party may be read in the cause, although the party taking it may wish to suppress it because it operates against him. *M'Mahon* v. *Spangler*, 4 Rand, 51.

An affidavit taken before a master of this court at a place out of this State, cannot be read in this court. The master has no authority to take an affidavit out of the State. *Lambert* v. *Maris*, Halst. Dig. 173.

It should appear upon the face of an affidavit where it was taken, but an objection to an affidavit on this ground should be taken before hearing. *Provost* v. *Bank of North America*, Id. 174.

(b) *Filing and Jurat.*

An affidavit may be sworn to before any proper officer, although he is counsel for one of the parties, or is a partner of the solicitor in the cause. *The People* v. *Spalding*, 2 Paige, 326.

The rule prohibiting the solicitor or attorney of a party from taking the affidavit, is confined to the solicitor or attorney on record. *Ibid.*

The provisions of the Revised Statutes of New York prohibiting a master acting as such in a cause where he is counsel, do not extend to the mere taking of an affidavit. *Ibid.*

An affidavit in chancery, not sworn to before a judge of this court, or a commissioner appointed to administer an oath, cannot be read in evidence. *Haight* v. *The Morris Aqueduct*, 4 Wash. C. C. 601.

An affidavit may be sworn to before a state senator; he being *ex officio* a judge of the court for the correction of errors, which is a court of record. *Craig* v. *Briggs*, 4 Paige, 548.

An affidavit taken before a master of this court at a place out out of this State, cannot be read in this court; the master has no authority to take an affidavit out of the State. *Lambert* v. *Maris*, Halst. Dig. 173.

Where a petition or affidavit is sworn to by a person who has been found by the inquisition of a jury to be a lunatic, the officer before whom the same is sworn should state, in the Jurat, that he has examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the petition or affidavit. *Matter of Chistie*, 5 Paige, 242.

Where a deposition or affidavit is on affirmation, and the person taking it does not certify that the affirmant is a Quaker, &c., the deposition or affidavit can be of no avail. *Ringgold* v. *Jones*, 1 Bland, 90.

(c) *In support of bill or answer.*

Affidavits filed in support of a bill, there being no proof of notice, ought not to be considered as testimony in the cause, unless it appear in the record that they were read either by consent of parties or without opposition, when such opposition might have been made. *Braxton* v. *Lee's Heirs*, 4 Hen. & Munf. 376.

Where the complainant waives an answer on oath and relies upon the affidavits of third persons annexed to his bill to sustain an injunction in opposition to the defendant's answer on oath, denying the equity of the bill, the defendant on an application to dissolve the injunction may also read the affidavits of third persons in support of his answer. *Haight* v. *Case*, 4 Paige, 525.

If an answer on oath has not been waived as to one of the defendants, the complainant, upon an application to dissolve the injunction, cannot be permitted to read the affidavits annexed to the bill for the purpose of contradicting the positive answer of that defendant on oath. *Ibid.*

Upon a motion to dissolve an injunction, if the complainant relies upon affidavits annexed to the bill under the thirty-seventh rule of the court of chancery to contradict the answer, the defendant has a right to read affidavits or other evidence in support of his answer. *Brown* v. *Haff*, 5 Paige, 235.

If an injunction is sustained upon hearing bill and answer, and the plaintiff takes depositions, they may be read on another

motion to dissolve, made by defendant in consequence of the introduction of an amended auswer; but *ex parte* affidavits are not admissible. *Leroy* v. *Dickerson*, 1 Car. Law Repos. 497.

Affidavits were allowed to be read in support of a bill for an injunction, against the answer, and the injunction continued. *Benton* v. *Gibson*, 2 Hayw. 136.

It is not usual or proper to introduce affidavits to aid the answer on a motion to dissolve the injunction. *Hoffman* v. *Livingston*, 1 John. Ch. 211; *Roberts* v. *Anderson*, 2 Id. 204.

Nor is the plaintiff allowed to traverse and contradict the answer by affidavits. *Ibid.*

Affidavits *ex parte* cannot be read in opposition to a motion made on the coming in of the answer, to dissolve an injunction restraining one copartner from using the copartnership name, or doing any act relative to the partnership concern, or in support of the allegations in the bill. *Eastburn* v. *Kirk*, 1 John. Ch. 444.

The admission of *ex parte* affidavits is an exception to the general rule, and is only allowable in waste, or in cases where irreparable mischief might ensue. *Ibid.*

The same interlocutory notice as to dissolve an injunction, having once been decided, ought not to be repeated without the existence of some new ground. It is not usual or proper to introduce affidavits to aid the answer on such a motion, nor can the plaintiff traverse and contradict the answer by affidavits. *Hoffman* v. *Livingston*, Id. 211.

It is enough that an affidavit to an answer is so positive, that if false, the party may be prosecuted for perjury. *Coale* v. *Chase*, 1 Bland, 137.

(d) *On motion.*

An affidavit to set aside proceedings for irregularity, should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless an excuse is shown for dispensing with the affidavit of the party or the solicitor. *The People* v. *Spalding*, 2 Paige, 326.

It is competent for the court, upon the mere examination of an affidavit or other paper read before it, on a motion, to order scandalous or impertinent matter contained in such affidavit or paper to be expunged without a reference to a master, and to charge the proper party with the costs. *Powell* v. *Kane*, 5 Paige, 265.

A party who makes an affidavit to oppose a motion is only authorized to state the facts; and it is scandalous and impertinent to draw inferences or state arguments in the affidavit, reflecting on the character or impeaching the motives of the adverse party or his solicitor. *Powell* v. *Kane*, 5 Paige, 265.

Copies of affidavits to support a special motion or petition must be served on the solicitor of the opposite party, with notice of the motion. *Brown* v. *Ricketts*, 2 John. Ch. 425.

On application for a writ of *ne exeat republica*, by a wife against her husband, pending a suit for alimony, &c., her affidavit is admissible, the proceedings being *ex parte*, and the wife in that respect considered as independent of her husband. *Denton* v. *Denton*, 1 Id. 441.

IX. *Answer.*

(a) *Where evidence, et e contra.*

(b) *What good against.*

(c) *Effects of reading.*

(a) *Where evidence, et e contra.*

Where a general replication is put in and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. *Hagthorp* v. *Hook's Adm'rs*, 1 Gill & Johnson, 270; *Roberts* v. *Salisbury*, 3 Id. 425; *Moffatt* v. *M'Dowell*, 1 M'Cord's Ch. 434; *Hopkins* v. *Stump*, 2 Har. & John. 301; *Maupin* v. *Whiting*, 1 Call. 224; *Blanton* v. *Brackett*, 5 Id. 232; *M'Caw* v. *Blewit*, 2 M'Cord's Ch. 102; *Leeds* v. *Marine Ins. Co.* 2 Wheat. 380; *Stafford* v. *Bryan*, 1 Paige, 239: s. c. 3 Wend. 532; *Searcy* v. *Pannell*, Cook, 110; *Martin* v. *Browning*, 2 Hawk. 644; *Green* v. *Vaughan*, 2 Blackf. 324; *Hart* v. *Ten Eyck*, 2 John. Ch. 92; *Estep* v. *Watkins*, 1 Bland, 488.

Where the complainant omits to reply, and sets down the cause for hearing on bill and answer, the latter will be taken as conclusive proof of the facts which it sets up by way of defence. *Dale* v. *M'Evers*, 2 Cowan, 118; *Scott* v. *Clarkson*, 1 Bibb, 277; *Jones* v. *Mason*, 5 Rand, 577; *Pierce* v. *West's Ex'rs*, 1 Peters's C. C. 351;

Kennedy v. *Baylor*, 1 Wash. 162; *DeWolf* v. *Long*, 2 Gilm. 679; *Mason* v. *M'Gin*, 28 Ill. 324; *Front* v. *Emmons*, 29 Ill. 436.

When a discovery is asked of defendant as to a particular fact, his answer is conclusive. *Lemon* v. *Cherry*, 1 Bibb, 253; *Pollard* v. *Lyman*, 1 Day, 156; *Ragsdale* v. *Buford*, 3 Hayw. 192; *Stouffer* v. *Machen*, 16 Ill. 554.

An answer to a bill charging fraud, responsive to the bill denying the charge, and uncontradicted by evidence, rebuts the idea of fraud. *Murray* v. *Blatchford*, 1 Wend. 583; *Cunningham* v. *Freeborn*, 3 Paige, 557.

The answer of a wife cannot be read as evidence against her husband; nor can she be examined as a witness against him. *City Bank* v. *Bangs*, 3 Paige, 36.

Neither the answer nor the evidence of the wife can be used for the purpose of influencing a decision for or against her husband. *Ibid.*

The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted. *Haight* v. *Morris Aqueduct*, 4 Wash. C. C. 601.

Where an answer to a bill filed is responsive to the bill and within the discovery sought, it is legal evidence in all cases. And this whether it is a denial of some fact alleged by the complainant, or sets up a fact by way of avoidance. *Woodcock* v. *Bennet*, 1 Cowan, 711.

Where a replication is filed, no statement in the answer not responsive to the bill can avail the defendant unless it is established by proof. *Wakeman* v. *Grover*, 4 Paige, 23.

The defendant is bound to answer the charging part as well as the stating part of the bill; and his answer to the charging part, if responsive thereto, is evidence in his own favor, if an answer on oath has not been waived by the complainant. *Smith* v. *Clark*, Id. 368.

Where an answer on oath is waived, the answer is not evidence in favor of the defendant for any purpose; but as a pleading the complainant may avail himself of admissions and allegations contained therein which establish the case made by his bill. *Bartlett* v. *Gale*, Id. 504.

When an answer is positive, no decree can be made against it upon the testimony of a single witness. If however there are circumstances which strengthen the witness, and entitle him to

greater credit, this forms an exception. In weighing circumstances, equal credit is to be given to each; and it is to be forgotten that one is a disinterested witness. *Sturtevant* v. *Waterbury*, 1 Edw. 442.

Affirmative allegations in an answer, not responsive to the bill, must be proved at the trial. But where the answer is not traversed it is to be taken as true, *it seems*. *Lucas* v. *Bank of Darien*, 2 Stewart, 280.

To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defence, is not to be taken as evidence for him, unless the plaintiff asks for a disclosure on that subject, but is only equivalent to a plea of the statute of usury. *M'Daniels* v. *Barnum*, 5 Verm. 279.

The answer of a defendant in equity, stating facts which are not inquired of in the bill, is not evidence of such facts. *New England Bank* v. *Lewis*, 8 Pick. 113.

Relief was denied on the testimony of one witness in support of the bill, in opposition to a positive denial in the answer. *Patterson* v. *Hobbs*, 1 Litt. 275.

An answer to new facts, as to which the defendant was not interrogated, must be sustained by evidence aliunde. The answer alone is no evidence. *Gordon* v. *Sims*, 2 M'Cord's Ch. 156.

Every allegation of the answer, which is not directly responsive to the bill, but sets forth in avoidance or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved, or it will have no effect. *Hagthorpe* v. *Hook's Adm'rs*, 1 Gill & John. 272.

The answer of an executor or administrator, in his representative capacity, which asserts a fact that is not, and cannot be within his own knowledge, does not properly come within the general rule that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one with pregnant circumstances. *Pennington* v. *Gittings*, 2 Id. 208.

Where an executor or administrator, answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and cannot alter the character of his testimony merely because it comes in the shape of an answer, but must be allowed its due weight only; and is not entitled to the full influence of the answer of a man speaking of facts which may be within his own knowledge. *Ibid.*

Quære. How far a court of equity will decree upon the proof of a single witness when the answer puts the matter in issue although only by a declaration of ignorance, &c., by administrators. *Hunt* v. *Rousmanier's Adm'r*, 3 Mason, 294.

The testimony of one witness prevails against the denial of an answer sworn to by a defendant who has no personal knowledge of the facts. *Combs* v. *Boswell*, 1 Dana, 474.

An injunction bill was filed upon the oath of the complainant against a corporation, and the answer was put in under their common seal unaccompanied by an oath. The weight of such an answer is very much lessened, if not entirely destroyed, as it is not sworn to. *Union Bank* v. *Geary*, 5 Peters, 99.

Upon a bill brought by a junior mortgagee against a prior mortgagor and mortgagee to have an account of what is due upon the prior mortgage, &c., the answer of the mortgagor as to the sum due and of further advances made by a prior mortgagee is not evidence against the second mortgagee. *Hughes* v. *Worley*, 1 Bibb, 200.

An answer responsive to a bill is evidence, but only entitled to the same weight that parol evidence is entitled to. *Jones* v. *Stubey*, 5 Har. & John. 372.

Where a bill of review has been dismissed on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill is not authorized in his subsequent defence to make use of the answer to the bill of review as evidence in his favor. *Ellzey* v. *Lane*, 4 Munf. 66.

Where a defendant in his answer only denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact. *Knickerbacker* v. *Harris*, 1 Paige, 209.

In chancery the testimony of one witness against the direct and positive averment of the answer, is not a sufficient ground for a decree. *Pierson* v. *Catlin*, 3 Verm. 272.

But when the testimony of witnesses is corroborated by circumstances, it will be sufficient; and the answer containing the denial may also in itself contain the circumstances required. *Ibid.*

Where a replication is taken to an answer, the answer is not evidence unless responsive to the bill. *Johnson* v. *Person*, Dev. Eq. 364.

A defendant executor must prove the payment of a legacy by other evidence than his own answer, especially as he is swearing

to the act of another person. *Boone* v. *Ex'r of Durand*, 1 Desau. 588.

A plaintiff cannot read his own answer to a bill of discovery in a cross suit, in evidence, unless the defendant chooses first to produce it. *Phillips* v. *Thompson*, 1 John. Ch. 131.

An answer replied to is in no case evidence against the plaintiff though the bill be sworn to; but an answer that cannot be replied to is evidence for the defendant, as in case of bills of discovery. *Ragsdale* v. *Buford's Ex'rs*, 3 Hayw. 192.

On a hearing before a master upon a bill and answer, general allegations in the answer containing matters of belief and inference from facts not particularly stated, are not conclusive, but may be controverted by testimony. *Copeland* v. *Thomas*, 9 Pick. 73.

The answer of a defendant to a bill in chancery, in a former cause, is not legal evidence in a cause against his legal representatives, relative to the same transactions. *Drury* v. *Connor*, 6 Har. & John. 288.

The answer of a defendant in chancery, uncontradicted by any witness, is conclusive evidence, although the defendant has a direct interest in the event of the suit, and to the extent of the whole sum in controversy. *Lenox* v. *Prout*, 3 Wheat. 527.

An answer in chancery (though *in form responsive* to a question put in the bill) is not evidence, when it asserts a right, affirmatively, in opposition to the plaintiff's demand, but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. *Paynes* v. *Coles*, 1 Munf. 373.

Where the fact alleged cannot be supposed to be within the defendant's knowledge, proof, by one witness, in opposition to the answer, will be sufficient. *Lawrence* v. *Lawrence*, 4 Bibb, 358.

The answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless where they are a part of the *res gestæ*. *Leeds* v. *Marine Ins. Co.* 2 Wheat. 380.

The answer of a defendant, professing a want of knowledge of the facts stated in the bill, is not evidence against those facts; its only effect is to put the complainant to the necessity of proving them. *Drury* v. *Connor*, 6 Har. & John. 288.

So an evasive answer (though not excepted to as such) is outweighed by the testimony of a single witness and circumstances. *Wilkins* v. *Woodfin*, 5 Munf. 183.

The weight of an answer must, from the nature of evidence, depend in some degree on the fact stated. If a defendant asserts a fact which is not, and cannot be, within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. *Clark's Adm'rs* v. *Van Reimsdyk*, 9 Cranch, 153.

The answer of infants by their guardian is a pleading merely, and not an examination for the purpose of discovery. It is not evidence, therefore, in their favor, although it is responsive to the bill and sworn to by their guardian *ad litem*. *Buckley* v. *Van Wyck*, 5 Paige, 536.

A complainant cannot, by any form of pleading, compel an infant to become a witness against himself. *Ibid.*

A wife cannot be a witness for or against her husband; therefore her answer can, in no case, affect him. *Lingan* v. *Henderson*, 1 Bland, 269.

The answer of defendant being corroborated in part by one witness and contradicted by one witness only must prevail. *Vermonet* v. *Delaire*, 2 Desau. 323.

Where the answer of two defendants expressly denied the charges of inserting provisions in a marriage settlement different from those agreed on, and of surprise on complainant in the execution of the deed, it was *held*, they must prevail. There was no proof of fraud, but some parol testimony was offered to show that complainant did not read the agreement, and objected to it. This was not permitted to prevail against the positive denial of the defendants. The court said it was complainant's own folly not to have read the deed, or to have signed what he did not understand, and dismissed the bill. *Pecton's Adm'r* v. *Graham*, Id. 593.

An answer to a bill of discovery is evidence for the defendant unless disproved; and, unless contradicted by more than one witness, it must prevail against the allegations in the complainant's bill. *Clayson* v. *Morris*, 10 John. 525.

On a bill to set aside a judgment, the allegations therein contained, being denied by the answer, and only supported by one witness, the court would not set aside the judgment. *Swift* v. *Dean*, 6 John. 522.

(b) *What good against.*

An answer must be contradicted by two witnesses, or one witness and strong circumstances. *Love* v. *Braxton*, 5 Call. 537; *Martin* v. *Browning*, 2 Hawk. 644; *Pierson* v. *Catlin*, 3 Verm. 272; *Patterson* v. *Hobbs*, 1 Litt. 275; *Heffner* v. *Miller*, 2 Munf. 43; *Salter* v. *Speir*, Taylor, 318; *Clark* v. *Hunt*, 3 J. J. Marsh, 560; *Hardwick* v. *Forbes*, 1 Bibb, 212; *Vance* v. *Vance*, 5 Monroe, 523.

In cases where the bill is sworn to, one witness is sufficient. *Searcy* v. *Pannell*, 1 Cook, 110.

One credible witness who swears positively is sufficient to establish a fact which the answer denies equivocally. *Phillips* v. *Richardson*, 4 J. J. Marsh, 213.

One witness, without any corroborating circumstances, is sufficient to sustain a bill of injunction against an answer in which the defendants profess that "they know nothing about the subject," but put the complainants on proof. *Harlan* v. *Wingate's Adm'r*, 2 J. J. Marsh, 138.

Where a bill relates to transactions with the ancestor of the defendants, of which they do not pretend to have any personal knowledge, and there is no grouud to presume they have, the testimony of one witness is sufficient, notwithstanding the answer is in terms a positive denial of the facts. *Carneal's Heirs* v. *Day*, Litt. Sel. Ca. 492.

If the answer to a bill contain a denial of the allegations, the plaintiff must support the statements in the bill by testimony and corroborating circumstances. *Higbie* v. *Hopkins*, 1 Wash. C. C. 230.

Where a defendant in his answer denies a fact charged in the bill, according to the best of his knowledge and belief, a single witness on the part of the complainant is sufficient to establish the fact. *Knickerbacker* v. *Harris*, 1 Paige, 209.

Where a bill was brought by a creditor to set aside sales of the property of defendant, charging that they were fraudulent; *Held*, that it was not merely a bill for discovery, and that proof might be received to contradict the answer of defendant, denying the fraud. *Miller* v. *Tolleson*, Harp. Eq. 145.

The general rule is that the answer of one co-defendant in chancery shall not be evidence against another, but to this rule

there are exceptions. When such defendants are partners, or where one has acted as the agent of the other in any transaction to which the answer may relate, and the agency or partnership, at the time of filing such answer, still exists, the answer of the partner will be evidence against the copartner, and that of the agent against his principal, when such copartner or principal claims through or under such partner or agent. . *Rector* v. *Rector et al.* 3 Gilm. 105.

X. *Bills generally, and when taken pro confesso.*

To a bill for discovery of facts within defendant's own knowledge, if he fails to answer, they are taken as admitted. *Sprigg* v. *Jarrit*, 1 A. K. Marsh, 336.

If a decree be taken by publication against an absent defendant, the statements in the bill are not evidence in any collateral contest. *Cobb* v. *Thompson*, Id. 511.

The allegations of a bill not under oath, are not evidence against a complainant. *Rankin* v. *Maxwell*, 2 Id. 491.

Where an injunction is granted and a material fact is alleged in the bill and not denied in the answer, such fact must be taken as true on a motion to dissolve; and no other proof will be required on such motion. *Randolph* v. *Randolph*, 6 Rand, 194.

Where a bill against several defendants makes an admission favorable to some against whom the bill is taken *pro confesso*, but the bill is unfavorable as to others who appear and take issue and disprove, it must yet be taken as true in respect to those who did not answer. *Pattison* v. *Hull*, 9 Cowan, 747.

Where a bill of foreclosure of a mortgage stated that the first instalment which fell due on the mortgage had been paid, to which bill the mortgagors and divers incumbrancers were made parties, and one set of incumbrancers appeared and claimed that the instalment had not been paid, but was due and belonged to them, and claimed that the foreclosure should proceed as well for that as for the residue of the mortgage debt, and established this claim in proof, but the bill was taken *pro confesso* against all the other defendants; *Held*, that as to the latter the instalment must still be taken as paid, though otherwise as between the parties litigant. *It seems* that to warrant a foreclosure for the whole debt against all the defendants, a cross-bill should have been filed. *Ibid.*

The answer of a party in chancery is proper evidence against him; and so much of the bill as is necessary to explain the answer. *M'Gowan* v. *Young*, 2 Stew. 276.

XI. *Taken on bill to perpetuate.*

The interest which the next of kin has in the estate of an idiot during his lifetime is not sufficient to support a bill to perpetuate testimony. But such next of kin may make a contract in regard to such expectancy on which such bill may be supported. *Butler* v. *Haskell*, 4 Desau. 651.

Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the court. *Lawrence* v. *Swann*, 5 Munf. 332.

XII. *Taken in another cause or matter.*

Depositions taken between the same parties and in relation to the same matter, but in a former suit, ought to be used in a new suit. *Brook* v. *Cannon*, 2 A. K. Marsh, 525; *Wade* v. *King*, 19 Ill. 308; *McConnell* v. *Smith's Adm'r et al.* 27 Ill. 308.

Where a bill had been filed in the Court of Chancery, under which testimony was taken and returned and the bill afterwards dismissed by the complainant who filed a new bill against the same defendants, to obtain the same relief for which the former bill had been filed on the petition of the defendants; *Held*, that the testimony so taken in the former suit be received and read in evidence in the new suit. *Hopkins* v. *Strump*, 2 Har. & John. 301.

On the hearing of an original bill in the nature of a supplemental bill and bill of revivor, depositions taken in the original suit may be read. *Benzein* v. *Robenett*, Dev. Eq. 444.

In a suit in chancery the defendants are in default; yet the record or proceeding in another suit, *inter alias*, is not competent evidence against them. *Frazier* v. *Frazier*, 2 Leigh, 642.

It seems that a deposition taken under a commission awarded before the bill was filed and executed by two persons, of whom one was not a magistrate, may be read in a subsequent suit. *Thornton* v. *Corbin*, 3 Call. 384.

In a suit in chancery, the bill having referred to the proceedings in another suit, "as now remaining of record in the same court,"

and the answer having admitted that such a suit was brought, and such a decree as stated in the bill existed, the court of appeals will award a writ of *certiorari* for a transcript of the record referred to, and receive it as evidence, so far as admitted by the answer. *Hooper* v. *Royster*, 1 Munf. 119.

A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits; it being a rule that a document cannot be used against a party who could not avail himself of it in case it was made in his favor. *Paine* v. *Coles*, Id. 373; *Dale* v. *Rosevelt*, 1 Paige, 35.

In a suit in equity in the Supreme Court of the United States, a copy of a deed from the clerk of a state court cannot be received as evidence, unless there is also a certificate of the presiding judge that the attestation of the clerk is in due form. *Drummond's Adm'rs* v. *Magruder's Trustees*, 9 Cranch, 122.

A deposition taken in an ejectment suit at law, brought by the defendants in the present suit against a third person, as tenant, to recover certain land, the subject of the present suit is not admissible evidence against the present plaintiff, it being *res inter alias acta*. *Roberts* v. *Anderson*, 3 John. Ch. 376.

A record of one suit cannot be read in evidence in another on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both; another plaintiff, and the person under whom both the said plaintiffs jointly claim, not having been parties to the former suit. *Chapmans* v. *Chapmans*, 1 Munf. 298; *Darsey* v. *Gassaway*, 2 Har. & John. 409.

In such case the circumstances that the writings and evidence in the former suit were read at the hearing of the latter without any exception taken at that time, appearing on the record is no proof that it was done by consent of parties; and does not preclude the objection from being taken in the appellate court; the defendant in his answer having objected to the admission of the verdict and other proceedings in the former suit, but offered to agree that the depositions only might be read, to which offer no assent appeared on the part of the plaintiff. *Ibid.*

If on a bill for partition, a decree be made that if either party is evicted the others should contribute, and one of the parties being sued submits to arbitration, an award against him is only evidence

of eviction, not of the validity of the title of the adverse claimant. *Devour* v. *Johnson*, 3 Bibb, 409.

XIII. *Private writings.*

When deeds from other persons to one of the parties are introduced by him, they only prove that such deeds were executed. *Mitchell* v. *Maupin*, 3 Monroe, 187.

Deeds of conveyance prove the facts which they recite between the parties, not others. *Ibid.*

A deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration. *Roberts* v. *Stanton*, 2 Munf. 129.

Where a statutory foreclosure of a mortgage took place previous to the passage of the act authorizing the making of affidavits to perpetuate the proof of the regularity of the proceedings, and where the attorney who made such foreclosure was dead, the entry of the attorney in his register of a sale pursuant to the notice and a recital of the facts in the deed were *held* sufficient evidence *prima facie* to establish the fact of such sale. *Hawley* v. *Bennett*, 5 Paige, 104.

A letter by a party to a third person, stating the terms of the contract, is good evidence against the writer to supply the loss of the original contract. *Peart's Heirs* v. *Taylor*, 2 Bibb, 556.

The books of account of a party ought to be taken altogether; therefore, credits ought not to be collected from them to charge him without admitting the debts charged therein. *Waggoner* v. *Gray's Adm'r*, 2 Hen. & Munf. 603.

The books of a partnership, kept subject to the inspection of each partner, are evidence against each other. *Simms* v. *Kirtley*, 1 Monroe, 80.

The will of a testator, recognizing certain persons as his children, is evidence that they are his heirs. *Cowan* v. *Hite*, 2 A. K. Marsh, 239.

The oath and books of the plaintiff are in no case admissible to charge the defendant with goods delivered by his order to a third person, unless such order be otherwise proved. *Kerr* v. *Love*, 1 Wash. 172.

An entry in the books of the plaintiff, made by his clerk who is

not now to be found, together with the plaintiff's oath to ascertain the quantity, is not sufficient evidence to charge the defendant with goods delivered for safe-keeping to the master of the defendant's vessel, there being no evidence that such goods came to the hands of the defendant. *Kerr* v. *Love*, 1 Wash. 172.

An entry in the books of an administrator, by his clerk or agent, of money paid over to the guardian of his distributees was admitted, under all the circumstances of the case, as evidence to charge the guardian; the administrator and his clerk being both dead, and the clerk's handwriting proved. *Brown* v. *Brown's Adm'r*, 2 Wash. 151.

A deed reciting another deed is evidence of the recited deed against the grantor and those claiming under him, but is not evidence against a stranger. *Hite* v. *Shrader*, 3 Litt. 444.

The recital in a post-nuptial settlement of an agreement as consideration of the deed, is evidence against persons claiming under the settlor, but not against a creditor of the settlor contesting the fairness and validity of the deed. *Blow* v. *Maynard*, 2 Leigh, 29.

Where, upon a bill filed to compel the defendant to discover and deliver over to the complainants a pass book alleged to belong to them, and which was wanted by them as evidence against him in a suit at law, and the defendant by his answer admitted the pass book to be in his possession, and referred to it in such manner as to entitle them to an inspection of the same as a part of the answer; *Held*, that the complainants were not entitled to use the pass book as evidence in their suit at law separate from the defendant's answer, previous to a final decree declaring their right to the same. *Watts* v. *Lawrence*, 3 Paige, 159.

On a bill against an agent for an account, his books are not admissible to prove the sale and delivery of provisions and necessaries to the principal. *Poag* v *Poag*, 1 Hill's Ch. 287.

XIV. *Evidence or answer of one defendant when read against or in favor of another.*

The answer of one defendant cannot be read in evidence against a co-defendant. *Hayward* v. *Carroll*, 4 Har. & John. 518; *Hunt* v. *Stephenson*, 1 A. K. Marsh, 571; *Thomasson* v. *Tucker*, 2 Blackf. 172; *Moseley* v. *Armstrong*, 3 Monroe, 389; *Webb* v. *Pell*, 3 Paige, 368; *M'Crackin* v. *Samuels*, Litt. Sel. Ca. 12; *Leeds* v. *Marine Ins.*

Co. 2 Wheat. 380; *Collier* v. *Chapman*, 2 Stew. 163; *Mitchell* v. *Nash*, 1 Cook, 240; *Harrison* v. *Johnson*, 3 Litt. 286; *Timberlake* v. *Coffs*, 2 J. J. Marsh, 136; *Davis* v. *Harrison*, Id. 191; *Ward* v. *Davidson*, Id. 445; *M'Kinn* v. *Thompson*, 1 Bland, 160; *Contra*, *Field* v. *Holland*, 6 Cranch, 8.

But this rule does not apply to the case where the defendants are all partners in the same transactions; for in such case the answer or confession of either is evidence against the others. *Van Reimsdyk* v. *Kane*, 1 Gall. 630; *Winchester* v. *Jackson*, 3 Hayw. 310.

In general the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another so that the right of one devolves on the other, and they become privies in estate, the rule does not apply. *Osborn* v. *U. S. Bank*, 9 Wheat. 738.

Upon a bill in equity by one partner against his copartners for an account, the answer of one of the defendants will not be evidence to charge another. But if it appears that the defendants, as constituting a partnership among themselves of the one part were in partnership with the plaintiff of the other part, the answer of one of the defendants would be evidence to charge the others. *Chapin* v. *Coleman*, 11 Pick. 331.

If an injunction is sustained upon hearing bill and answer, and the complainant regularly takes depositions, they may be read on another motion to dissolve, made by the defendant in consequence of the introduction of an amended answer which he had leave to file. *Leroy* v. *Dickinson*, 1 Car. Law Repos. 497.

The deposition of one defendant is not admissible in evidence against the others, although he had received his certificate of discharge under a state insolvent law, from all debts and contracts prior to the date of the discharge, and although the debt in suit was contracted prior to such discharge, the debt having been contracted in a foreign country with a foreigner. *Clark's Adm'rs* v. *Van Reimsdyk*, 9 Cranch, 153.

If a defendant, in argument, relies upon the answer of his co-defendant, he thereby makes it evidence against himself. *Chase* v. *Manhardt*, 1 Bland, 336.

XV. *Depositions.*

(a) *Generally.*
(b) *Amendment and suppressal of.*

(a) *Generally.*

If irregularities occur in awarding a commission to take a deposition in chancery, and in taking the deposition, and the deposition be read at the hearing in the court of chancery without any exception taken there, upon appeal to this court objections taken here to the deposition for such irregularities, cannot avail to exclude the evidence. *Dickenson* v. *Davis*, 2 Leigh, 401.

A's deposition was taken by C, the second mortgagee, and those claiming under him, under a special commission awarded by the chancellor to take the deposition, subject to all just exceptions, and B, the first mortgagee, prayed and obtained a like special commission to take A's deposition, but did not act under his commission; *Held*, that B, by obtaining this special commission himself, was not precluded from objecting to the competency of the deposition taken under C's commission. *Beverly* v. *Brooks*, Id. 425.

Where the deposition of a party in a suit in chancery is taken under a special commission, subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not, it behooves the court to examine and decide the question of competency; and though the deposition be read at the hearing in the court of chancery without exception, yet if on an appeal from the decree, the appellate court finds the deposition incompetent evidence by reason of the deponent's interest in the event, it will pay no regard to the deposition. *Ibid.*

A deposition having been taken after the cause was set for hearing in the superior court of chancery, and no objection appearing to have been made in that court, the court of appeals will presume that good cause was shown for admitting it. *Stubbs* v. *Burwell*, 2 Hen. & Munf. 536.

A deposition cannot be read to affect the interest of any party to whom no notice of the time and place of taking it had been given. *Ibid.*

Exceptions to the reading of depositions taken by virtue of commissions issued after the cause in which they may be required is

set for hearing, may be made at any time, before the cause is gone into, when called; after which such exceptions would come too late. *Foster* v. *Sutton*, 4 Hen. & Munf. 401.

A deposition taken after an appeal from an interlocutory decree in chancery, may be read upon the hearing of the appeal. *Alexander* v. *Morris*, 3 Call 89.

A deposition taken before the decree was pronounced in the court of chancery, but not filed until after an appeal was taken from the decree, was received by the court of appeals. *Auditor of Public Accounts* v. *Pauly*, 5 Id. 331.

If a deposition is contradictory of any other previous deposition of the same witness, it destroys his credibility; but if the former deposition is not inconsistent with the latter, and the witness is supported by the testimony of others, his deposition will have its influence. *Cardwell* v. *Strother*, 2 Dana, 444.

If a deposition be read upon the hearing of the cause below, and it does not appear to have been excepted to, no exception can be taken in the supreme court; and defects in the certificates or the deposition itself will be presumed to have been waived. *Pillow's Heirs* v. *Shannon's Heirs*, 3 Yerg. 508.

Depositions in a chancery cause, regularly taken and returned to the clerk's office in due time, ought not to be rejected, because, by the inadvertency of the clerk, they had not been filed with the other papers, and their existence was unknown to the court until after considerable progress had been made in the argument of the cause. *Cravens* v. *Harrison*, 3 Litt. 92.

The court of appeals will not reverse a decree in chancery on the ground of depositions having been improperly excluded, if they see that the final decree ought to have been made against the party in whose favor they were taken, if they had been admitted. *Ibid.*

No second deposition of a witness ought to be taken and used in the same suit without leave of the court. *Newman* v. *Kendal*, 2 A. K. Marsh, 236.

If, after answer filed and depositions taken, the plaintiff makes new parties and files a new bill, the depositions previously taken cannot be read against the new defendant. *Jones* v. *Williams*, 1 Wash. 230.

Quære, if such depositions can be read where the new defendant has purchased from the original defendant, *pendente lite*? *Ibid.*

Testimony taken in the cause cannot be read upon a motion to dissolve an injunction. *Brush* v. *Vandenburgh*, 1 Edw. 21.

The deposition of a witness taken whilst she is incompetent, may be retaken when her competency is restored; and for an error committed by the court in excluding the last deposition the cause will not be reversed when the deposition is incorporated in the record, and the cause decided as though it had not been excluded. *Haddix's Heirs* v. *Haddix's Adm'rs*, 5 Litt. 201.

A deposition which had been taken while the replication was standing, cannot be read after it is withdrawn. *Clarke* v. *Tinsley's Adm'r*, 4 Rand, 250.

Proofs taken in a cross-suit will not be allowed to be read on the hearing in the original cause, unless the parties by themselves or by their privies by representation are the same in both causes, especially where the depositions are sought to be used against a person not a party to the original suit. *Perine* v. *Swain*, 2 John. Ch. 475.

If a cross-bill contained a charge of fraudulent misconduct in the arbitrators, but no such allegation is made in the answer to the original bill, though, by an order of the court, the depositions taken in the original suit are allowed to be read in the cross-suit, yet such parts of the depositions as related to the fraudulent misconduct, not charged in the original suit, in which they were taken, will be suppressed. *Underhill* v. *Van Cortlandt*, Id. 345.

Depositions refused because the witness refused to answer a proper question, and because they were written by the plaintiff's attorney. *Mosely* v. *Mosely*, Cam. & Nor. 522.

A deposition cannot be read to affect the interests of any party to whom no notice of the time and place of taking it had been given. *Stubbs* v. *Burwell*, 2 Hen. & Munf. 536.

Where a deposition or affidavit is on affirmation, and the person taking it does not certify that the affirmant is a Quaker, &c., the deposition or affidavit can be of no avail. *Ringgold* v. *Jones*, 1 Bland, 90.

(b) *Amendment and suppressal of.*

A deposition was rejected because the witness refused to answer a proper question; also because it was in the handwriting of the complainant's attorney. *Mosely* v. *Mosely*, Cam. & Nor. 522.

Depositions taken without notice are to be rejected. *Honore* v. *Colmesnil*, 1 J. J. Marsh, 525.

Evidence of a fact not in issue in the cause cannot be read, and such evidence may, upon motion before hearing be suppressed, or it may be rejected at the hearing. *Trumbull* v. *Gibbons*, Halst. Dig. 174.

Depositions taken after the argument of the cause, without special order, were suppressed. *Dangerfield* v. *Claiborne*, 4 Hen. & Munf. 397.

Where, on examination, a witness has misbehaved, the deposition may be suppressed. *Phillips* v. *Thompson*, 1 John. Ch. 140.

After publication passed and the cause set down for hearing, the deposition of a witness was allowed to be amended on examination of the witness by the court, he being aged and very deaf, and a mistake made in taking down his testimony by the examiner. *Denton* v. *Jackson*, Id. 526.

XVI. *Publications generally, and enlarging publication.*

Filing and opening in the clerk's office, a deposition taken in a suit in chancery, is equivalent to a publication in the English practice. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344.

Where the facts charged in a bill are fully denied by the answer, there can be no decree against the answer on the evidence of a single witness only, without corroborating circumstances to supply the place of a single witness. And in such case the court refused, after the lapse of two years, from passing publication to open the rule to pass publication on an affidavit of plaintiff that he had discovered a witness who could prove a material fact denied by the answer, as this would not be sufficient to rebut the answer. *Smith* v. *Brush*, 1 John. Ch. 459.

Notice of the rule to pass publication must be served on the defendant's solicitor or his agent; and if on the agent, the time of service must be double, as in other cases, or for six weeks. *Billings* v. *Rattoon*, 5 Id. 189.

It is not of course to enlarge the rule to pass publication, and it will be refused where there has been great delay. *Underhill* v. *Van Cortlandt*, 1 John. Ch. 500.

Where the rule to show cause why publication should not pass

has been enlarged by an order for that purpose, at the instance of the defendants, and that order has expired, publication may pass without entering a further rule with the register, as is the practice in ordinary cases, on the expiration of the rule to show cause. *Moody* v. *Payne*, 3 Id. 294.

After publication passed, but the deposition taken not read, a motion to enlarge the time for passing publication will not be granted, but on special cause shown, and due notice to the opposite party. *Hammersley* v. *Brown*, 2 John. Ch. 428.

The deposition of a witness whose examination was not closed until after publication passed, was allowed to be read, he having been cross-examined by the opposite party, and no actual abuse appearing. *Underhill* v. *Van Cortlandt*, Id. 345.

Either party who has examined witnesses may give rules for passing publication, but the rule for passing publication can be entered only by the party who had given the previous rules; the defendant cannot pass publication on the plaintiff's rules, nor *vice versa*. *Brown* v. *Ricketts*, 3 John. Ch. 63.

In Maryland there is no publication of depositions, but all objections are open and may be taken at the hearing. *Strike's Case*, 1 Bland, 96.

XVII. *Parol Evidence.*

(a) *Generally.*
(b) *To explain, vary, or contradict written instruments.*

(a) *Generally.*

Parol evidence is admissible to establish a trust. *Letcher* v. *Letcher*, 4 J. J. Marsh, 593.

Parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument; but it must be evidence of so positive a character as to leave no doubt of the fact, and at the same time so clearly define the trust that the court may see what is requisite for its due execution. *Harrison* v. *M'Mennomy*, 2 Edw. 251.

The testator by his will directed the remainder of his estate to be sold and the proceeds to be equally distributed among his granddaughters, and adds, "I allow my under-named executors to retain the aforesaid children's parts in their hands until the chil-

dren arrive at maturity," on a bill filed against the executors to account, *it was held*, that parol evidence was admissible to show that the executors retained the legacies in their hands without making interest on them, in consequence of an agreement with the testator that they should not be bound to invest the fund or make interest, nor be chargeable with interest on their failure to do so; and that they accepted the executorship on that condition. *Chesnut* v. *Strong*, 1 Hill's Ch. 125.

A mistake in drawing and fraud in either procuring the writing to be executed or in framing it differently from what was intended and concealing that difference by address, may be shown by parol evidence. *Baugh* v. *Ramsey*, 4 Monroe, 158.

It seems that the allegation that the written agreement was drawn for dollars merely, instead of commonwealth's paper "by either fraud or mistake," without saying which, is not sufficient to admit the parol proof. *Ibid.*

The bare ground that the contract was for commonwealth's paper and the note otherwise, without showing the note was fraudulently drawn, is not sufficient to admit the parol evidence. Id. 159.

It is the settled law that a mistake in reducing agreements to writing is a head of equity jurisdiction, and parol evidence is competent to prove the mistake. *Inskoe* v. *Proctor*, 6 Mouroe, 316.

Parol evidence is competent to prove a transaction in the form of an absolute sale was a mortgage to secure a usurious loan. *Lindley* v. *Sharp*, 7 Id. 252.

Parol evidence was received to prove the existence and loss of a deed of marriage settlement corroborated by other deeds referring to and speaking of the deed of settlement. *Potts* v. *Cogdell*, 1 Desau. 454.

To a bill praying for the specific performance of a parol agreement for the sale of land, the defendant answered and denied the agreement as charged by the bill; but set up another agreement which he insisted upon he had complied with. The complainant is not at liberty to support the alleged parol agreement by parol evidence. *Askew* v. *Poyas*, 2 Id. 145

Parol evidence of the sum brought into the copartnership funds by one of the partners was not allowed, after a great lapse of time (twenty-four years), to prevail against the entry in the books of a much smaller sum credited him on that account. *Ex'rs of Richardson* v. *Wyatt*, Id. 471.

Parol proofs of loose declarations of a party shall not, after a great lapse of time, establish an alleged renunciation of clear rights. *Irby* v. *M'Crae*, 4 Desau. 422.

Parol evidence of the execution of some deeds for the conveyance of lands, and of the payment of the purchase-money equal to the value of the fee-simple, and of the house and papers of the purchaser, being afterwards burnt, will establish the existence and loss of the title deeds in fee-simple to the land in question. *Belton* v. *Briggs*, Id. 465.

Parol evidence of the declarations of a testator cannot be received to explain the intention of the bequest. *Putter's Ex'rs* v. *Puller*, 3 Rand, 83.

Parol evidence is admissible to prove a fraud or mistake in reducing a contract to writing; in such case the fraud or mistake must be alleged. *Morris* v. *Morris*, 2 Bibb, 311.

Parol evidence is inadmissible to show a mistake in law as a ground for reforming a written instrument founded on such mistake. *Wheaton* v. *Wheaton*, 9 Conn. 96.

The court will not admit parol evidence to show that a renunciation of dower before a magistrate was intended as a release of inheritance. *Westbrook* v. *Harbeson*, 2 M'Cord's Ch. 117.

Parol evidence is inadmissible to set up a parol agreement between husband and wife, to compensate the wife for consenting to renounce her dower. *Hall* v. *Hall*, Id. 274.

The fact that the wife has renounced her dower, raises no presumption that she is not to be compensated, in order to let in parol evidence of an agreement to compensate. Id. 277.

The court is particularly reluctant to let in parol evidence after the death of one of the parties, where a specific performance is asked. *Ibid.*

The testimony of the person who executed the deed, was received as fixing the time when it was executed, notwithstanding the testimony of two witnesses to his acknowledgment to the contrary, when not on oath; he being entirely disinterested between the parties, and the falsehood of his evidence being not probable under the circumstances of the case. *Colquhoun* v. *Atkinson*, 6 Munf. 550.

It seems that to determine whether a specific legacy shall abate or not, evidence of the state of the assets *dehors* the will may be received. *White* v. *Beattie*, Dev. Eq. 320.

A agrees with B, at a sheriff's sale, to bid off the property sold, for B. He bids it off and takes a conveyance to himself, and then refuses to convey to B. As B is not privy to the conveyance, he is not bound by it; and he may produce parol evidence to prove the agreement between A and himself. *Strong* v. *Glasgow*, 2 Mur. 289.

In chancery, a mistake in a deed may be shown by parol evidence. *Abbe* v. *Goodwin*, 7 Conn. 377.

Parol evidence of the republication of a will cannot prevail as to real estate. It cannot be received on the question whether the testator meant to revoke or republish a will of lands. *Cogdell's Ex'rs* v. *His Widow*, 3 Desau. 365.

Where there is an agreement in writing for the conveyance of land, according to the valuation of certain appraisers named, and the parties subsequently by parol agree to substitute other appraisers, this is not within the statute, and may be shown by parol evidence. *Stark* v. *Wilson*, 3 Bibb, 478.

Parol evidence of a parol agreement respecting the sale of land will not be received. *Askew* v. *Poyas*, 2 Desau. 145; *Givens* v. *Calder*, Id. 190.

Complainant had brought a suit at law on a promissory-note, on which a considerable amount of interest was due. The jury gave a verdict for the principal of the note, omitting the interest; *Held*, that parol evidence of a juror was admissible to show that the jury had omitted the interest by mistake. *Cohen* v. *Dubose*, Harp. Eq. 102.

(b) *To explain, vary, or contradict written instruments.*

The general rule is that parol evidence cannot be admitted to contradict, explain, or alter a written agreement; but may be received to prove fraud, mistake, usury, or surprise in the execution of it. *M'Mahon* v. *Spangler*, 4 Rand, 51; *Pooser* v. *Tyler*, 1 M'Cord's Ch. 18; *Gibson* v. *Watts*, Id. 490; *Holmes* v. *Simons*, 3 Desau. 149; *Loyd* v. *Ex'rs of Inglis*, 1 Id. 333; *Anderson's Ex'rs* v. *Bacon*, 1 A. K. Marsh, 50; *Fishback* v. *Woodford*, 1 J. J. Marsh, 86; *Love* v. *Cofer*, Id. 327; *Williams* v. *Beazley*, 4 Id. 580; *Thompson* v. *Patton*, 5 Litt. 74; *Dwight* v. *Pomeroy*, 17 Mass. 303; *Bradbury* v. *White*, 4 Greenl. 391; *Meads* v. *Lansingh*, Hopk. 124; *Wesley* v. *Thomas*, 6 Har. & John. 24; *Watkins* v. *Stockett's Adm'r*, Id. 435; *Randall* v. *Phillips*, 3 Mason, 378; *Dickenson* v. *Dickenson*, 2

Mur. 2; *Lemaster* v. *Burckhart*, 2 Bibb, 28; *Baugh* v. *Ramsey*, 4 Monroe, 158; *Huston's Ex'r* v. *Noble*, 4 J. J. Marsh, 134; *Fenwick* v. *Ratliff*, 6 Monroe, 154.

Parol evidence is admissible to show that a deed or conveyance absolute on its face was intended by the parties only as a mortgage, or security for the payment of money. *Slee* v. *Manhattan Co.* 1 Paige, 48; *Whitlick* v. *Kane*, Id. 202; *Ross* v. *Norvell*, 1 Wash. 14; *Streator* v. *Jones*, 3 Hawk. 423; *Thompson* v. *Patton*, 5 Litt. 74; *Lewis* v. *Robards*, 3 Monroe, 409; *Washburn* v. *Merrills*, 1 Day, 139; *Mark* v. *Pell*, 1 John. Ch. 594; *Blanchard* v. *Keaton*, 4 Bibb, 451.

Where there is no *latent* ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible. *Field* v. *Eaton*, Dev. Eq. 283; *Broadwell* v. *Broadwell*, 1 Gil. 600; *McEvoy* v. *Long*, 13 Ill. 150.

Parol evidence is inadmissible to prove that the intention of the testator was not properly expressed in the will; or that he used words the meaning of which he did not understand. *Reeves* v. *Reeves*, Id. 386.

Parol evidence is sometimes admitted on the part of the defendant to show a mistake in a deed, to prevent the specific execution of it, but never on the part of the complainant to set up a different deed from that which has been executed. *Westbrook* v. *Harbeson*, 2 M'Cord's Ch. 115.

The existence of a resulting trust may be proved by parol evidence in opposition to the face of the deed, and to the answer of the trustee; but to establish the trust under those circumstances the earliest and the strongest testimony must be produced. *Jenison* v. *Graves*, 2 Blackf. 440; *Elliott* v. *Armstrong*, Id. 198.

When the complainant alleges his contract to have been for the commonwealth's paper, though the written instrument calls for specie, and the defendant in his answer denies it, but sets up a contract variant from the writing and from that alleged by the complainant, parol testimony is inadmissible to establish the real contract. *Wilson's Adm'r* v. *Bowen*, 4 J. J. Marsh, 122.

Parol evidence, though inadmissible to vary the terms of a written contract, is admissible to prove a vice in it; *ergo*, it is admissible to prove that a bill of sale, absolute on its face, was intended as a mortgage to secure an usurious loan. *Murphy* v. *Trigg*, 1 Monroe, 72.

Parol evidence is not competent to vary a written agreement to support a demand, but may be sometimes used to resist a recovery. *Wood* v. *Lee*, 5 Monroe, 57.

The fraud or mistake must be in the execution of the instrument for parol proof to contradict the terms of it or vary its stipulations. *Fishback* v. *Woodford*, 1 J. J. Marsh, 87.

For parol evidence to alter or modify the terms of a written instrument, it is necessary to establish some fact independent of the consideration establishing fraud or mistake. *Ibid.*

Parol proof of the conduct and condition of parties is admissible to aid in the construction of writings of doubtful import on their face. Parol evidence is always admissible to prove fraud, usury, or illegality of contract or consideration. *Edrington* v. *Harper*, 3 Id. 355.

Where the words of a will are equally applicable to two persons or two things, parol evidence is admissible to show which person was the object of the testator's bounty, or which article he intended for the legatee. *Pritchard* v. *Hicks*, 1 Paige, 270.

Where a testator made a bequest to a person by a wrong Christian name, parol evidence was admitted to show what person was intended. *Connolly* v. *Pardon*, Id. 291.

Notwithstanding a clause of general warranty in a deed for land, a court of equity will receive parol testimony to prove that such clause was contrary to the actual agreement by which the land was to have been conveyed with special warranty only; the written agreement of the vendor to make the conveyance not being produced on the part of the vendee to whom it was delivered. *Bumgardner* v. *Allen*, 6 Munf. 439.

The rule that parol evidence is inadmissible to alter, add to, or explain a written agreement, is founded in the general rules of evidence in which writing evidence stands higher in the scale than mere parol testimony. *Ratcliffe* v. *Allison*, 3 Rand, 537.

But collateral circumstances attending an agreement may be proved by parol evidence. And these circumstances may be gone into in every case by a defendant who resists the specific execution of an agreement. *Ibid.*

Parol declarations of a grantor previous to the execution of a deed and at the very moment of executing it, are admissible to explain the intention with which it was made. *Land* v. *Jeffries*, 5 Rand, 211.

Parol evidence is not admissible to supply a clause in a will devising real estate, omitted by mistake. *Webb's Heirs* v. *Webb*, 7 Monroe, 629.

Bonds apparently absolute may be shown by evidence to be merely counter securities. *Todd* v. *Ex'rs of Rivers*, 1 Desau. 155.

The word "increase" without the word "future" prefixed, in the bequest of a female slave is ambiguous; and if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. *Reno's Ex'r* v. *Davis*, 4 Hen. & Munf. 283.

On a bill to compel the specific execution of a written agreement, if the defendant in his answer denies that interpretation thereof which appears obvious according to its words, parol evidence on the part of the complainant is admissible to explain it. *Cutt's Trustees* v. *Craig*, 2 Id. 618.

Parol evidence is admitted to explain the meaning of the parties in marriage articles, when a conveyance is called for. *Flemings* v. *Willis*, 2 Call, 5.

Parol evidence is not to be admitted nor extraneous circumstances introduced in the exposition of deeds, except in the single instance of a latent ambiguity. *Howard* v. *Rogers*, 4 Har. & John. 278.

Parol evidence of declarations and intentions is inadmissible to raise a trust inconsistent or at variance with the expressed intention of a deed where the facts and circumstances would not of themselves, by implication or construction of law, do so. Nor can such a trust be created for the benefit of a third person and to defeat a complainant's equity by alleging declarations or intentions at variance with the express intention of a deed. *Jones* v. *Slubey*, 5 Har. & John. 372.

Where a mistake has been made by a scrivener, or error in calculation, or other obvious mistake in matter of fact in a written contract, parol evidence may be let in. *Gibson* v. *Watts*, 1 M'Cord's Ch. 505.

Where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar," parol proof may be admitted of other valuable considerations. *Harvey* v. *Alexander*, 1 Rand, 219.

A being seized of a tract of land containing two hundred and

seventy-five acres, called P. D., gave his bond for the conveyance of all his right, &c., "of, in, and to one hundred and twenty acres of land called P. D.," &c. Parol evidence is inadmissible to show from what part of the tract the one hundred and twenty acres were to be taken. *Hunt* v. *Gist*, 2 Har. & John. 498.

The answer of a defendant, who had no interest, was received as evidence, to explain the terms of a sale, notwithstanding the objection that it was parol evidence, and contradicted the advertisement of the deed. *Wainwright* v. *Read*, 1 Desau. 573.

Where a deed has been executed pursuant to a written agreement, parol evidence is inadmissible to show a resulting trust. *St. John* v. *Benedict*, 6 John. Ch. 111.

The rule of evidence is that where a deed is proved to have been lost, or casually destroyed, or to be in the hands of the opposite party, parol evidence may be allowed to prove the existence and contents. None of the cases go beyond this. *Adm'r of Bunch* v. *Adm'r of Hurst*, 3 Desau. 291.

Parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: first, where there is a latent ambiguity, arising *dehors* the will as to the person or subject meant to be described; and second, to rebut a resulting trust. *Mann* v. *Ex'rs of Mann*, 1 John. Ch. 231; *Scott* v. *Bennett*, 3 Gilm. 254.

Parol evidence admitted to explain a mistake in a will, being the omission of the name of one of the testator's children. *Greer* v. *Wind's Ex'r*, 4 Desau. 85.

On a bill to compel the specific execution of a written agreement, if the defendant in his answer deny that interpretation thereof which appears obvious, according to its words, parol evidence on the part of the plaintiff is admissible to explain it. *Cout's Trustees* v. *Craig*, 2 Hen. & Munf. 618.

Where an assignment is absolute on the face of it, but is admitted in the answer to have been intended as a security, parol proof is admissible to show the nature and extent of the security, or the real intent of the parties. *Moses* v. *Murgatroyd*, 1 John. Ch. 119.

Parol evidence is inadmissible that a note absolute on its face was not to be paid on the happening of a certain contingency. *Dale* v. *Pope*, 4 Litt. 167.

Parol evidence was admitted to prove the existence and loss of a deed of marriage settlement, which was corroborated by other deeds referring to and speaking of the deed of settlement; and the contents of the lost deed were ascertained by reference to other deeds. *Potts* v. *Cogdell*, 1 Desau. 454.

Parol evidence is admissible as to the declarations of testator at the time he made his will, and as to facts on which he was induced to make it, the declarations being consistent with the will. *Webley* v. *Langstaff*, 3 Id. 509.

A receipt in full of all claims given on the settlement of partnership accounts thirteen years back, may be rebutted by evidence, that the party giving it refused to pay interest for which he was then liable, so as to subject him to the payment of it. *Snowden* v. *Thomas*, 4 Har. & John. 335.

A latent ambiguity appearing on the face of a will, can only be explained by examination of the will itself; a latent ambiguity arising from matter *dehors* the will, may be explained by parol evidence. *Breckenridge* v. *Duncan*, 2 A. K. Marsh, 51.

Parol evidence will not be admitted to show that a bill of sale absolute on its face, was a mere security for a sum of money, unless there is a charge of fraud in obtaining it. *Fitzpatrick* v. *Smith*, 1 Desau. 340.

Where the bill alleges a deed from the plaintiff to the defendant, absolute on its face, to have been given in trust, and the answer denies such trust, parol evidence is inadmissible, under the statute of frauds, to establish it. *Moran* v. *Hays*, 1 John. Ch. 343.

Where the deeds were absolute, parol evidence of an intended trust was rejected, as being contrary to the statute of frauds. *Lloyd* v. *Ex'rs of Inglis*, 1 Desau. 333.

Parol testimony, even by the person who drew the will, rejected, when offered to support the allegation of a mistake in the will, and to prove that the testator intended to dispose of the property in a manner not apparent on the face of the will. *Rothmales's Adm'r* v. *Meyers*, 4 Id. 215.

A in writing agreed to convey to B on the payment of a certain agreed sum, "a lot of land situated in the town of Windham;" B alleging that there was a mistake in the contract—that the whole of a particular lot was intended to be embraced by it, though a part of the lot lay in the town of Westbrook, brought his bill in

equity to have the mistake corrected and specific performance decreed of the contract as amended; *Held*, that parol evidence was inadmissible to vary the terms of the written contract according to the prayer of the bill. *Elder* v. *Elder*, 1 Fairfield, 80.

Parol proof which goes to sustain and supply deficiencies in a written instrument may be received. *Lingan* v. *Henderson*, 1 Bland, 249.

XVIII. *Examination of Witnesses.*

(a) *Generally, and of demurrer to interrogatories by witness.*
(b) *When and how taken.*
(c) *Viva voce.*
(d) *Before master or examiner.*
(e) *De bene esse.*
(f) *Cross-examination.*
(g) *Further, or re-examination.*
(h) *Order to produce witnesses and notice thereof.*
(i) *Examination of parties to cause, effect thereof.*
(k) *Of defendant on interrogatories.*
(l) *Commission to examine.*
  (1) *When and how granted, effect thereof.*
  (2) *Execution and return of.*

(a) *Generally, and of demurrer to interrogatories by witness.*

Under the act of the 17th of April, 1823, parties and their counsel have a right to be present at the examination of witnesses, and to cross-examine in all cases; and this as well upon commission issued to examine witnesses out of the State, as in other cases. *Steer* v. *Steer*, 1 Hopk. 362.

Counsel have no right to advise a witness who is before an examiner, that he is not bound to answer a particular question. *Taylor* v. *Wood*, 2 Edw. 94.

If the witness objects, he should demur. *Ibid.*

It is the duty of an examiner to inform a witness of his legal rights. *Ibid.*

Notice that a deposition will be taken at a particular tavern in a city, named in the notice, is good without mentioning the Christian name of the tavern keeper, unless it is shown there were, in the same city, two tavern keepers of the same surname. *Overstreet* v. *Thompson*, 1 Litt. 120.

Where there are several defendants having different rights and claims among one another, they cannot examine witnesses against each other; nor can one defendant examine witnesses produced by another defendant; but a co-defendant may read anything proved on the part of the complainant, and there may be a decree for one defendant against a co-defendant, grounded on the pleadings and proofs between the complainant and defendant. *Trumbull* v. *Gibbons*, Halst. Dig. 174.

(b) *When and how taken.*

Where there are several defendants having different rights and claims among one another, they cannot examine witnesses against each other; nor can one defendant cross-examine a witness produced by another defendant; but a co-defendant may read anything produced on the part of complainant; and there may be a decree for one defendant against a co-defendant grounded on the pleadings and proofs between the complainant and defendant. *Trumbull* v. *Gibbons*, Halst. Dig. 174.

Proofs cannot regularly be taken as to one of the defendants in a cause, to whose answer a replication has been filed, until the answers of the other defendants have been put in, or the bill has been taken as confessed against them. *Vermillyea* v. *Odell*, 4 Paige, 121.

After publication passed, witnesses cannot be examined except under very special circumstances. *Hamersley* v. *Lambert*, 2 John. Ch. 432.

The testimony of the witness is complete, so far as the party calling him is concerned, when the direct examination is finished and signed by the witness; but the party calling him is bound to keep the witness before the examiner a sufficient length of time afterwards to enable the adverse party to complete the cross-examination, or the deposition may be suppressed. *Trustees of Watertown* v. *Cowen*, 5 Paige, 510.

(c) *Viva voce.*

A court of chancery has no authority to hear witnesses *viva voce*, their examination must be in writing; to hear it otherwise is erroneous when objected to by the parties. *Heirs of Hardin* v. *Heirs of Stanley*, 3 Yerg. 381.

A party intending to produce *viva voce* testimony should apply for an order, on affidavit, and give notice. This is only done to prove the execution of deeds, signatures, &c., and without a cross-examination. *Emerson* v. *Berkley*, 4 Hen. & Munf. 441.

A witness may be examined *viva voce*, at the hearing, for a particular purpose, as to prove exhibits, which had not been proved before the examiner; and the regular mode is to serve a previous order for that purpose, or notice on the opposite party four days before the hearing. But where the circumstances are special, the court may dispense with the previous notice. *Barrow* v. *Rhinelander*, 1 John. Ch. 559.

It is the proper course, in the trial of an issue out of chancery, to examine witnesses *viva voce*, and it cannot properly be inferred that the answer and depositions were the only evidence exhibited on such trial; on the contrary, it ought rather to appear that such written evidence was actually made use of, since the court of chancery ought to give directions respecting the reading of the papers filed in the cause. *Paul* v. *Paul*, 2 Hen. & Munf. 525.

Exhibits may be proved *viva voce* at the hearing. *Hughes* v. *Phelps*, 3 Bibb, 199.

(d) *Before master or examiner.*

A witness, who demurs to a question put to him in the examiner's office, cannot bring the matter before the court. It is for the party who puts the question to do so; and if he does not do so, no one else ought or can. *Mowatt* v. *Graham*, 1 Edw. 13.

Counsel have no right to advise a witness who is before an examiner, that he is not bound to answer a particular question. *Taylor* v. *Wood*, 2 Id. 94.

It is the duty of the examiner to inform a witness of his legal rights. *Ibid.*

Where, by a mistake of the solicitor for the defendant, which the counsel for the opposite party was aware of, but did not attempt to correct, the names of the defendant's witnesses were not furnished at the commencement of the examination of the complainant's witnesses before the examiner; the court, upon an affidavit of the solicitor, explaining the mistake, and upon a general affidavit of the defendant, under the advice of counsel, as to the materiality of the witnesses, permitted the witnesses to be

examined, saving to the complainant the right to examine other witnesses on his part. *Gaul* v. *Miller*, 3 Paige, 192.

Where the attention of the party is called to the provisions of the eighty-third rule at the commencement of the examination, or he neglects to furnish the list of his witnesses with a full knowledge of the existence of that rule, he will not be allowed to examine his witnesses without stating on oath the substance of what he expects to prove by their testimony, in addition to the excuse for not having complied with the rule. *Ibid.*

The right which is given to a party by the eighty-fifth rule of the court to proceed with the examination, notwithstanding the decision of the examiner, that the witness is incompetent, or that the interrogatory is irrelevant and improper, cannot properly be exercised, except in cases where the solicitor or counsel of such party has reason to doubt the correctness of the decision; and if the solicitor or counsel who is conducting the examination insists upon proceeding in a case, where there is no reasonable ground for doubt as to the correctness of the decision, he will be personally charged with the costs of the application to the court to suppress the deposition or to expunge the objectionable testimony. *Scott* v. *Young*, 4 Paige, 542.

The examiner has no right to reserve the question upon objection to the competency of a witness, or the propriety of an interrogatory, where he has no rational doubt as to the validity of the objection. It is his duty in such cases to decide the question, and leave the solicitor or counsel conducting the examination to proceed with the illegal testimony at the peril of being personally charged with costs. *Ibid.*

On reference to a master, aged witnesses, residing in a distant part of the State, may be examined on interrogatories, before a master in the county where they reside, under the directions of the master before whom the reference is pending; and examination so taken may be used on the reference, saving all just exceptions. *Mason* v. *Roosevelt*, 3 John. Ch. 627.

Each party has a right to elect his own examiner; and the court will not, on motion of the opposite party, interfere with that right; but a direct examination may be before one examiner, and a cross-examination before another. *Troup* v. *Haight*, 6 Id. 335.

A party is not entitled to copies of deeds or other exhibits referred to in the interrogatories of the opposite party, until publica-

tion. Exhibits ought, however, to be sufficiently described in the interrogatories, so as to enable the adverse party to know what is intended to be proved, and to put him on all due inquiry. *Troup* v. *Haight*, 6 Johns. Ch. 335.

(e) *De bene esse.*

The court will order a witness to be examined, *de bene esse*, in a cause before an answer has been put in, provided the necessity for taking his deposition is satisfactorily shown by affidavit. *Fort* v. *Ragusin*, 2 John. Ch. 146.

Where a witness is about to depart the State to reside abroad, the court, on petition verified by affidavit and motion for that purpose, will order him to be examined *de bene esse* without previous notice of the motion. *Rockwell* v. *Folsom*, 4 John. Ch. 165.

On a bill or petition on oath, in the same case, a commission may be granted to take the testimony of an aged or infirm witness *de bene esse*. *Lingan* v. *Henderson*, 1 Bland, 238.

(f) *Cross-examination.*

Under the act of the 17th of April, 1823, parties and their counsel have a right to be present at the examination of witnesses, and to cross-examine in all cases; and this as well when commission issued to examine witnesses out of the State as in other cases. *Steer* v. *Steer*, Hopk. 362.

Where one party is examined as a witness against another party in the same cause, he may be cross-examined like any other witness by the party against whom he is called, and his evidence cannot be used in his own favor. *Benson* v. *Le Roy*, 1 Paige, 122.

But where a party is examined before a master in relation to his own rights, the examination is in the nature of a bill of discovery. He cannot be cross-examined by his own counsel, nor can he give evidence in his own favor, any further than his answers are responsive to the questions put to him. *Ibid.*

He may, however, accompany his answer by explanations responsive to the interrogatory which may be necessary to rebut any improper inference arising from such answer. *Ibid.*

(g) *Further, or re-examination.*

A witness examined while incompetent by reason of interest,

may be re-examined after his competency is restored. *Haddix* v. *Haddix*, 5 Litt. 202.

After a witness has been examined, the court may, if they deem it necessary, order his further examination, either before the examiner or in open court. *Phillips* v. *Thomson*, 1 John. Ch. 140.

The re-examination of a witness in chancery, rests in discretion and though granted under peculiar circumstances, is against the ordinary practice of that court. *Beach* v. *Fulton Bank*, 3 Wend. 573.

Where an application was made to open the proofs in a cause in chancery, for the purpose of re-examining a witness, and to amend an answer so as to embrace an usurious contract to which it was expected the witness would testify on his re-examination, which contract was not set forth in the answer originally put in; it was *held*, that the defendant was not entitled to succeed in his applications, unless he paid or offered to pay the money actually lent with the legal interest thereof. *Ibid.*

After a hearing and final decree in a cause, a witness cannot be re-examined to explain or correct his testimony, taken on his examination in chief, and read at the hearing, unless under very special circumstances. *Gray* v. *Murray*, 4 John. Ch. 412.

A witness who has been examined before a commissioner, by consent of parties, on affidavit that his testimony was not truly taken down by the commissioner, who had mistaken it materially, was ordered to be re-examined before the examiner, there being no suggestion of any tampering with the witness. *Trustees of Kingston* v. *Tappan*, 1 Id. 368.

After a witness is examined, in the regular course, there must be something special to justify his re-examination. *Sterry* v. *Arden*, Id. 62.

Where, after publication passed, a party files articles and gives notice of the examination of witnesses to impeach the credit of former witnesses, the adverse party may examine witnesses to support the credit of his witnesses who have already deposed, and is entitled to a rule to produce witnesses, and pass publications as in other cases. *Troup* v. *Sherwood*, 3 John. Ch. 558.

A re-examination of witnesses is not of course, but only on special application to the court, and on sufficient cause shown by affidavit or otherwise, according to circumstances. *Hallock* v. *Smith*, 4 Id. 649.

A witness cannot be re-examined without the express order of the court. *Newman* v. *Kendal*, 2 A. K. Marsh, 236.

(h) *Order to produce witnesses, and notice thereof.*

Notice that depositions will be taken at a particular tavern in a city named in the notice, is good without mentioning the Christian name of the tavern keeper, unless it be shown that there were in the same city two tavern keepers of the same surname. *Overstreet* v. *Phillips*, 1 Litt. 120.

Where notice of the order to produce witnesses had been served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses. *James* v. *Berry*, 1 Paige, 647.

If the adverse party wishes to shorten the time, he must obtain an order on his part and serve notice thereof on the opposite solicitor either personally or by leaving the same at his office. *Ibid.*

Where an order to produce witnesses had been extended by the agreement of the parties; it was *held*, that an order to extend the time to produce witnesses, obtained upon an application *ex parte* to the chancellor after the time limited in the first order had expired, but before the expiration of the time as enlarged by the agreement, was regular. *Fitch* v. *Hazeltine*, 2 Paige, 416.

But where the agreement to enlarge the time to produce witnesses contained a stipulation that the defendant should have fifteen days to produce testimony on his part after the examination of a witness named on the part of the complainant had closed; *Held*, that this fact should have been stated in the affidavit presented to the chancellor upon the *ex parte* application, so that a similar provision might have been inserted in a similar order granted by him; *It was also held*, that the affidavit should have stated that the time to produce witnesses had been once extended by stipulation, so that the chancellor might have taken this circumstance into consideration in deciding upon the propriety of granting further time. *Ibid.*

Where one of the parties has obtained a special order enlarging the time to produce beyond the forty days limited by the original order, the eighty-sixth rule does not preclude the adverse party from applying *ex parte*, for a similar order, at any time before the

time limited by the extended order has actually expired. *Osgood* v. *Joslin*, 3 Paige, 195.

If one party obtains an order to extend the time to produce witnesses, it operates as an enlargement of the forty day rule; and both parties have a right to take testimony during the extended time. *Ibid.*

(i) *Examination of parties to cause, effect thereof.*

A certificated bankrupt or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity; but if he be made a defendant he cannot be examined as a witness in the cause until an order has been obtained upon motion for that purpose. *DeWolf* v. *Johnson*, 10 Wheat. 367.

A complainant cannot examine a sole defendant as a witness against himself; because no decree can be had against a party defendant upon facts to which he is examined as a witness. *Palmer* v. *Van Doren*, 2 Edw. 192; *Goold* v. *O'Keeffe*, 1 Beat. 356; *Fulton Bank* v. *Sharon Canal Co.* 4 Paige, 127.

If there be more defendants than one, an examination of a defendant may be had, and a decree obtained against another defendant upon such facts; but a decree cannot be had against the party examined embracing such facts. Id. 192.

Where a defendant has been examined under the usual order, as a witness, a complainant may have a decree against him upon other matters, to which he was not examined. *Ibid.*

A defendant who is charged by the plaintiff as fraudulently colluding with his co-defendant in regard to the transactions sought to be impeached, cannot be a witness for his co-defendant, especially when he has an interest in the cause arising from his liability for costs, and his ultimate responsibility if the charge is proved. *Whipple* v. *Lansing*, 3 John. Ch. 612.

A court of chancery may direct the reference of a case to a master with authority to examine the defendants on oath, and such examination will have the effect of an answer. *Templeman* v. *Fauntleroy*, 3 Rand, 434.

Where, on the hearing of a bill for an account between partners, there is great obscurity in the proofs, the chancellor ought not to pronounce a final decree, but should appoint commissioners with power to take explanatory evidence and to put interrogatories to the parties on oath. *Simms* v. *Kirtley*, 1 Monroe, 81.

Where one party is examined as a witness against another party in the same cause, he may be cross-examined like any other witness by the party against whom he is called, and his evidence cannot be used in his own favor. *Benson* v. *LeRoy*, 1 Paige, 122.

But where a party is examined before a master in relation to his own rights, and the examination is in the nature of a bill of discovery, he cannot be cross-examined by his own counsel, nor can he give evidence in his own favor any further than his answers are responsive to the questions put to him. *Ibid.*

He may, however, accompany his answer by explanations responsive to the interrogatories which may be necessary to rebut any improper inference arising from such answer. *Ibid.*

A mere naked trustee who is a party, is a competent witness in a controversy in which a creditor seeks to set aside a deed on the ground of fraud. *Harvey* v. *Alexander*, 1 Rand, 219.

Where a defendant has been examined as a witness by a co-defendant without an order of the court for that purpose, and the complainant also examines him, without objection, it is too late to object to the witness at the time of hearing; the complainant should have moved to suppress the depositions before hearing, and then a further opportunity may be given to examine the witness if necessary. *Sharp* v. *Runk*, Halst. Dig. 173.

Before a party can be examined as a witness an order ought to be obtained for that purpose, and that order is to be produced when the party attends to be examined. *Ibid.*

This order is of course before a decree, but after a decree a special ground must be made. *Ibid.*

An order to examine one of the defendants as a witness cannot be taken until the cause is at issue, for the answers may make it unnecessary. *Decker* v. *Caskey*, Halst. Dig. 174.

Where a deed of trust is impeached as fraudulent, the trustee may be a witness, if he has no interest in the support of the deed, and no participation in the alleged fraud. *Taylor* v. *Moore*, 2 Rand, 563.

Where a bill filed by a corporation aggregate to foreclose a mortgage, is taken as confessed against an absentee, and a reference is made to a master, to take proof of the facts and circumstances stated in the bill, it is proper, under the Revised Statutes of New York (2 R. S. 187, S. 228) to examine the officers of the

corporation as to the payments which ought to be credited on the mortgage. *Ontario Bank* v. *Strong*, 2 Paige, 301.

If a nominal plaintiff in an action at law, but who has no real interest in the suit, is the only witness by whom the defendant can establish his defence to such action, the defendant may file a bill in chancery against the real plaintiff to restrain the proceeding at law, and to have the controversy settled in this court, where such nominal plaintiff may be examined as a witness. *Norton* v. *Woods*, 5 Paige, 249.

On references to take and state an account, the court may direct the parties to be examined on oath by the master. *Hart* v. *Ten Eyck*, 2 John. Ch. 515.

If a complainant examines a defendant, who is primarily liable for the payment of the demand for which the suit is brought, as a witness against a co-defendant, who is only secondarily liable, he cannot have a decree against either of those defendants, upon that part of the case to which he examined one of them as a witness. *Bradley* v. *Root*, 5 Paige, 633.

The rule that a complainant cannot have a decree against a defendant whom he has examined as witness in the cause, does not apply to the case of a mere female defendant, as an executor or trustee, against whom no personal decree is sought, and who has no personal interest in the question as to which she is examined as a witness against her co-defendant; nor to the case of a defendant who, by his answer, admits his own liability, or who suffers the bill to be taken as confessed against him. *Ibid.*

Where a defendant admits that he is primarily liable to the complainant for the payment of the demand for which the suit is brought, he may be examined either by the complainant or by his co-defendant as a witness in the cause. *Ibid.*

Where the complainant examined a witness against the original defendants in the cause, and it appeared upon such examination that the witness was primarily liable for the payment of part of the claim for which the suit was brought, and he was thereupon made a defendant by a supplemental bill, and suffered such bill to be taken as confessed against him; *Held*, that the complainant was not precluded from having a decree against the defendant who had thus been examined as a witness before he was a party to the suit. *Ibid.*

A co-plaintiff or a co-defendant may be examined as a witness

if he has no interest in the matter, or none in that part of it as to which separate relief may be given. *Lingan* v. *Henderson*, 1 Bland, 268.

If a co-defendant has been received by the plaintiff as a witness to the whole, the bill as to him must he dismissed. *Ibid.*

A party examined before a master by order of the court on matters in reference, has a right to give every explanation in relation to the matters inquired about, but is not thereby made a witness for himself as to other distinct matters; and his testimony having been thus taken at large, and being important, a new reference was ordered. *Armsby* v. *Wood*, Hopk. 229.

(k) *Of defendant on interrogatories.*

The master's certificate to the insufficiency of an examination of a party on interrogatories does not require an order of conformation. *Case* v. *Abeel*, 1 Paige, 630.

If the master's certificate is not excepted to within eight days after notice of the filing thereof, it becomes absolute of course. *Ibid.*

The practice in relation to answers for insufficiency must be adopted and pursued as far as the same is applicable to exceptions to the examination of a party. *Ibid.*

If the examination is reported insufficient, the master may allow new interrogatories to be added by the adverse party, and the exceptions and new interrogatories must be answered together. *Ibid.*

If the examination is certified by the master to be sufficient, the adverse party cannot re-examine the defendant to the same point without the permission of the court. *Ibid.*

(l) *Commission to examine.*

(1) *When and how granted, effect of.*
(2) *Execution and return of.*

(1) *When and how granted, effect of.*

A deposition was taken by C, the second mortgagee, and those claiming under him, under a special commission awarded by the chancellor to take the deposition, subject to all just exceptions; and B, the first mortgagee, prayed and obtained a like special

commission to take A's deposition, but did not act under his commission; *Held*, that B, by obtaining this special commission himself, was not precluded from objecting to the competency of the deposition taken under C's commission. *Beverly* v. *Brooke*, 3 Leigh, 425.

In all cases where a general commission issues for taking depositions upon an answer and replication in any suit in the court of chancery, the cause must remain at rules six months from the time of filing the replication before it is set down for hearing, unless this be dispensed with by consent of parties entered on the record. *Dalby* v. *Price*, 2 Wash. 191.

After a cause has been argued, a commission to take depositions cannot be obtained but upon an affidavit of the party and by special order of the court for that purpose. *Anonymous*, 4 Hen. & Munf. 409.

A commission to examine one of the defendants as a witness, should be awarded on the motion of the plaintiff as a matter of course, saving all just exceptions. *Plainville* v. *Brown*, Id. 482.

A commission cannot issue at the instance of a defendant to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, Id. 488.

In issuing a commission to take proof of a will in a foreign country for the purpose of establishing the same and having it recorded as a will of real estate within this State, the same notice of the application for a commission must be given to the heirs at law of the testator and the persons interested in contesting the will as is required upon proving a will before a surrogate. *Matter of Atkinson*, 2 Paige, 214.

Persons authorized to contest the validity of the will may join in the commission and may be permitted to name a commissioner on their part, and they will also be entitled to reasonable notice of the time and place of executing the commission. *Ibid.*

On a bill or petition on oath in the same case, a commission may be granted to take the testimony of an aged or infirm witness, *de bene esse*. *Lingan* v. *Henderson*, 1 Bland, 238.

An objection before the commissioners, that the evidence is not such as is required by the statute of frauds, if that statute be not relied on as a defence, cannot be allowed. Id. 248.

(2) *Execution and return of.*

When the deposition of a party is taken under a special commission subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not, it behooves the court to examine and decide the question of competency; and though the deposition be read at the hearing in the court of chancery without exception, yet if on an appeal from the decree, the appellate court finds the depositions incompetent evidence by reason of the deponent's interest in the event, it will pay no regard to the deposition. *Beverly* v. *Brooke*, 2 Leigh, 245.

Under the act of the 17th April, 1823, parties and their counsel have a right to be present at the examination of witnesses and to cross-examine in all cases, and this as well upon commissions issued to examine witnesses out of the State as in other cases. *Steer* v. *Steer*, Hopk. 362.

When a commission from the court of chancery to take testimony is returned, it is opened by the chancellor or his register, and objections of every kind to the evidence are taken and considered at the hearing of the cause. *Strike* v. *M'Donald*, 2 Har. & Gill. 192.

XIX. *Evidence in Appeals.*

In appeals to the Supreme Court of the United States from the circuit courts in chancery cases the parol testimony which is heard at the trial in the court below ought to appear in the record. *Conn* v. *Penn*, 5 Wheat. 424.

Appellate courts which proceed according to the course of the civil law may allow the parties to introduce new allegations or further proofs. *Scribner* v. *Williams*, 1 Paige, 550.

But it is not a matter of course to receive further proofs upon an appeal. *Ibid.*

If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the court below. *Ibid.*

Upon an appeal from a decree or order of a vice-chancellor, the appeal must be decided upon the papers which were read or used before the court below, and where a question arises upon the hearing of the appeal as to what papers were before the court below, if such papers are not referred to in the order or decree appealed

from, resort must be had to the minutes of the clerk, and to the papers marked by him as read, to ascertain what papers were read or used before the vice-chancellor. *Bloodgood* v. *Clark*, 4 Paige, 574.

Where a party opposing a motion on petition has papers to read in opposition thereto, and the application is decided in his favor upon the opening of the case on the papers of the adverse party, if he desires to have the benefit of his papers in opposition to the application upon an appeal from the decision or wishes to be allowed therefor upon the taxation of his costs, he should have such papers entered in the minutes of the court below, and marked as read. *Ibid.*

Depositions read on the trial in the court below, without objection, cannot be rejected in the appellate court. *Johnson* v. *Rankin*, 3 Bibb, 87.

If an objection to the interest of a witness be not made at the hearing in the court below, it cannot be made in this court. *Respass* v. *Morton*, Hard. 226.

Where interrogatories are excepted to as leading, the chancellor ought to expunge them and the answers to them, so that they may not be certified here. If this be not done, this court will consider the cause without such questions or answers. *Doran* v. *Shaw*, 3 Monroe, 415.

If a deposition be read upon the hearing of a cause below, and it does not appear to have been excepted to, no exception can be taken in the Supreme Court, and defects in the certificates or the deposition itself, will be presumed to have been waived. *Pillow* v. *Shannon*, 3 Yerg. 508.

Upon the hearing of a cause before the vice-chancellor, it is the duty of the clerk to enter in the minutes of the court all the papers read, or which are agreed to be considered as read, or which are offered in evidence and overruled by the court, and a certified copy of the clerk's minutes is the proper evidence of those facts upon the hearing of an appeal to the chancellor. *Studwell* v. *Palmer*, 5 Paige, 166.

The party whose duty it is to furnish the papers on the hearing of an appeal, should be prepared with the proper evidence to show what papers were read before the vice-chancellor, and, if required, to show that the papers furnished by him are correct copies. *Ibid.*

If the clerk by mistake neglects to enter in his minutes any paper which was read, or considered as marked and read before

the vice-chancellor, the proper course is to apply to the court below to correct the minutes. But no paper which was not before the vice-chancellor or offered and rejected, can be used on hearing of an appeal from his decision. *Ibid.*

On an appeal from an interlocutory order of the court of chancery, this court will not permit evidence to be read, which was not read in the court below, nor will they hear and decide on the merits, unless the merits have also been heard in the court below. *Deas* v. *Thorne*, 3 John. 543.

I. *General Principles and Rules.*

The rule in chancery is, if the answer admits a fact, but insists on matter by way of avoidance, that the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clarke* v. *White*, 12 Peters' Rep. 178.

The rule at law that the evidence must substantially support the plaintiff's declaration, is applicable to bills in chancery. *Moffats* v. *Clements*, 1 Scam. 384.

An averment in a bill that a payment of a note was made on the day it became due, is not supported by proof that the money was paid or tendered at a subsequent and remote day. *Ibid.*

Upon a bill by complainants as infants, claiming the equitable interposition of chancery in their behalf, the fact of infancy is a material allegation, and should be sustained by proof, if not admitted by the answers. *Boyd* v. *Boyd.* 6 Gill & Johns. 25.

An executor must expressly aver an insufficiency of assets; otherwise he cannot prove it and avail himself of the fact. *Contee* v. *Dawson*, 2 Bland, 264.

When there is a presumption that a fact exists, he who makes an allegation to the contrary must prove it. *Higdon* v. *Higdon*, 6 J. J. Marsh. 51.

He who alleges that a deed was delivered on a different day from that of its date, must prove it. *Ibid.*

On a plea of no consideration, the *onus probandi* lies on the party pleading it. *Ibid.*

When a rescission of an executory contract for land is sought by a vendee, alleging that the vendor has no title, and demanding exhibition of it, vendor must prove his title to the land. *Ibid.*

On the trial of the validity of a will, on bill filed, the defendant is bound to prove every part necessary to authorize the probate

of a will in the county court, not admitted by the pleadings. The defendant holds the affirmative on the trial before the jury. *Rogers* v. *Thomas*, B. Monroe, 394.

An allegation in an answer which is not responsive to the bill, is not evidence; and it lies upon the defendant to establish it by proof. *Flagg* v. *Mann*, 2 Sum. 489.

Where, about the time of execution and delivery of a deed, the grantor was generally sane and capable of comprehending business of that character, the burden of proof lies upon those who seek to avoid the deed on the ground of insanity or imbecility of mind. *Morse* v. *Slason*, 13 Verm. 296.

The *onus probandi* lies upon the party seeking to avoid the operation of the statute of limitations, where it is *prima facie* a good defence, by showing that it never in fact commenced running. *Shropshire* v. *Shropshire*, 7 Yerg. 165.

A person charging usury, where part of the loan was advanced in goods and stock, must prove that they were put off at a price beyond their value. *Grosvenor* v. *Flax and Hemp Man. Co.* 1 B. Monroe, 394.

The deposition of a disinterested person who afterwards becomes interested may be read. *Hitchcock* v. *Skinner*, 1 Hoffm. 21.

Transactions, which show the general habits of a person, his intemperance, extravagance, and thoughtlessness, are competent evidence in a case of fraud and imposition. *Haufman* v. *Swar*, 5 Barr's Pa. St. Rep. 230. (1847.)

The rule in equity is that an answer responding to the allegations and charges made in the bill, and containing clear and positive denials thereof, must prevail until it is overcome by the testimony of two witnesses, or by one witness and other attending circumstanees supplying the want of another. *Daniel* v. *Mitchell*, 1 Story's Rep. 172, 198. (1842.)

Where a party is charged with fraud in a particular transaction, evidence may be given of previous fraudulent transactions between him and third persons. And, when the intention or guilty knowledge of a particular matter is material to the issue of the case, collateral facts tending to establish such intention and knowledge are proper evidence. *Bottomley* v. *The United States*, 1 Story's Rep. 135. (1842.)

It is against equity to permit a party to take advantage of a course of conduct, pursued by another in consequence of the declared inten-

tion of the claimant made with full knowledge of his rights. *Darnal* v. *Hill*, 12 Gill & Johns. Rep. 388. (1845.)

It is in many instances perfectly consistent to pursue two different remedies, when either may avail, taking care only to obtain the fruits of one. *Lee* v. *Adm'rs of Botalar & Bell*, 12 Gill & Johns. Rep. 323. (1845.)

The courts of the United States, in exercise of their maritime and admiralty jurisdiction, are exclusively governed by the legislation of Congress, or, in the absence thereof, by the general maritime law; and no State can, by its local legislation, narrow or enlarge such jurisdiction. *The Barque Chusan*, 2 Story's Rep. 455. (1845.)

Facts, which are a part of the experience and common knowledge of the day, are legitimate grounds for the judgment of a court. The principle is applicable to the usual duration of voyages across the Atlantic Ocean by steam and other packet ships. *Openheim* v. *Leo Wolf*, 3 Sanford's Ch. Rep. 571. (1846.)

The deposition of a witness taken down after he was sworn, but which he refused to sign, was allowed to be read in evidence. *Clarke* v. *Sawyer*, 3 Sanford's Ch. Rep. 352. (1846.)

The court of chancery is as much restricted as any other court to the issue made by the pleadings, and while it endeavors to avoid technical and narrow grounds of objection, it cannot, without losing sight of technical principle, admit evidence of a different charge from that pleaded. *Green* v. *Storm*, 3 Sandford's Ch. Rep. 305.

In ascertaining the early and continuing usage and doctrines of a sect of Christians, resort may be had to history, and to standard works of theology of an era prior to the existence of the dispute or controversy. When it is shown what such particular usages and doctrines were, it is incumbent on those who allege a departure therefrom in the founders of the particular congregation, or the donors of its temporalities, to prove such departure. *Kniskern* v. *The Lutheran Churches, Wieting, et al.* 1 Sandf. Ch. Rep. 439.

II. *Presumptions.*

The lapse of years cannot fail to raise an unanswerable presumption against the validity of an antiquated claim of any kind. *Hepburn's Case*, 3 Bland, 95.

The lapse of twenty years will raise the presumption of the payment of a legacy. *Barnwell* v. *Barnwell*, 2 Hill's Ch. 233.

After the lapse of nineteen years from the legatee coming of age, and where the legacy had been paid thirty years before to his father, and the executor was dead and his estate administered and disposed, such presumption will arise against the legatee. *Ibid.*

A party who alleges fraud in a mortgage or other deed, is not entitled to an unlimited time for the prosecution of his rights, after his knowledge of the existence of those rights, and of the fraud, but in such case often an unreasonable delay, the law will presume a payment or discharge of the equity. *Hatfield* v. *Montgomery*, 2 Port. 56.

Where an owner of land and those claiming under him have diverted a part of the water of a spring from its natural course, by an artificial conduit, for the use of the land, and have continued in the uninterrupted enjoyment of the water in that way for twenty years, a grant of the right to direct the water to that extent for the use of the premises will be presumed. *Smith* v. *Adams*, 6 Paige, 435.

Where real estate has been conveyed to trustees for the use of a church, which was afterwards incorporated, the court, after a great lapse of time, will presume a conveyance from the original trustees, or their heirs, to the corporation. *Dutch Church, &c.* v. *Matt*, 7 Paige, 77.

The death of a person who had gone beyond seas, and was never heard of afterwards, was dated from his departure, in order to quiet a title under twenty years' possession. *Godfrey* v. *Schmidt*, 1 Cheever's Eq. Rep. 57.

A person who had been absent, and not heard from for seven years, was presumed to be dead. *Tilby* v. *Tilby*. 2 Bland, 436.

One, who is absent, will be presumed to have lived for seven years, and to have died at the end of that period. *Craig* v. *Craig*, 1 Bail. Eq. 102.

From a matrimonial cohabitation, and the acknowledgment of the parties that they were husband and wife, though commenced under a void contract of marriage, a subsequent marriage, after the removal of the disability, may be presumed, such cohabitation, recognition, and general reputation being continued. *Rose* v. *Clark*, 8 Paige, 574.

There is no legal presumption, nor ought there to be an inference

in fact, from the mere circumstance of a person attesting a paper writing as a witness, that such a witness was aware of the contents of the paper, and is therefore bound by it when it affects his interest. *Plummer* v. *Barkerville*, 1 Ired. Eq. 252.

If a deed is found in the possession of the grantee, there is a presumption of the due delivery thereof, because then, and not otherwise, it would be in the proper custody. *Flagg* v. *Mann*, 2 Sum. 489.

In no case will an ouster of a joint-tenant be presumed from lapse of time, under a period of twenty years, unless aided by other circumstances. *Gray* v. *Gioms*, 2 Hill's Ch. 513.

Where a deed of assignment is absolute upon its face, without any condition whatever attached to it, and is for the benefit of the grantees, the presumption of law is, that the grantees accepted the deed. *Tompkins* v. *Wheeler*, 16 Peters, 106.

Evidence of reasons for delay in enforcing a trust, may be admitted to rebut presumption from laches. 6 Barr's Pa. St. Rep. 425.

The possession of a bond or note by an indorsee is presumptive evidence that it was transferred to him on good consideration before its maturity. The giving of a new note without objection by the drawer on an usurious note held by the indorsee, is of itself an admission that the indorsee is a *bona fide* holder of the old note, without notice of the usury. In a suit upon a note so given, the holder may rely upon such admission in connection with his possession of the old note, to overcome the defence of usury in the latter, and the burden will be cast upon the defendant to prove that the plaintiff had notice of the usury, or received the usurious note without a sufficient consideration. 3 Sandford's Ch. Rep. 321.

III. *Bill — Answer.*

The principle, that an answer to a bill can only be overthrown by two witnesses, or by one witness and corroborating circumstances, does not apply to the case of the proof by one witness of of the execution of a written instrument, which contradicts the answer. Where M assigned to P a judgment he held against S, and afterwards in answering a bill in chancery denied that he made such assignment, the proof of assignment by the subscribing witness, is sufficient to countervail the denial of the answer. *Thomason* v. *Smithson*, 7 Port. 144; *Smith* v. *Rogers*, 1 Stew. & Port. 317.

An answer in chancery can only be taken as true, so far as responsive to the bill, where the complainant replies, and puts the answer in issue. But when a complainant neither replies nor puts the answer in issue, by any course indicating an intention to contest the facts alleged, then the answer must be taken as true. *McGowen* v. *Young*, 2 Stew. & Port. 161.

Where a case is heard on the bill and answer alone, the answer must be taken as true, whether responsive to the bill or not, *Lowry* v. *Armstrong*, 3 Stew. & Port. 297; *Cheney* v. *Belcher*, 5 Stew. & Port. 134.

The answer of a defendant to a bill, filed for the discovery of testimony in aid of a trial at law, may be used by the plaintiff on the trial, or not, and if used, any other evidence, consistent with the issue, is not thereby precluded. *Cox* v. *Cox*, 2 Port. 533.

The answer of an assignor is no evidence against the assignee. *Taylor* v. *Morton*, 5 J. J. Marsh, 66.

An answer in chancery acknowledged the receipt from the complainant of an assignment of property in part payment of the defendant's demands against him; but the answer also stated that the defendant had afterwards cancelled the assignment. *Held*, that the defendant's statement in the answer, that the assignment had been cancelled, was no evidence for him of that fact. *Wasson* v. *Gold*, 3 Blackf. 18.

An answer being inconsistent with the bill is so discredited that one witness may be sufficient. *Carter* v. *Leper*, 5 Dana, 263.

The answer of a corporation, under its corporate seal, which the complainant does not require to be verified by the officers of the company, for the purpose of discovery, is not evidence in favor of the corporation, although it is responsive to the bill. *Lovett* v. *Steam Saw Mill Association*, 6 Paige, 54.

An allegation in an answer to a bill in equity, set up in evidence, not responsive to the bill, and unsupported by proof, must be considered as untrue and out of the case. *O'Brien* v. *Elliott*, 15 Maine, 125.

Although an answer on oath is waived by the complainant, the defendant, as in other cases, is entitled to the dissolution of an injunction, upon a sworn answer denying the whole equity of the bill; unless the allegations in the bill are supported by the affidavit of a credible and disinterested witness in conformity to the 37th rule of the court. *Manchester* v. *Day*, 6 Paige, 295.

Upon an application to dissolve an injunction upon bill and an-

swer, the defendant's answer is entitled to the same credit as the complainant's bill. It, therefore, makes no difference, on such an application, that the bill is supported by the oaths of several complainants. *Ibid.*

The answer of a defendant, when responsive to the bill, is evidence in his favor, though the equity of the complainant's bill is grounded upon the allegation of fraud. *Dilly* v. *Barnard*, 8 Gill & Johns. 171; *McDonald* v. *McLeod*, 1 Ired. Eq. 226; *Lewis* v. *Owen*, 1 Ired. Eq. 290.

If a cause in chancery be set down for a hearing, on bill and answer, the answer will be taken as true, and if the complainant is entitled to a decree, notwithstanding all the statements in the answer, he must, nevertheless, take his decree, subject to the exceptions claimed by the answer. *Doolittle* v. *Gookin*, 10 Verm. 265.

Where the bill specially interrogates the defendant as to particular facts which are denied by the bill, and the bill seeks to discover from them, an answer responsive to those interrogatories, and stating affirmatively that the facts do exist, is evidence for the defendants. *Jones* v. *Perry*, 10 Yerg. 59.

When the statement of the bill is defective, in not showing the plaintiff's right, but calls upon the defendant to state his title, &c., and the answer states with precision all the facts, &c., from which it appears that the complainant was entitled to relief, the court will decree for complainant, upon the case made in the answer. *Maury* v. *Lewis*, 10 Yerg. 115.

If a matter stated in answer be a direct and proper reply to an interrogatory contained in the complainant's bill, it is evidence for the defendant, though it be in his favor. *Alexander* v. *Wallace*, 10 Yerg. 105.

If an answer is not responsive to some charge or interrogatory in the bill, and the answer is replied to, facts alleged in it by way of avoidance, must be proved. *Locke* v. *Trotter*, 10 Yerg. 213.

Where in an answer by two defendants unitedly, the one, an assignor, meets the allegations of the bill on his own knowledge, and the other, an assignee, on his information and belief; the answer of the latter does not fall within the rule requiring two witnesses to prevail against it; nor can it be aided by the answer of the other. *Dunbar* v. *Gates*, 1 Hoffman, 185.

Where there is no allegation or interrogatory in the bill to which the defendant's answer is directly responsive, his answer is not evidence for him. *Jones* v. *Jones*, 1 Ired. Eq. 332.

The plaintiff alleges in his bill a contract which he cannot prove; but the defendant in his answer, sets forth a contract in relation to the same transaction, upon which the plaintiff might have had relief, if he had alleged it in his bill. *Held*, that the plaintiff cannot recover upon these admissions of the defendant, as they show a contract different from that for which he sought the aid of the court of equity; especially where the defendant does not submit to any decree. *Herron* v. *Cunningham*, 1 Ired. Eq. 376.

A bill against an infant, while he remains a minor, is a bill for relief merely, as the answer of the guardian *ad litem* cannot be used either for or against the infant. And if the infant, after he becomes of age, applies and obtains leave to put in a new answer in person, it is proper to allow the complainant to amend his answer, so as to waive an answer on oath as to him. *Stephenson* v. *Stephenson*, 6 Paige, 353.

Regularly an infant's answer by his guardian is not evidence against him, because he is not sworn; and it is only for the purpose of making proper parties. It is in reality not the answer of the infant, but of the guardian only who is sworn. *Boyle* v. *Tannehill*, 6 Gill & J. 1.

The chancellor is not authorized to decree a sale of an infant's interest in land, on the ground that it would be for his benefit, unless upon proof of that fact, of which neither the infant's answer, nor the answer of adult defendants confessing the fact, is evidence to charge the infant. *Harris* v. *Harris*, 6 Gill & Johns. 111.

A positive denial, in an answer in chancery, of a fact within the respondent's knowledge, can be overthrown only by the opposing testimony of two witnesses, or one with corroborating circumstances. *Betty* v. *Taylor*, 5 Dana, 598; *Gray* v. *Farris*, 7 Yerg. 155; *Johnson* v. *Slawson*, 1 Bail. Eq. 463.

A defendant charged with notice of a lien upon land, at the time he took a mortgage upon it, answers that "he most expressly denies, according to his best recollection and belief, that at the time of the execution of the mortgage, or of his being in treaty for it, he had any notice of the claim secured by the lien, and that if it was ever mentioned in his hearing, it must have happened in some other conversation, and in relation to other proposals to sell, long anterior to the contract that did take place;" *Held*, that the testimony of one witness who proved the notice, the time when,

and place where it was given, circumstantially, must prevail against an answer thus qualified. *Hun* v. *Clark*, 6 Dana, 57.

The evidence of a single witness will sustain the allegations of a bill, against the denial of an answer, when the answer taken in a strict literal sense, may be true, though the evidence establishes the allegation in substance, though not in form, and is, therefore, not in direct conflict with the strict literal import of the answer. *Amos* v. *Heatherly*, 7 Dana, 47.

It seems, the rule requiring two witnesses to disprove a responsive denial in an answer, does not apply where the defendant refers to facts not within his own knowledge, and where he gives no satisfactory reason for having such knowledge of the facts denied, as would justify a response in the negative. Thus, *it seems*, two witnesses would not be necessary to disprove the answer of an executor, denying an allegation in the bill, referring to facts within the knowledge of the deceased co-executor, where the respondent is a stranger to such facts, and gives no explanation of the manner in which he acquired such information. *Waters* v. *Creegh*, 4 Stew. & Port. 410.

An answer by a purchaser denying notice of an unrecorded mortgage, is sufficiently disproved by the positive oath of a single witness, aided by corroborating circumstances. *Martin* v. *Sale*, 1 Bail. Eq. 1.

And the testimony of a witness is also sufficient to prove fraud, although it is denied by the answer, if it is corroborated by the circumstances of the case. *Rowe* v. *Cockrel*, 1 Bail. Eq. 126.

The testimony of one witness is insufficient to authorize a decree against the positive denial of the answer. *Hudson* v. *Cheathem*, 5 J. J. Marsh, 59; *Patrick* v. *Langston*, Id. 654; *Mason* v. *Peck*, 7 Id. 391.

Where there is no positive witness, circumstances alone may be sufficient to overrule the denial in the answer, even of a person who answers on his own personal knowledge. *Long* v. *White*, J. J. Marsh, 228.

A decree cannot be had upon the testimony of one witness unsupported by circumstances against the plain and direct denial of the defendant in his answer, although the plaintiff swears to his bill upon obtaining an injunction. *Grither* v. *Caldwell*, 1 Dev. & Batt. Eq. 599.

If an answer be directly responsive to the material facts charged in the bill, and be clear, precise, and positive in its denial of them

and be not disproved or discredited in this part by what is found in any other part of it, the testimony of a single witness, where there is no circumstance to corroborate it, will not be sufficient to entitle the plaintiff to a decree; especially if the testimony of such witness be equivocal or evasive. *Spright* v. *Spright*, 2 Dev. & Batt. 289.

The admissions in the answer of one of the defendants in the suit are not evidence against his co-defendant. *Judd* v. *Seaver*, 8 Paige, 548; *Singleton* v. *Gale*, 8 Port. 271; *Graham* v. *Soublett*, 6 J. J. Marsh, 45; *Calwell* v. *Boyer*, 8 Gill & Johns. 136; *Dexter* v. *Arnold*, 3 Sum. 152.

But where one copartner, in a joint and several answer put in on oath, makes admissions as to his own acts relative to the business of the firm, and the other copartner states his belief that what is thus admitted by his copartner is true, a decree may be made against both upon such admissions. *Ibid.*

The answer of a defendant in a bill in equity, which is responsive to the bill, is admissible in evidence in favor of a co-defendant, more especially where such co-defendant being the depositary of a chattel claimed by the plaintiff, defends under the title of the other defendant. *Mills* v. *Gore*, 20 Pick. 28.

In an inquiry in a master's office the parties proceeded by affidavit; *Held*, that the plaintiff could not use the answer of one defendant, by way of an affidavit against a co-defendant. *Hoare* v. *Johnstone*, 2 Keene, 553; *Rector* v. *Rector*, 3 Gilm. 105.

The answer of a defendant is not evidence against the other defendants, though prior to the filing of the answer the former may have transferred to the latter all his interest in the subject-matter of the controversy. *Jones* v. *Hardesty*, 10 Gill & Johns. 404.

Evidence to prove facts amounting to fraud is inadmissible under the pleadings averring it was through mistake, and on the suggestion by the defendant that he could not deny his agreement. *Clark* v. *Partridge*, 2 Barr's Pa. St. Rep. 3.

A paper purporting to be an answer to a bill of discovery, and to have been sworn to before a magistrate in another State, is not admissible in evidence as such, without proof of its having been filed as such, of the signature of the party, and of the attestation of the officer. *Doughty* v. *Tillay*, 4 Blackf. 433.

To admit such a paper as a voluntary affidavit, proof of the party's signature, and of its having been legally sworn to, is necessary. To admit it as a written acknowledgment, the signature of the party must be proved. *Ibid.*

In cases of appeal in admiralty proceedings where damages are discretionary, the burden of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law, or to offer new and important testimony, which must go to the proof of the new allegations without contradicting the former evidence. *Cushman* v. *Ryan*, 1 Story's Rep. 91.

The answer of the respondent on oath in reply to interrogatories does not, in admiralty, constitute positive evidence in his own favor. Its true effect is either to furnish evidence for the other party, or, in a case doubtful in point of proof, to turn the scale in favor of the respondents. *Ibid.*

Where an answer in equity is used as evidence, the whole answer must, in general, be read. *Glascock* v. *Hays*, 4 Dana, 59. (1836.)

But an answer may include impertinent matter, which ought not to be received; and where the court below excluded part of an answer, and there was nothing in the court above to show what that part contained, the latter refused to decide that it was erroneously excluded. *Ibid.*

A bill in equity is not evidence of the facts stated in it against the complainant, unless sworn to by him. *Burden* v. *Cleveland*, 4 Ala. 225.

Under the Alabama Statute (Clay's Dig. 341, § 160), authorizing discoveries in suits at law, it is no objection to the discovery sought, that it does not rest in the exclusive knowledge of the party required to answer, or it is not shown that the matter cannot be proved by other witnesses. *Alston* v. *Graves*, 6 Ala. 174.

If the party refuses to answer, the court is not authorized to consider the interrogatories as confessed, or to submit an account exhibited with them to the jury, without further than what arises from the judgment by default entered under the statute. *Ibid.*

The answer of a nominal plaintiff to interrogatories, proposed under the Alabama Statute of 1837, "more effectually to provide for discoveries in suits at law," are not admissible evidence against the party for whose use the suit is brought. *Vickers* v. *Mooney*, 6 Ala. 97.

A party cannot read, as evidence for himself, his own answer to a bill of discovery; but where he proposed reading bill and answer, and the defendant said, "You may read the bill," and he then read both bill and answer, *it was held*, that the verdict would not, for this reason, be set aside, especially where the reading of

the bill and answer would not have varied the result. *Thompson* v. *French*, 10 Yerg. 452.

Where a bill in equity and answer are introduced as evidence merely in a suit at law, the court cannot, on motion, order the respondent to answer further, in order that such answer may be used as evidence in the cause. *Lowney* v. *Perham*, 2 Appleton's Rep. 235. (Maine).

Where a defendant, in an action of assumpsit against him in Virginia, filed a bill of discovery against the plaintiff, who answered, and the defendant read the bill and answer to the jury, *it was held*, that the contents of the answer might be considered by the jury, so far as they credited them, as evidence of the plaintiff's right to recover. *Sowerwein* v. *Jones*, 7 Gill & Johns, 335.

A bill in chancery is not evidence in another suit, to prove any fact contained in it, or evidence for any purpose, except to prove that such a bill was filed. *Adams* v. *McMillan*, 7 Port. 73. (Alabama.)

An answer in chancery is competent evidence against a party in an action at law, and when introduced, all its statements are made evidence. *Roberts* v. *Tennell*, 3 Monroe, 247. (Kentucky.)

But a subsequent answer to an amended bill cannot, in such case, be so admitted for the respondent. *Ibid.*

The answer of a party in one suit is evidence against such party in any other suit; but the bill to which it is an answer is not evidence for the party filing it, and cannot be used or read further than is necessary to explain the answer. *Clarke* v. *Robinson*, 5 B. Monroe, 55.

A trustee holding the legal title to property is not to be presumed to make admissions adverse to the interests of those for whom he acts, and such admissions are therefore competent, though not conclusive, evidence. *Helm* v. *Steele*, 3 Humph. 472.

An answer to a bill in equity is not admissible as evidence in an action at law, except against the party making it as an admission. *Bien* v. *Weitharspoon* 1 How. (Miss.) 28.

The answer of a trustee, in the trustee process, is not admissible as evidence for him in another action in favor of one not a party to the trustee process. *Edmond* v. *Caldwell*, 3 Shep. 340.

A court of admiralty, being judge both of the law and the fact, is not confined to the strict rules of the common law, in respect to the admission of evidence. *Elwell* v. *Martin*, Ware's Rep. 53.

In the admiralty, the libellant is required to verify the debt or cause of action, on which the libel is founded, by his oath. In

like manner the respondent is required to verify his answer by oath. *Hatson* v. *Jordan*, Ware's Rep. 385.

There is no rule in the admiralty, like that in equity, which precludes the court from making a decree against a denial by the answer of any matter alleged in the libel unless it is disproved by two witnesses. *Ibid.*

Each party in admiralty has a right to require the personal answer of the other party, under oath, to any interrogatories touching the matter in issue. *The David Pratt*, Ware's Rep. 495.

If the defendant refuses to answer any such interrogatories propounded by order of the court, the charge in the libel to which the interrogatory relates will be taken *pro confesso*. *Ibid.*

The answers to such special interrogatories are evidence in the the cause as well in favor as against the party answering. *Ibid.*

Courts of admiralty do not recognize the rule in equity requiring two witnesses and strong corroborative circumstances in order to overcome the denial in the answer. *Sherwood* v. *Hall*, 3 Sumner's Rep. 127.

A charge in general terms in a bill, when it is the point on which the merits af the case turn, and does not come in collaterally and incidentally, will warrant the production of evidence to particular facts. *Aiken* v. *Ballard*, Rice's Eq. 13. (South Carolina, 1838.)

In general, the statements of a bill in equity are not evidence against the plaintiff; when, however, he has sworn to the bill, they are evidence against him. *Cooper* v. *Day*, 1 Richardson's Eq. 24.

The testimony of one witness, although in some degree supported by corroborating circumstances was held insufficient to disprove defendant's answer. *Maddox* v. *Sullivan*, 2 Richardson's Eq. 4.

Where the testimony of a witness and corroborating circumstances are relied on to disprove defendant's answer, the circumstances must themselves be such, that, standing alone, a reasonable conclusion, as to the truth of the fact, can be drawn from them. *Ibid.*

A bill in equity by a bank, sworn to by the cashier, is competent evidence against the bank in a subsequent suit between the same parties. *North Western Bank* v. *Nelson*, 1 Grattan's Rep. 105. (Virginia, 1844.)

The answer not denying the charge in the bill, and a copy of a decree in a previous case being filed as proof of the charge, and not objected to, the decree is *prima facie* evidence. *Roberts* v. *Calvin*, 3 Grattan's Rep. 358. (1846.)

In an answer in equity, as well as in a plea in a suit at law founded on a specialty, where the defence is usury, the terms of the agreement and quantum or rate of the usurious premium or interest must be specifically stated, and the proof must come up to the statements in the pleadings. *Rowe* v. *Phillips*, 2 Sandf. Ch. 14.

Proof of the plaintiff's admissions that he had taken usury, will not support a plea setting out a particular sum or rate per cent.; nor will proof that he received a certain rate per cent. sustain a plea which alleges the taking a sum in gross which does not correspond with the rate per cent. *Ibid.*

Where the answer charged that the mortgagee exacted $112.50 for usury, and the proof consisted of his admission that he had taken usury on the mortgage, also that the mortgagors had paid him more than seven per cent., and that they had paid him ten or twelve per cent.; neither of which rates would produce the sum named; *Held*, that the proof did not support the answer. *Ibid.*

Where the answer stated a contract as a sale and purchase of a foreign exchange, without any averment that it was a cover for a loan, or that there was an application for a loan which assumed the form of a sale, the defendant cannot prove those facts, or insist upon them, although he has inserted a general allegation that the contract was usurious. *Holford* v. *Blatchford*, 2 Sandf. Ch. 149.

An answer stated execution and delivery of an assignment in trust for creditors, and referring to the instrument, averred that a copy of it was set forth in a schedule annexed, to which the defendant referred as proof of his answer. The answer then stated the recording of the instrument on the day of its date, and mentioned the book in which it was recorded. The schedule contained the assignment at length, acknowledged before a commissioner of of deeds; *Held*, that the deed might be read at the hearing under these allegations. *New* v. *Bane*, 3 Sandf. Ch. 190.

Where a bill stated the indorsing of a note by the defendant, payable at a particular place, and the answer admitted the indorsement of the note, without any qualification, the defendant cannot prove the place of payment was inserted after the indorsement of it. *Smedburg* v. *Whittlesey*, 3 Sandf. Ch. 321.

Testimony taken by the complainant on a supplemental bill cannot be read against those defendants in a prior suit, who were not made parties in such bill. *Borst* v. *Boyd*, 3 Sandf. Ch. 501.

In the defence of usury the proof must strictly sustain the alle-

gation. So when in an answer the usurious agreement was stated to be that H was to advance the borrowers $ 2,000, and D was to give them his notes, one for $ 150, and one for $ 450, making the $ 2,600 for which the security was given; and the proof showed an agreement by which H was to advance $ 2,052 in cash, and $ 548 in the notes of D, one for $ 414, and the other for $ 140, it was held a fatal variance. *Helfield* v. *Newton*, 3 Sandf. Ch. 564.

Where a party setting up the defence of usury alleges that certain bonds or evidences of debt were advanced by the lender, and the proof showed that he advanced cash, the variance was held fatal. *The Farmers' Loan and Trust Company* v. *Ferry*, 3 Sandf. Ch. 339.

In an interpleading suit, where it appears by the answer of each defendant, that he claimed the fund in dispute from the complainant, no further evidence of that fact need be proved to entitle the complainant to a decree. *Balcher* v. *Crawford*, 3 Sandf. Ch. 380.

IV. *Affidavits.*

An affidavit taken before a commissioner of deeds *de facto*, who is exercising such office under color of an appointment by the governor and senate, may be read in a suit between other persons; and the court will not inquire collaterally into the legality of such appointment. *Parker* v. *Baker*, 8 Paige, 428.

An affidavit sworn to before a master in chancery in another State, who was not a commissioner appointed by the State of North Carolina, is regular in the latter State. *Allen* v. *State Bank*, 1 Dev. & Batt. 7.

On an application for an injunction, the plaintiff may read affidavits filed before making the answer, in order to support the bill, or to contradict the answer; but no affidavits filed subsequently to the making of the answer can be admitted in evidence. *Kinsler* v. *Clarke*, 2 Hill's Ch. 620.

The general rule is that when an injunction has been obtained upon the affidavit of the complainant alone, and the defendant moves, upon filing his answer, to dissolve the injunction, affidavits cannot be read upon the argument of the motion, either in support of the bill or answer. *Merwin* v. *Smith*, 1 Green's Ch. 182.

There may be exceptions to the rule. In cases of waste, affidavits are admissible to prove acts of waste. But affidavits will

not be heard to prove allegations made in the bill, which are not denied by the answer. *Merwin* v. *Smith* 1 Green's Ch. 182.

Where the answer states new matter, not responsive to the bill, which is relied on as a ground for dissolving the injunction, the complainant may read affidavits in contradiction of such new matter. *Ibid.*

Ordinarily it is of course to dissolve an injunction, if the answer denies the whole merits; and the plaintiff cannot, upon a motion to dissolve the injunction, read affidavits in contradiction to the answer. It is not so in cases of special injunctions. *Poor* v. *Carleton*, 3 Sum. 70.

After answer, affidavits may be read by the plaintiff to support the injunction, as well as by the defendant against it; and this may be done, although the answer denies the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer. *It seems*, the practice in this respect is more liberal in America than in England. *Ibid.*

V. *Decrees and Judicial Proceedings.*

In a proceeding in chancery to subject the lands of the testator in the possession of the heirs and legatees, to the payment of debts, a judgment against the executor is no evidence to charge the heirs and devisees. *Darington* v. *Borland*, 3 Port. 10.

But such judgment would be sufficient evidence of a presentment of the demand, within the time prescribed by the statute of non-claims, if the demand were not otherwise liable to that objection, in Alabama. *Ibid.*

The recital in a decree, that an order to take a bill *pro confesso* unless, &c., had been duly served, is sufficient evidence of the fact of service in the appellate court. *Fitzhugh* v. *M'Pherson*, 9 Gill & Johns. 51.

A decree against executors of an executor is *prima facie* evidence against the legatee of the first testator, on a bill to charge him with the legacy. *M'Mullen* v. *Brown*, 2 Hill's Ch. 460.

There being no privity between real and personal representatives of a deceased person, a judgment against the administrator is not evidence against the heir, unless the heir has been a privy to such suit. *M'Coy* v. *Nichols*, 4 How. 31.

A suit against the representatives of an estate for the purpose of subjecting the assets of a deceased partner to the payment of a

judgment against the firm, is a new and distinct proceeding against a new party; and all the facts must be established by testimony in the ordinary manner. *Marr* v. *Southwark*, 2 Port. 351.

The judicial decisions of sister states are entitled to full effect where the courts had jurisdiction over the person, subject, or thing. *Oldham* v. *Robinson*, 1 B. Monroe, 334.

VI. *Deeds, Writings, Books, &c.*

Objection to a deed as evidence comes too late in an appellate court, when it was read without objection on the trial below. *Thurston* v. *Mastroson*, 9 Dana, 233.

A deed under which possession has been held for thirty years, may be read without proof of its execution. *Plummer* v. *Baskerville*, 1 Ired. Eq. 252.

Documentary evidence, set out or distinctly referred to in the pleadings, and which is of itself evidence without further proof, such as exemplifications of records, deeds duly acknowledged, &c., may be read at the hearing, without notice to the adverse party, or any order previously obtained for that purpose, although made an exhibit before the examiner. *Pardee* v. *DeCala*, 7 Paige, 132.

A trustee accounting may read letters to show the information on which he acted for the estate. *In re M'Farland*, 4 Barr's Pa. St. Rep. 149. (1846.)

W being indebted to E, and desiring forbearance, procured N to advance his securities for the amount, and W gave to N his bond for the same sum, and transferred divers effects to N. The bond recited the transfer of the latter, and stated it to be to secure the bond. With the bond, the transfer, and the effects, W delivered to N a letter, giving a history of the transaction, and stating that the effects were transferred to be held in trust for the payment of N's securities to E. The letter was accepted without objection, and it conformed to the verbal agreement; *Held*, 1. That the transfer by W to N, the bond, and W's letter were to be construed together, as if their terms had been brought into one instrument, executed by the parties. 2. That the letter does not conflict with, or detract from the bond, or diminish its force; although both derogate from the absolute terms of the transfer executed to N. 3. That the letter is admissible to prove a consideration for W's transfer, other than that mentioned in the bond.

4. That it was competent for W to file a bill against N and E, to secure from loss the property assigned to N, and for an account. *Shaw* v. *Leavitt*, 3 Sandf. Ch. 163.

When the witness sworn by a commissioner of deeds to identify the grantor in a conveyance, on the latter appearing to acknowledge the execution of such conveyance, is the grantee therein, or otherwise interested in sustaining the execution, the certificate of the officer furnishes no proof of its execution. *Goodhue* v. *Berian*, 2 Sandf. Ch. 630.

A subscribing witness testified to his own signature to a mortgage and that it was subscribed and acknowledged by a person who was introduced to him as the mortgagor; and another witness identified the signature thus made as that of the mortgagor; *Held*, that the mortgage was sufficiently proved. *Ibid.*

An assignment purporting to be executed by a corporation, through its president and under its corporate seal, was presented, and the president's signature proved, and there appeared to be a seal attached, but there was no proof that the seal was that of the corporation, or of the president; *Held*, that the court would not decide the point upon inspection, and that the execution of the assignment was not proved. *Man, Receiver, &c.* v. *Pentz*, 2 Sandf. Ch. 259.

When the intention of the donor is proved, under his own hand, a delivery will be presumed from slight circumstances. *Brinkerhoff* v. *Lawrence*, 2 Sandf. Ch. 400.

The retention of the deed or instrument by the donor does not impeach its validity, unless there be clear and decisive proof that he never parted, or intended to part, with its possession. *Ibid.*

VII. *Admissions, Declarations, and Receipts.*

The confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein. *Smith* v. *Burnham*, 2 Sum. 612.

The declarations of a party to an instrument impeached for fraud are not admissible, when made subsequently to its execution, unless the fraudulent nature of the instrument is otherwise established. Where the impeachment is on the ground of a continued possession, under the statute, the fact of such possession cannot be proved by the assignor, nor by his declarations. *Lee* v.

Huntoon, 1 Hoffman, 448; *Schoonover* v. *Myers*, 28 Ill. 312; *Myers* v. *Kinzie*, 26 Ill. 37.

Declarations of the person under whom one of the parties in the suit claims title by a conveyance made subsequent to the declarations, may be given in evidence by the adverse party to show that a conveyance, under which such adverse party claimed title to the same premises, had been duly executed, and had been fraudulently surrendered to the grantor and destroyed. *Varick* v. *Briggs*, 6 Paige, 323.

Where there are several co-defendants in equity, who have a common interest, the declaration of one of them is evidence against the others. *Griffin* v. *Pleasants*, 1 Hoff. 152.

The declarations of one of several devisees in evidence against a will, is admissible evidence, not as a declaration or admission by all, but as a circumstance entitled to some influence, and to which the tribunal trying the question of will or no will should give such effect, under all the circumstances of the case, as such a fact intrinsically merits. *Rogers* v. *Rogers*, 1 Hoffman, 325.

The declaration of a judgment creditor that this judgment was confessed to keep another creditor, who is seeking to obtain judgment, out of his money, and that if such creditor had not sued, the judgment would not have been confessed, coupled with proof that the judgment creditor is a man of no property, is insufficient to overcome direct proof of the consideration of the judgment. *Edgar* v. *Clevinger*, 4 Green's Ch. 258.

An *ex parte* affidavit of the payment of money, made by the person who received it and who died before the filing of the bill, if not admissible as testimony, is admissible as his receipt. *Williams* v. *Maitland*, 1 Hoff. 103.

On a bill filed against C & B as partners, the declarations of C are not admissible against B to prove the partnership. The declaration of one partner is only admissible against the other after the fact of the partnership is established. *Flannagan* v. *Champion*, 1 Green's Ch. 51.

The declarations of one partner, made after the dissolution of the partnership, are not admissible to charge his copartner. *Ibid.*

Where a combination between several persons for an illegal object is clearly established, the acts and declarations of one of the parties in reference to the subject-matter of the combination, whilst engaged in the prosecution of the joint design, are admissi-

ble in evidence against his associates. *Waterbury* v. *Sturtevant*, 18 Wend. 354.

Generally, the declarations of a grantor, made after the sale, cannot be admitted to impeach the sale; but where there is a community of interest and design in several, or circumstances showing a conspiracy between the grantor and the defendants, to defraud the plaintiff, such declarations would be admissible. *Bell* v. *Coiel*, 2 Hill's Ch. 109.

The admissions of a party on a charge of adultery are not, as a general rule, to be received with much faith. They are competent proof of the charge only when connected with other evidence. *Miller* v. *Miller*, 4 Green's Ch. 139.

Where the items of an account book were read over to the person charged, who objected to a few of the items only, the book may be received in evidence as his admission. *Lever* v. *Lever*, 2 Hill's Ch. 159.

The declarations of a trustee, that an investment made by him was of the trust fund, after his death, may be given in evidence as proof of the fact, it being the confession of one whose sacrifice, by the narration, is equivalent to his oath. *Harrisburg Bank* v. *Tyler*, 3 Watts & Serg. 373.

A trustee holding the legal title to property is not to be presumed to make admissions adverse to the interests of those for whom he acts, and such admissions are therefore competent, though not conclusive evidence. *Helm* v. *Steele*, 3 Humph. 472.

On a bill to establish a written will, testimony of the admission of a part of the heirs is not sufficient, as, if established at all, it must be established against all the heirs. *Grant* v. *Grant*, 1 Sandf. Ch. 235.

The declarations of the decedent are not competent to prove the execution or existence of a will. *Ibid.*

An assignment of a mortgage as security for a debt, by a mortgagee in possession, is evidence that the mortgage is redeemable. *Borst* v. *Boyd*, 3 Sandf. 501.

A mortgagor, on a bill to redeem, may rebut the objection of the lapse of time, by proof of such an assignment, or of similar acts by the mortgagee, though the mortgagor was not a party to the same. *Ibid.*

VIII. *Parol Evidence.*

It is a well-established rule, in equity as well as in law, that

parol evidence is not to be received to contradict, add to, or alter a written contract. *Chetwood* v. *Brittain*, 1 Green's Ch. 439; *Eveleth* v. *Wilson*, 15 Maine, 109.

But parol evidence to prove matters extrinsic to the terms of a written contract, for the purpose of applying it to the subject to which it relates, does not come within this rule. *Ibid.*

An ambiguity asising from too great generality of description may be removed by parol evidence, which applies it to a single point. *Ibid.*

Although parol evidence is inadmissible to add to, or explain, a deed, yet if a conveyance purporting to be voluntary, is impeached for fraud, it is competent for the party claiming under it to show that in fact it was made for a valuable consideration. Its being voluntary does not make it void, but it is merely evidence of a fraudulent intent; and any evidence is admissible which shows that no such intent existed. *Henderson* v. *Dodd*, 1 Bail. Eq. 138.

Parol evidence to show that a deed, in terms an absolute conveyance, was not intended as such, but was designed as a mortgage, or other conditional conveyance, is not admissible at law; nor can it be admitted in chancery, unless there is an allegation with some proof that there was fraud or mistake in the execution of the deed, or some vice in the consideration. But where an answer admits that a deed apparently absolute was, to any extent, or for any purpose, conditional, or in trust, the complainant may show the true condition or trust by parol testimony. *Thomas* v. *McCormick*, 9 Dana, 109.

A mere admission in an answer which denied any such condition or trust, that the consideration was in fact different from that recited in the deed, will not justify the admission of parol testimony to show that the deed was conditional, when it purports to be absolute. *Ibid.*

Parol testimony is admissible to locate the boundaries and monuments in a deed; and those being proved, an ambiguity latent may become apparent, the description being inconsistent with itself; and the court will proceed to adduce the intention of the parties. *Brown* v. *Haven*, 3 Fair. 164.

Testimony will not be received to show a parol agreement contradictory to, or varying from, a written agreement made at the same time, when no reason is assigned why the former is not incorporated into the latter. *Parker* v. *Vick*, 2 Dev. & Batt. Eq. 195.

The consideretion clause in a deed, that is, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer, is open to explanation by parol proof. Thus, where the consideration in a deed conveying lands was expressed to be money paid, *it was held*, that parol evidence was admissible to show that the consideration, instead of money, was iron of a specified quantity, valued at a stipulated price. *McCrea* v. *Purmot*, 16 Wend. 460; *Kinsie* v. *Penrose*, 2 Scam. 516.

It seems, according to the American cases, that the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration; and that for every other purpose it is open for explanation, and may be varied by parol proof. *Ibid.*

The doctrine that a deed absolute on its face may be converted into a mortgage by parol testimony is unquestioned, where the acts or declarations proved are contemporaneous with the instrument. Subsequent declarations should be more scrupulously admitted. *McIntyre* v. *Humphreys*, 1 Hoff. 31.

A reversion after the determination of a life estate cannot be created by parol in a case of a conveyance of slaves purporting to be absolute. *Richardson* v. *Thompson*, 1 Humph. 151.

Where there is a parol condition to a written contract, which is understood by the parties, but by fraud or mistake not inserted in the contract, the court will reform the contract according to the intent and understanding of the parties; but such parol condition must be sustained by full, clear, and unequivocal proof, and in the absence of such proof the written contract will be adjudged to contain the true intent of the parties. *Perry* v. *Pearson*, Id.

Parol evidence, although it may be inadmissible to reform a written contract, yet is received to repel a specific execution of it; but in the latter case it cannot be received to show that the written contract was not the one made; but to prove fraud, accident, or surprise, raising an equity to rebut the claim to specific execution. *Ward* v. *Ledbetter*, Dev. & Batt. Eq. 496.

Parol evidence is not admissible to enlarge the time within which the terms of a written contract for the sale of land were to be complied with. *Doar* v. *Gibbs*, 1 Bail. Eq. 371.

Where there is an ambiguity in a writing, partaking of the nature of both patent and latent ambiguities, *i e.* where the words used have a settled meaning but admit of two interpretations, accord-

ing to the subject-matter in the contemplation of the parties; extrinsic facts, not contradictory of the writing, but which will aid in upholding it, may be proved by parol, in order to explain the actual intention of the parties. *Railroad Co.* v. *Ormsby*, 7 Dana, 277.

Parol evidence cannot be received to explain a will except in case of a latent ambiguity. *Patterson* v. *Leith*, 2 Hill's Ch. 16.

A latent ambiguity, arising out of intrinsic facts, in the construction of a will, may be explained by facts in and out of the will, and by parol evidence of intention. *Hayden* v. *Ewing*, 1 B. Monroe, 113.

There are several exceptions to the general rule of evidence, that a party cannot contradict his deed, or prove any other consideration than that expressed in it; as in cases of fraud, mistake, imposition, or oppression, and in cases where deeds have been made upon secret trusts between the parties.

Parol evidence cannot be admitted to prove that a payment of a bond, payable immediately by its terms, was not to be demanded until after the obligor's death, in absence of fraud, mistake, or surprise. *Geddy* v. *Stamback*, 1 Dev. & Batt. Eq. 475.

The obligor of a bond cannot be allowed to adduce parol evidence that, at the time of giving the bond, it was agreed that the obligee should look to another source for payment, and that the obligor should not be personally liable. *Chetwood* v. *Brittan*, 1 Green's Ch. 438.

If by fraud or mistake or accident, a written instrument does not contain the true agreement, or the whole agreement between the contracting parties, it may be supplied by parol proof. *Ibid.*

Sales made by sheriffs are embraced by the statute of frauds and perjuries; but such sales may be taken out of its operation by parol evidence, unless such evidence is excepted to in the court of chancery, in Maryland. *Spencer* v. *Pierce*, 10 Gill & Johns. 294.

The rule, that parol testimony is not to be admitted to vary an instrument in writing, prevails as well in equity as in law. But courts of equity admit an exception to it, where a mistake is alleged, and if clearly proved or admitted, they will give relief. If a mistake be made in a deed of land according to the rules of equity,

it should be reformed, and the mistake corrected, so as to make the deed read as it should have done.

It is also a rule that he who seeks equity must do equity. But this rule does not extend to make one who had committed a mistake responsible for all the remote consequences which may arise from its leading others to commit errors by placing confidence in its accuracy, instead of examining for themselves. *Peterson* v. *Groover*, 20 Maine R. 363.

Parol evidence of the understanding of the parties to a written agreement may be given in evidence to explain their construction of terms otherwise ambiguous. *Selden* v. *Williams*, 9 Watts, 9.

Where an omission in a contract is not corrected by reason of an agreement to consider it as inserted, and advantage be taken thereof, it is fraud; and as such it must be distinctly averred in the pleadings; it is not sufficient to aver facts from which the jury may infer fraud. *Clark* v. *Partridge*, 2 Barr's Pa. St. Rep. 3.

Evidence to prove facts amounting to fraud is inadmissible under the pleadings averring it was through mistake, and on the suggestion by defendant that he could not deny his agreement. *Ibid.*

Evidence of the understanding of one who drew a written agreement, as to what the agreement was, arising from expressions of the parties, is not admissible. *Fox* v. *Foster*, 4 Barr's Pa. St. Rep. 119.

Evidence that plaintiff's lease had been deposited with one who at the time of trial resided out of the State, will not authorize parol evidence of its contents by the plaintiff, the defendant having notified him to produce the document. *McGregor* v. *Montgomery*, 4 Barr's Pa. St. Rep. 539.

Misrepresentation, whether wilful or accidental, is a ground for reforming a deed or contract; but it must be of some material fact which the party might have placed confidence in, and not an opinion; unless there be peculiar circumstances of contrivance or abuse of confidence reposed; and it must be shown that the complaining party relied on the misrepresentation or mistake induced by the party seeking to bind him by the written evidence. *Zoentmeyer* v. *Mittower*, 5 Barr's Pa. St. Rep. 403.

It seems, that to make such a misrepresentation available against the express terms of the contract, it must, in ordinary cases, assume the character of a contract. *Ibid.*

Transactions which show the general habits of a person, his

intemperance, extravagance, and thoughtlessness, are competent evidence in case of fraud and imposition. *Kaufman* v. *Swar*, 5 Barr's Pa. St. Rep. 230.

A devise made under a parol promise or agreement that the devisee will hold the land in trust for herself and another, creates a valid trust. Subsequent parol admissions by the husband, and by the wife in the presence of the husband, of such a trust existing on the devise of the wife, are evidence. 6 Barr's Pa. St. Rep. 425.

Oral representations made by a party to a contract, before the execution of the instrument, may be given in evidence for the purpose of proving fraud on the part of such party. 22 Pick. 546.

Where a person uses technical language in a deed or instrument, the law presumes he intended it in a technical sense to be understood and used; and parol evidence is inadmissible to explain, control, or vary the legal effect of such deed or instrument. *Ryan* v. *Goodwyn*, McMullin's Eq. Rep. 451.

Where specific things are described in a deed or will, the existence and qualifications of the things which, it is alleged, pass under the instrument, may be ascertained by parol evidence, and where in this process two things are proved to exist, each satisfying the description, an ambiguity latent is created by parol, which may be removed by parol evidence. *Wallace* v. *McCollough*, 1 Richardson's Eq. 427.

But when of things presented, neither tallies with the description, it is against principle, whatever annonymous cases may be found in the books, to receive evidence as to which of them was intended, or whether both were intended. *Ibid.*

Where an agent purchased land in his own name at the request and for the benefit of his principal, and gave his own bond and mortgage for the purchase-money, in which the principal joined ostensibly as surety, it is competent to prove by parol evidence that the latter is the principal in the bond, and the agent the surety. *The Mohawk and Hudson Railroad Company* v. *Costigan*, 2 Sandf. Ch. 306.

Where in a bequest for charitable purposes the name of the legatee is defectively described, extrinsic evidence is admissible as to what society or corporation was intended by the testator. *Hornbeck's Ex'r* v. *The American Bible Society*, 2 Sandf. Ch. 133.

Various facts admitted in aid of construing a will, and designat-

ing the object intended by the testatrix in her bequest for charitable purposes, viz., that the testatrix was a member of a society claiming the fund; that she was attached to a specific society or denomination. She had made donations to such society; she was a correspondent of its officers; she had taken a warm interest in its particular objects; her deceased husband had exhibited such interest, and had made similar gifts personal and by his will; as his executrix she had transmitted the latter; and that there is no like society or institution. *Hornbeck's Ex'r* v. *The American Bible Society*, 2 Sandf. Ch. 133.

Parol evidence is not admissible to show that a bond and mortgage for the payment of money were not to be paid, unless the mortgagee and two other persons to whom he furnished materials, fulfilled a contract of the latter for executing the stone-work of certain houses, which the mortgagor was erecting; there being no fraud or mistake, surprise or accident, in the case. *Russell* v. *Kinney*, 1 Sandf. Ch. 34.

Parol evidence in contradiction of the words of a will or to add an omitted clause, which would alter the effect of what is written, is inadmissible. *Sturges* v. *Cargill*, 1 Sandf. Ch. 319.

Where the language of a will was plain, and not ambiguous, using no doubtful terms or designation of objects requiring explanation to make them intelligible, extraneous evidence, although it was offered in the testator's own handwriting, was held inadmissible to show that he intended to give a devise or bequest in different shares or proportions from those indicated by the words of the will. *Bunner* v. *Storm*, 3 Sandf. Ch. 357.

IX. *Testimony of the Parties in a Case.*

A defendant may examine a mere nominal complainant, with his consent, as a witness against the real complainant. But a defendant who has a common interest with the complainant in the suit, cannot examine such complainant as a witness against a co-defendant, for the purpose of sustaining the claim made by the bill. *Eckford* v. *Dekay*, 6 Paige, 565.

Where one of the complainants, who is a necessary party, but who has no personal interest in the subject-matter of the litigation, is a material witness to prove the facts necessary to sustain the suit, the proper course, where the nature of the case will admit of such a change of parties, is to make him a party defendant, so that he may be examined as a witness. *Ibid.*

After a decree, it is not a motion of course for one defendant to examine another; and a special ground for such motion must be laid. And, after a decree against two executors to account, *it seems* to be a good special ground for such a motion that the one sought to be examined had alone received the money of the estate. *Williams* v. *Maitland*, 1 Ired. Eq. 93.

A party may be a witness for himself, by consent of the adverse party; and his deposition read without objection may operate for him as well as for his co-defendant, especially when, being insolvent, he has no real interest. *Fletcher* v. *Wier*, 7 Dana, 356.

A party examined as a witness becomes released, in equity, in regard to the matter upon which he was examined. And if of two defendants the one examined be the one primarily liable to the plaintiff, and the other defendant only secondarily, the plaintiff by the examination of the former necessarily gives up his claim against both. *Lewis* v. *Owen*, 1 Ired. Eq. 290.

A defendant in a chancery cause cannot be examined as a witness without an order of the chancellor for that purpose. *Nill* v. *Hall*, 9 Gill & Johns. 81.

The order for the appointment of a receiver, upon a creditor's bill, the defendant not consenting that his examination before the master shall be a substitute for his answer, as provided by the ninety-first rule of court, authorizes the complainant to examine the defendant on oath only in regard to the property which he is ordered to assign and deliver over to the receiver, in New York. *Browning* v. *Bettis*, 8 Paige, 568.

An order allowing a defendant to examine his co-defendant as a witness will always be granted upon a suggestion that the party to be examined has no interest in the cause, leaving the question of interest to be determined at the hearing upon the proofs. *Nevill* v. *Deonerritt*, 1 Green's Ch. 321.

The examinations of parties to a cause as witnesses are always made by the very terms of the order subject to all legal exceptions at the hearing. *Ibid.*

In a suit for an account, if the plaintiff reads on the hearing the examination of the defendant, taken before the master on a reference to him on behalf of the plaintiff, the answers to the interrogatories, so far as they are responsive thereto, will be evidence for the defendant, though subject to contradiction, upon the same principle that his answer to the bill is evidence for him. *Chaffin* v. *Chaffin*, 2 Dev. & Batt. Eq. 255.

Upon the usual order, on a creditor's bill to appoint a receiver, and that the defendant deliver over to such receiver his property and effects on oath, the defendant is only bound to answer such interrogatories as relate to the subject of the proceeding before the master. *Fitzhugh* v. *Everington*, 6 Paige, 29.

The examination of the defendant on oath before the master, upon a reference to appoint a receiver, on a creditor's bill, may be read by the adverse party upon the hearing of the cause, to contradict the defendant's answer; although the master required him to answer questions which he was not legally bound to answer. *Gihon* v. *Shaw*, 7 Paige, 278.

If illegal or improper questions are put to a defendant upon his examination before the master, he is not bound to answer them, but may appeal from the decision of the master to the court. If he refuse to answer questions which are relevant and proper, he will be compelled to pay the costs of an application to the court to compel him to answer; and he may be otherwise punished for the contempt. *Ibid.*

As a general rule, the court will not allow *ex parte* affidavits to be used on a reference to a master to examine the defendant on interrogatories relative to an alleged contempt, and to take such other proof as shall be produced before him by either party; but will compel the parties to produce and examine the witnesses before the master, so that they be cross-examined by the adverse party. *Cumming* v. *Waggoner*, 7 Paige, 603.

The mere fact that a witness in chancery is a party to the suit, does not disqualify him; but, if he is interested in the matter as to which he testifies, or may be liable for costs, his deposition must be rejected. *Allison* v. *Allison*, 7 Dana, 92.

A party to the suit, whose admissions would be evidence to affect another party, may be examined as a witness by the opposite party, if he himself consent. *Row* v. *Coekrell*, 1 Bail. Eq. 311.

The examination of a defendant trustee by the complainant does not compel the court to receive his statements of matters of discharge as conclusive in his favor. *Baker* v. *Williamson*, 4 Barr's Pa. St. Rep. 456.

The answer of one co-defendant is not evidence against another. *Fetch* v. *Hooper*, 20 Maine Rep. 159.

X. *Witnesses. — Examination.*

Competency. — A witness interested in one part of a case, and therefore incompetent, may, nevertheless, be examined as to other points, in which he is not interested. *Row* v. *Cockrell*, 1 Bail. Eq. 127.

A debtor, who has assigned his estate for the benefit of his creditors, is a competent witness in a suit between his assignee and one of the creditors who claims a special lien on a part of the estate; his interest being equal either way. *Gilchrist* v. *Martin*, 1 Bail. Eq. 492.

Where the husband would be a competent witness, the wife may be sworn; and where the husband, if living, would have been competent to prove fraud in a deed from himself to his sisters, his wife is competent to prove his acts and declarations. *Bell* v. *Coiel*, 2 Hill's Ch. 110.

One partner, when called by another, may testify as to the correctness of an account set up against the firm by the partner calling him as a witness. But the testimony of a partner so called as a witness, is incompetent to diminish the accounts which may be set up against the firm, or to augment his own account against the firm by the other partners who did not call for his testimony. *Garney* v. *Beatty*, 7 J. J. Marsh, 225.

A distributee is not a competent witness for the executor or administrator. *Brown's Ex'r* v. *Durbin's Adm'r*, 5 J. J. Marsh, 174.

The wife cannot be examined as a witness either for or against her husband in a civil suit. But she may be compelled to testify as a witness, in a suit between other persons, where the husband would himself be compelled to testify as a witness. *Capous* v. *Kaufman*, 8 Paige, 47.

Upon a reference to a master, upon a creditor's bill, to appoint a receiver of the property of the judgment debtor, and to examine witnesses, &c., the complainant cannot compel the wife of the defendant to submit to an examination before the master as to such property, or as to any other matter charged in the bill; although the husband is a lunatic, and cannot himself be examined, or compelled to make a discovery of his property. *Ibid.*

A defendant who suffers the bill to be taken as confessed, and thereby enables the complainant to obtain a decree against him

individually, notwithstanding his testimony in favor of a co-defendant, is a competent witness for such co-defendant; although he would have been directly interested in the matter to which he is examined, if he had put in an answer denying the allegations in the complainant's bill. *Holgate* v. *Palmer*, 8 Paige, 461.

But in a matter of contract, where it is impossible to obtain a decree against the defendant, who suffers the bill to be taken as confessed, if the complainant fail in his suit against the other defendants who were joint-contractors with him, the defendant against whom the bill is taken as confessed, cannot be examined as a witness for his co-defendants, to sustain their defence. *Ibid.*

Upon the return of a *habeas corpus*, directed to the father-in-law of the relator, requiring him to bring before the court the wife and child of the relator, alleged to be detained from him by the defendant, the wife is a competent witness for the defendant to prove acts of cruelty of her husband on her, which justified her separation from him, and her refusal to return to her house; but she cannot testify as to his general character, or as to any misconduct of his in other respects. *The People* v. *Mercien*, 8 Paige, 47.

Where a witness's interest is of such a nature that he cannot be benefited, by swearing to the matters which he is called to prove, unless they are really as he states them to be, it is no legal objection to his competency as a witness, that he may be benefited by the proof of those matters, if his testimony is in fact true. *Pratt* v. *Adams*, 7 Paige, 617.

A complainant who may be liable for costs, if he does not succeed in establishing the claim in his bill, is not a competent witness to prove the facts necessary to sustain the suit, although he has no personal interest in the subject-matter of the litigation. *Eckford* v. *Dekay*, 6 Paige, 76.

If the liability of the witness will remain the same, which ever way the suit is determined, he is not incompetent; but if a decision in favor of one of the parties would have the effect to discharge the witness from further liability, while a contrary decision would leave him exposed to a suit, he is not a competent witness for the party who seeks a decision which will discharge the witness from further liability. *Woods* v. *Skinner*, 6 Paige, 76.

A husband cannot be a witness in favor of his wife, or of his trustee, in a suit respecting her separate estate; although he has no interest in the subject-matter. *Burrel* v. *Bull*, 3 Sandf. Ch. 15.

Where there is a dispute, and one of the parties consults an attorney, solicitor, or counsellor, on the subject, the communications between such party and his legal adviser are sacred. And the courts will not permit them to be divulged without the client's consent. *March* v. *Ludlum*, 3 Sandf. Ch. 35.

There is a dispute, when there are conflicting rights in existence, or claims made, to the same property, which, unless abandoned by one party or the other, or arranged amicably, will terminate in litigation. *Ibid.*

The privilege is not affected by the circumstance that the client offered no compensation, and the legal adviser did not make or expect to make any charge for his opinion. *Ibid.*

A solicitor for a non-resident complainant, in whose behalf security for costs has been filed, by a surety who justified *ex parte*, is a competent witness presumptively, although he testifies before the time for excepting to the surety is expired. *Van Weasel* v. *Wyckoff*, 3 Sandf. Ch. 428, 528.

Examination, &c. Where there is a plurality of defendants, and a commission with consent of some of them only has been issued, the testimony so taken cannot be read against those who had not consented to the issuing of the commission. *Kipp* v. *Hanna*, 2 Bland. 26.

The court will compel a witness to attend before commissioners, summoned by them to do so; but a commission should be so issued that the examination may be had at a reasonable distance from the witness's residence. *MacCubbin* v. *Mathews*, 2 Bland. 250.

A witness may, on assigning cause, demur to the questions propounded to him; and the examination must be suspended until the court decides. *Winder* v. *Diffenderfer*, 2 Bland. 166.

Courts of chancery possess the power to examine witness *viva voce*, for the purpose of proving written instruments. *Levert* v. *Redwood*, 9 Port. 80.

Fresh interrogatories and a re-examination have been permitted after publication, where depositions have been suppressed on account of the interrogatories being leading, or for irregularity, or where it has been discovered that a release has not been given to make a witness competent. *Wood* v. *Main*, 2 Sum. 316.

A witness may be examined to the mere credit of the other witnesses, whose depositions have been taken and published in the

cause; but he cannot be examined to prove or disprove any fact material to the merits of the cause. *Wood* v. *Main*, 2 Sum. 316.

The general rule of equity proceedings is, that after publication of the testimony, no new witness can be examined, and no new evidence can be taken, unless the judge himself, upon or after hearing, entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a decree. *Ibid.*

Exhibits in the cause may be proven after publication, and even *viva voce* at the hearing, where there has been an omission of the proof in due season, and they are applicable to the merits, *Ibid.*

It seems, that, after publication, new evidence may be received of facts and conversations which occurred after the original cause is at issue, and publication has passed. *Ibid.*

The court may, in the exercise of a sound discretion, allow the introduction of newly-discovered evidence of witnesses to facts at issue in the cause, after publication and knowledge of the former testimony; and even after the hearing. But it will not exercise this discretion, to let in merely cumulative testimony. *Ibid.*

The time for taking testimony will be enlarged, after publication has passed, on good cause therefor shown on affidavit, as surprise, accident, or other circumstance, which repel any imputation of laches. Such affidavit is indispensable, except in case of fraud practised by the other party. *Ibid.*

A witness whose examination is apparently closed, and an adjournment taken place, and another witness examined, cannot be recalled by him for whom he testified, and examined anew on the subject of the former examination. *Odrondux* v. *Helie*, 3 Sandf. Ch. 512.

Nor can a party reserve the right to recall a witness whose examination has been proceeded in, without the consent of the adverse party; unless the officer taking the testimony should so direct for cause shown. *Ibid.*

XI. *Evidence on Re-hearing.*

A re-hearing will not be granted on the ground of newly-procured evidence, which would have materially varied the case on the trial; it must have appeared that the evidence was discovered since the decree, and of which the party could not have had the benefit in the first instance. *Hinson* v. *Picket*, 2 Hill's Ch. 357.

Where a re-hearing is sought on the ground of newly-discovered evidence after an interlocutory decree, the court will grant a re-hearing upon filing a supplemental bill, if the evidence is of such a nature as to entitle the party to relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise. *Baker* v. *Whiting*, 1 Story, 218.

Where the party had knowledge of the evidence before the decree, or might by reasonable diligence and inquiry have obtained it, he is not entitled to relief. *Ibid.*

The general rule is, not to allow a re-hearing and a supplemental bill, where the newly-discovered evidence is merely cumulative upon the litigated facts already in issue. *Ibid.*

INDEX.

INDEX.

[*The references are to the pages.*]

A.

ACCIDENT.
relief against, ... 23
ACCOUNT.
how set out, ... 79
(*See also* 133.)
ADDRESS.
of bill, ... 10
of amended bill, ... 49, n. 3
ADMISSIONS.
as evidence, ... 149, 218
bind defendant, ... 69, 70
AFFIDAVIT.
must be made on application for leave to amend, ... 48
impertinence and scandal in, . . 67, n.
as evidence, ... 158, 215
ALLEGATIONS.
must be made as the case will be proved, ... 14, n. 2
certain, ... 15
positive, ... 17, n. 2
materiality of, ... 69, n. 1
AMENDMENT OF BILL.
must be signed by counsel, when, 47, n. 3; 51, 101, n. 2
application for, must be supported by affidavit, ... 48
what defects may be cured by, ... 48, n., 50
new case made by, ... 48, n.
what may be introduced by, . . 48, n.
when parties added by, ... 48, n.
instances of, ... 48, n.
not allowed, when, ... 48, n.
time when made, ... 48, n., 49
allowed as of course, when, . . 49, 104
applications for, how many allowed, ... 49
AMENDMENT, &c. — *continued.*
may alter form, but not intent, of prayer, ... 50
by making a plaintiff defendant, when, ... 51, 52
materiality of, ... 52, n.
of bills for injunction, ... 52, n.
application for leave to make, must state proposed amendment, &c., ... 52, n.
(*See also* 104, 106, 113.)
ANSWER.
form of, ... 65 *et seq.*
title of, ... 56–59
if demurrer or plea joined, . 84, n. 1
preliminary saving of, ... 59–61
examination part of, ... 61–82
defence of, ... 82–87
formal ending of, ... 85
may be omitted, 85
how to be made, ... 75–78
must be direct, ... 73, n. 1
full, 69, 71–3, 81, but see 109.
positive, ... 73, n. 1
to best of knowledge, information and belief, . . . 68
signed and sworn to, 86, n. 5
must not be argumentative, . 73, n. 1
state conclusions, ... 79
need not be made to immaterial allegation, ... 69, n. 1
of infant, may omit what, ... 85
if evasive, taken off file, ... 86
if not under oath, how treated, 87, n.
by several defendants, when separate, ... 56, n. 2
until filed, no record, ... 85
if not filed, ... 66, n

ANSWER—*continued.*
if not filed in time, ... 66, n. 1
plaintiff can prevent filing of, until costs tendered to him, when, ... 85
admission in, ... 61, 69, 70
denial in. 61, 74
impertinence in, ... 66, n., 80
insufficiency in, ... 63, 66-69, 80
exceptions to (*see* EXCEPTIONS)
made sufficient by extrinsic circumstances, ... 81
ANSWER—*continued.*
in support of plea, ... 83, n. 1
only on matters on face of, can defendant give evidence, . . . 84
responsive to bill, evidence for defendant, ... 84, n. 1, 87
as evidence, ... 161, 205
amendment of, ... 86, n. 2 (*See also* 123.)
APPEALS.
evidence in, ... 199

B.

BILL.
form of, ... 9, 47 (*See also* 98, 112, 128.)
address of, ... 10
introduction of, ... 10
stating part of, ... 12
confederacy of, ... 26
charging part of, ... 27
averment of jurisdiction of, . . . 30
interrogating part of, . . 31-34, 45, 46
prayer of relief of, ... 34-38
prayer of process of, ... 38-42
signature of, ... 42
presumptive evidence of what, ... 101, n. 2
note of, ... 43
BILL—*continued.*
plaintiff must stand on case made by, ... 12, n.
must show jointure, when, . . . 22
demurrable, if equity appears only in charging part, ... 27, n. 2
amendment of, (*See* AMENDMENT.)
after amendment, must be re-signed, ... 101, n. 2
exceptions to, (*see* EXCEPTIONS.)
as evidence, ... 168, 205
when taken *pro confesso*, . . 168, 205
supplemental, to add parties, . 48, n. (50, n. 1; *See also* 120.)
of discovery and injunction, . . . 53
quia timet, ... 21
of special injunction and relief, . 52

C.

CHARGING PART.
form of, ... 27
contents of, ... 27, 30
conclusion of, ... 29
if equity appears only in, bill demurrable, ... 27, n. 2
unnecessary, ... 27, n. 2
CITIZENSHIP.
must appear on face of bill, when, ... 11, n. 2
CONFEDERACY.
form of, ... 26
must be pleaded, if relied on, . . 27
may be omitted, ... 27, n. 1, 2
CONTRIBUTION.
by surety, ... 22
COSTS.
must be paid before filing answer, when, ... 85
counsel liable for, if exceptions sustained, ... 103, n.
plaintiff required to give security for, when, ... 108, n. 1 (*See also* 102, 107, 108, 122, 124, 130, 136.)
COUNSEL.
must sign bill, ... 42 and n. 4 (*See also* 101.)

COUNSEL — *continued.*
must sign amendment of bill, when, 47, n. 3; 51, 101, and n. 2
COUNSEL — *continued.*
liable for costs, if exceptions sustained, ... 103, and n.

D.

DEFENCE.
contents of, ... 70, 82–87
plaintiff's control over, ... 84
DEFENDANT.
who ought to be, ... 11, 12
who is, ... 39
description of, in bill, ... 20, 44
misnamed in answer, ... 57, n. 1
in bill, ... 58
bound by his admissions, ... 70
separate answers, if more than one, when, ... 56, n. 2
DEMURRER.
if equity appears only in charging part, ... 27, n. 2
if intent of prayer altered by amendment, ... 61
DEMURRER — *continued.*
is a distinct defence, although joined with answer, ... 83
(*See also* 97, 106, 108, 109.)
DENIAL.
general, not sufficient, ... 74, n. 1
must not be by negative-pregnant, ... 74, n. 1
(*See also* 61.)
DEPOSITIONS.
as evidence, ... 174
scandal and impertinence in, . . 66, n.
(*See also* 133.)
DISCOVERY.
bill for, granted when, ... 53, 54
prayer for, *see* PRAYER.

E.

EVIDENCE.
signature of bill, presumptive, ... 101, n. 21
can be given by defendant, only on matters on face of answer, 84
answer responsive to bill is, for defendant, ... 84, n. 1, 87
what is sufficient, ... 147
onus probandi, ... 148
admissions declarations, and receipts, ... 149, 218
secondary, ... 151
presumptive, ... 152, 203
further, when admitted, ... 156
judgments, decrees, and judicial proceedings, ... 157, 216
affidavits, ... 158, 215
answer, ... 161, 205
bills generally, and when taken *pro confesso*, 168, 205; also, 94, 97, 107
taken on a bill to perpetuate, . . 169
in another cause or matter, 169
private writings, ... 171, 217
EVIDENCE — *continued.*
evidence or answer of one defendant when read against or in favor of another, ... 172
depositions, ... 174
publications generally, and enlarging publication, ... 177
parol, ... 181, 222
in appeals, ... 199
general principles and rules, . . . 201
testimony of the parties in a case, 226
witnesses, examination, . . . 187, 229
on re-hearing, ... 232
EXAMINATION PART.
general subject, ... 61–82
EXCEPTIONS.
to affidavit, when taken, for impertinence, ... 67. n
when taken, for scandal, ... 67, n.
to answer, ... 81
for impertinence, 62, 63, 71
when taken, 64, 66, n., 67, n.

EXCEPTIONS—*continued.*
to answer for scandal, when taken, ... 64, 66, n.
point out what, . . 103, n.
of Attorney-General, . . 73
of infant, ... 73
to bill, for impertinence, . . . 103, n.
for scandal, ... 103, n.

EXCEPTIONS—*continued.*
to master's report, when taken, ... 136, n. 1
to supplemental answer, ... 86
master's report on, ... 63
contain what, ... 103, n.
how supported, ... 103,n.
sustained, counsel liable for costs, ... 103, n.

I.

IMPERTINENCE.
what, . . 15, and n. 2; 63, 65, and n. 3
test of, ... 15, n. 2
moral, ... 63, 64
in affidavit, ... 67, n.
in answer, ... 66, n., 71, 80
writing set out verbatim, ... 65
answering when not required to, ... 65
In bill, ... 25
in deposition, ... 66, n.
in master's report, ... 136, n. 1
if bill contain, ... 25, n. 1
exceptions for, *see* EXCEPTIONS.
interrogatories not referred for, 66, n.
(*See also* 102, 103.)

INJUNCTION.
form of prayer for, ... 20
when granted, ... 21
bill for, when used, ... 52, 53
(*See also* 100, 118.)
INSUFFICIENCY.
general subject, . 63, 66–69, 71, 72, 80
exceptions for, *see* EXCEPTIONS.
INTERROGATING PART.
general subject, ... 31–34, 45, 46
form of, ... 31
purpose of, ... 33
INTERROGATORIES.
those only to be answered, specified in the note, ... 67
not answered, when, ... 67, 68
impertinence in, ... 66, n.
(*See also* 111, 112.)
INTRODUCTION, ... 10–12

J.

JUDICIAL PROCEEDINGS.
as evidence, ... 157, 216
JURISDICTION.
averment of, form of, ... 30

JURISDICTION—*continued.*
averment of, may be omitted, 30, n. 1
must appear by case shown in the bill, ... 30, n. 1

M.

MASTER'S REPORT, . 63, 80, and n. 2
MASTER.
power of, as to production of papers, ... 132, n. 1
(*See also* 129–134.)
exceptions to, ... 136, n. 1
MATERIALITY.
of allegation, ... 69, n. 1

MATERIALITY—*continued.*
of amendment, must be shown in petition, ... 52, n.
MISJOINDER.
of plaintiff, ... 12, n. 2
MISTAKE.
relief against, ... 23
MULTIFARIOUSNESS.
general subject, ... 14, 36, n. 2
determined by prayer alone, ... 30

N.

NEGATIVE-PREGNANT, . . 74, n. 1
NOTE.
general subject, ... 43
NOTE—*continued.*
only those interrogatories to be answered, specified in, ... 67

O.

OATH TO ANSWER, ... 86, n. 5
waived, ... 87, n.
(*See* 121, 140.)
ONUS PROBANDI, ... 148

P.

PAPERS.
production of, ... 132, n. 1
PAROL.
evidence, ... 181, 220
PARTIES.
who ought to be, . . 39, n. 3, 40, 46, 47
aliens may be, when, ... 46, n. 2
want of, ... 83
added, by amendment, ... 48, n.
by supplemental bill, 48, n., 50, n. 1
testimony of, ... 226
PENALTY.
suit for, restrained, ... 23
PLAINTIFF.
who ought to be, ... 40–42
interest of each, must be identical with that of every other, . . . 11
description of, ... 10, 43, 44
why material, ... 11
title of, ... 44
party refuses to be, ... 11
misjoinder of, ... 12, n. 2
must stand on case made by bill, 12, n.
PRAYER.
for discovery, ... 38
for discovery and relief, ... 37
PRAYER—*continued.*
for injunction, ... 20
of process, ... 38–42
form of, ... 38, 39
of relief, ... 34–38
form of, ... 34, and n. 1
efficacy of, ... 34, n. 1
alone determines whether bill be multifarious, . 36
form, but not intent of, may be altered by amendment, ... 50, 51
(*See* RELIEF; also 100.)
PRELIMINARY SAVING.
form of, ... 59, 60
contents of, ... 60
PREMISES, ... 12
PRESUMPTION.
to what extent the court will act on, ... 5–9, 17
PROCHEIN AMI.
of infant who may be, ... 21, n. 2
(*See also* 137.)
PROCESS.
prayer of, ... 38–42
(*See also* 91, 92, 97.)
PUBLICATIONS GENERALLY, 177

R.

RECEIPTS.
as evidence, ... 149, 218
RELIEF.
against accident, ... 23
against mistake, ... 23
prayer of, ... 34–38
prayer for special, not essential, ... 34, n. 2
RELIEF—*continued.*
must be consistent with that specially prayed for. . . . . 34, n. 2
importance of prayer for general, ... 35, n. 1
if prayer for general, omitted, 35, n. 1
prayer for alternative, . 35, 36, and n.

S.

SCANDAL.
what, ... 16, 65, n.
in affidavit, ... 67, n.
in depositions, ... 66, n.
in interrogatories, ... 66, n.
in master's report, ... 136, n. 1
if bill contain, ... 25, n. 1
exceptions for, *see* EXCEPTIONS.
SCHEDULE.
how set out. 79
SIGNATURE.
of amendment. . 47, n. 3, 51, 101, n. 2
of answer, ... 85, n. 5
of bill, ... 42
why required, ... 42, n. 4
presumptive evidence of what, 101, n. 2
SPECIFIC PERFORMANCE, . . . 22
STATING PART.
contents of, ... 12, 13, 19, 30
order of statement in, ... 14
STATING PART—*continued.*
must contain equitable ground of relief, ... 27, n. 2
certainty in, ... 15
conclusion of, ... 26
SUBPŒNA.
returnable on Sunday, irregular, ... 95, n. 1
service of, on husband good unless, ... 95, n. 1
on agent or clerk, ... 95, n. 1
on some of the partners, 95, n. 1
(*See also* 94, 95, 96, 119.)
SUPPLEMENTAL ANSWER.
how excepted to, ... 86
SUPPLEMENTAL BILL.
to add parties, ... 48, n. 1, 50, n. 1
(*See also* 120.)
SURETY.
contribution by, ... 22

T.

TITLE.
must be alleged, by legatees, 17, n. 2
by grantees, 17, n. 2
of answer, ... 56–59
contents of, ... 56, 57
should correct the error, if defendant is misnamed in the bill, . . . 58
TITLE—*continued.*
of answer, if insufficient, 57, and n. 1
to amended bill, ... 57
of plaintiff, *see* PLAINTIFF.
TIME.
how reckoned, ... 135, n. 1

W.

WIFE.
separate estate of, ... 55
WITNESS.
generally, ... 187, 229
examination of, ... 187, 229
notice of examination of, not received, ... 127, n. 1
(*See also* 137, 141.)
WRITINGS.
private, as evidence, ... 171, 217
how put in evidence, ... 24
if set out verbatim, when impertinence, ... 25, 65
how pleaded, ... 24
discovery of, how obtained, 53 and n.

INDEX TO EQUITY RULES.

[*The references are to the pages.*]

A.

ACCOUNTS.
in what manner presented before master, ... 133
ACCOUNTING.
party may be examined before master, or by deposition, . . . 133
AFFIRMATION.
taken instead of an oath, ... 140
AMENDMENTS.
when made as of course, ... 104
in material points, how made, . . 104
if numerous, ... 104
when granted after answer, plea, or demurrer, ... 104
how obtained after replication, . 104
granted, when considered abandoned, ... 105
made necessary by answer, when and how granted, ... 113
AMENDMENTS — *continued.*
after answer, new answer filed, . 113
AMENDED ANSWER.
when filed, ... 123
ANSWER.
when filed, ... 97, 123
when and how made, demurrer or plea overruled, ... 107
not obliged to be full, ... 109
what matters of defence may be insisted upon therein, ... 109
when amended as of course, . . . 121
only by special leave, ... 121
to be separately engrossed, ... 121
when deemed sufficient, ... 122
(*See* AMENDMENT, 113: CROSS BILL, 129.)
APPEARANCE DAY.
when, ... 96
of defendant, how entered, ... 96

B.

BILLS.
form of, ... 98
contents of, how expressed, . 98, 102
what part plaintiff may omit, . . 99
necessary part of, ... 98
plaintiff may state and avoid matters of defence in, ... 99
prayer of, shall state special relief asked for, ... 99
BILLS — *continued.*
should state why all are not made parties thereto, ... 100
taken *pro confesso* when, . 94, 97, 107
of revivor, when issued, ... 119
filed, ... 119
need not set forth statement in the original suit, ... 120

C.

CLERK.
shall have power to name commissioners, ... 141
CIRCUIT COURTS.
as courts of equity, for what purposes always considered open, 88
CIRCUIT COURTS — *continued.*
may make additional rules, not inconsistent with those now adopted, ... 139
COMMISSIONER.
how appointed, ... 125

COMMISSIONS.
(*See* TESTIMONY, 125.)
COSTS.
on bills and answers, ... 102
for scandal and impertinence in bills, ... 102
upon demurrer and plea, . . . 107, 108
not allowed for separate answers, when, ... 122
on exceptions taken, ... 124, 136
on reference before master, ... 130
COUNSEL.
must sign bill, ... 101
exception taken, ... 101, 103
COURTS.
will proceed without making all persons parties, ... 113–115
CROSS BILL.
answer thereto, when and how made, ... 129

D.

DECREE.
form of, ... 137
clerical mistakes in, how rectified, 137
on "bills taken *pro confesso*," . . 98
made without prejudice to parties absent, ... 113, 115
made through want of parties suggested, ... 117
for an account of personal estate, shall direct, &c., ... 129
DEFENDANT.
before whom he may make oath to his answers, ... 121
DEMURRER.
when filed, ... 97
not allowed, unless, ... 106
allowed to whole or part of bill, . 106
set down by plaintiff for argument, ... 106
when not overruled, though defective, ... 108
plaintiff shall be deemed to admit the truth thereof, ... 109

E.

EVIDENCE.
before master, how taken down, . 134
EXCEPTIONS.
taken for scandal and impertinence, ... 103
duly filed, ... 103
EXCEPTIONS — *continued.*
when considered abandoned, . . 123
allowed, must be answered in full, ... 123
as of course, ... 123
set down for answer, . 123

F.

FORM.
of bill, ... 98
last interrogatory, ... 128
FORM — *continued.*
the part preceding the interrogatories, ... 112

G.

GUARDIAN.
ad litem to defend a suit, how appointed, ... 137
GUARDIAN — *continued.*
may institute suit, ... 137

H.

HEIR-AT-LAW. (*See* PARTIES, 116.)

I.

INFANTS.
when parties to bill must be so stated, ... 100
INTERROGATORIES.
how divided, numbered, and specified, ... 111
form of such specification, ... 111
specification of, how considered, . 111
additional, specifications of, how considered, ... 111
not obliged to answer, ... 112
INTERROGATORIES—*continued.*
special, not necessary to obtain discovery, ... 141
INJUNCTIONS.
to stay proceedings at law, ... 118
special, granted, &c., ... 118
granted in vacation, how disposed of, ... 118
asked for, in prayer for relief, sufficient, ... 100
ISSUE.
when joined, ... 124

M.

MASTERS.
proceedings before, ... 129–137
matters of reference before, when made, ... 130
duties of, in matters of reference, ... 130, 131
may proceed *ex parte*, ... 130
may adjourn proceedings, ... 130
must report without delay, ... 130
report, how made up, ... 131
rights of, in all matters, ... 131
may compel attendance of witnesses, ... 132
may use documents before used in court, ... 134
may examine creditor or others presenting claims, ... 134
how appointed, ... 134
in particular cases, ... 134
fees, ... 134
shall not retain report as security therefor, ... 134
is allowed attachment for fees, . 134
report, where filed, ... 135
exceptions thereto, when taken, ... 135
how disposed of, ... 135
otherwise stands confirmed, 135
MASTERS—*continued.*
MORTGAGES.
decree may be rendered, ... 143
execution may issue, ... 143
MOTIONS.
which are granted of course, . 88, 90
made at chambers, where entered, ... 89
so entered, sufficient notice to parties, unless, ... 89
granted in vacation time may be rescinded, ... 90
not grantable as of course, how obtained, ... 91

N.

NOTICE.
what is sufficient, ... 89
to solicitor, notice to parties, unless, &c., ... 89
NOTICE—*continued.*
time of, may be abridged, ... 89

O.

ORDERS.
made as of course, when obtained, ... 88
ORDERS—*continued.*
interlocutory, made in vacation, . 89
made at chambers, how entered, . 89

P.

PARTIES.
to suits concerning real estate may be represented by trustees, &c., ... 115
heir at law not necessary to execute trusts in a will, ... 161
when not obliged to appear and answer, ... 118
when entitled to all costs for appearing, ... 118
want of, suggested, set down for answer, ... 116
must be so noted, ... 116
not amended as of course, ... 116
court will proceed to decree, notwithstanding, ... 117
(*See* DECREE, 113, 115.)
PERSONS.
liable on joint and several demand, not necessarily made parties, ... 116
not parties to a suit, can enforce orders obtained, ... 93
orders how enforced against persons not parties, ... 93
PLEAS.
when filed, ... 97
PLEAS — *continued.*
to whole or to part allowed, . . . 106
not allowed, unless, ... 106
may be set down for argument, . 106
how far facts stated therein shall avail the defendant, ... 106
not overruled though defective, . 108
when plaintiff shall be deemed to admit truth thereof, ... 109
PETITION.
for rehearing, when granted and when not, ... 138
necessary contents thereof, ... 138
signed by counsel, ... 138
verified by oath of party, ... 138
PROCESS.
to require defendant's appearance, 91
compel obedience to decrees, . 91
execute final decrees, ... 92
enable plaintiff to obtain a proper decree, ... 97
PRAYER.
for subpœna contain names of all defendants, ... 100
PROCHEIN AMI. (*See* GUARDIAN.)
may institute suits, subject to order of court, ... 137

R.

RE-HEARING.
(*See* PETITION, 138.)
REPLICATION.
special, not allowed, ... 113
when filed, ... 124
if not filed in time, ... 124
RULES.
which are granted as of course, . . 88
RULES — *continued.*
made in vacation, ... 89
when entered, &c., ... 89
prescribed, when they do not apply, ... 139
present, when to take effect in Circuit Courts, ... 140
may be previously adopted, ... 140

S.

SCANDAL.
and impertinence in bill, ... 102
order of reference for, not made unless, ... 103
reference on, when abandoned, . 103
SERVICE.
of processes, by whom, ... 95
SUBPŒNA.
when issued, ... 94, 119
returnable, ... 94

SUBPŒNA — *continued.*
may be sued out for each defendant, ... 94
service of, how made, ... 95
returned not executed, ... 95
how entered, ... 96
SUITS.
when stand revived as of course, 119
SUPPLEMENTAL BILL.
when necessary, ... 120
leave to file, when granted, ... 120
filed, defendant shall, &c., ... 120
need not set forth statements in original suits, ... 120

T.

TESTIMONY.
commissions to take, issued in vacation or term time. 125
may issue *ex parte*, ... 125
when taken by oral interrogatories, ... 125
may be taken by deposition after issue joined, ... 126
time allowed to take, after cause at issue, ... 127
TESTIMONY — *continued.*
taken, publication thereof how ordered, ... 69
de bene esse, ... 127
taken, witness aged or infirm, ... 127
witness leaving country, &c., ... 127
TRUSTEES.
(*See* PARTIES, 115.)

W.

WITNESS.
See TESTIMONY *de bene esse*, . 127
oral examination of, ... 141
compulsory attendance of, ... 141
WRIT OF ASSISTANCE.
when granted, ... 93
attachment shall issue, ... 92
sequestration, ... 93