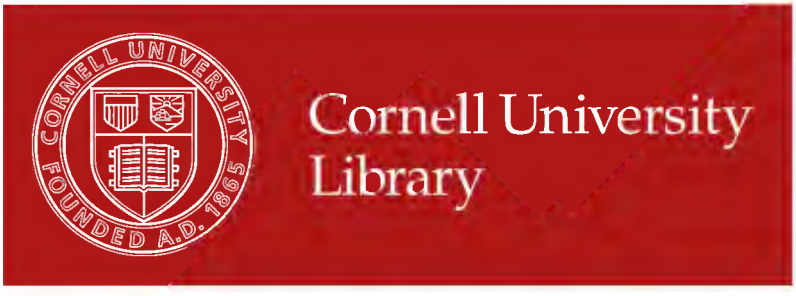
Equity Pleading and Procedure.



A PRIMER

IN

Equity Pleading and Procedure

Being a series of lectures delivered before students of the Law Department of the University of Minnesota,

By SELDEN BACON,
Instructor in Civil Procedure.

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This pamphlet is the result of an attempt to enable a class of law students to obtain, in the brief time allotted in their course to this subject, such a general idea of the nature of equitable proceedings, that such knowledge of the subject as they hereafter acquire, may be readily assimilated by them. It is intended simply as a primer.

Liberal use has in a number of instances been made of the work of Mr. Justice Story, but it has not been thought necessary to make specific mention thereof in each place.

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LECTURE I.

OF THE RISE OF CHANCERY-JURISDICTION AND OF PARTIES IN EQUITY.

OF THE RISE OF CHANCERY-JURISDICTION.

As we have seen in studying the rise of the common law courts, their power was of slow growth, their resources were limited, their ability to enforce their judgments slight, in early and turbulent days. In a local or baronial court a poor suitor might get little redress against a wealthy and powerful defendant. In the king's courts justice was administered with a stronger and firmer hand, but still there too the difficulty was apparent. Difficulties were of two great kinds, 1st, inefficiency of the courts and judges in the administration of the remedies the law had placed in their hands; and 2nd, inadequacy of the remedies afforded by the common law even when properly administered. In the earliest times the common law actions sufficed for the needs of a simple race which had neither commerce nor wealth, and as long as the courts made no pretence of enforcing their decisions but simply authorized the plaintiff to obtain redress, if he could, by the strong hand, their feebleness was a matter of small moment, but long before the Conquest (1066) the courts had begun to enforce their decrees, and their inefficiency in bringing powerful barons to terms was seriously felt. We very early find complaints of the weakness of the administration of justice, and the complainants asking the strong assistance of the king in their efforts to obtain justice. Such extra-legal applications we find even under the stern rule of the Conqueror, and they appear with growing frequency down to the times of Edward III and Richard II.

In the earlier days of this long period, the days of greater

turbulence and simpler transactions, the applications to the king are apt to be grounded on the poverty or sickness of the petitioner, the wealth and power, or learning, of his opponent, which enables him to set at naught all the efforts of the poor applicant to obtain redress, and they implore as a favor (matter of grace) the aid of the king.

The inadequacy of the common law remedies, if properly administered, is not for some time seriously felt, but the king in his progresses through the realm meets frequently with applications for relief for petitioners who cannot obtain redress owing to the inefficiency of the courts. Upon these applications to his favor the king would sometimes give aid—he might give or refuse as he would—and being untrammeled by any rules of procedure, could determine on such rude justice as he deemed best adapted to the special case; could draw before him one and another, whenever he had reason to suppose their presence advantageous in making disposition of the case, and could then grant such aid as he saw fit, irrespective of any rules of law, as well as of the position of the individual as plaintiff or defendant. These applications to the king seem from the first to have been based largely on the actual power of the king to bring an oppressor to terms. He can make it very uncomfortable for any man who refuses to do as the king would have him do; his arm is strong. In course of time this power of granting justice gets, as we shall see, to be recognized as a prerogative right of the king.

As time goes on these applications to the personal power of the king increase in numbers, especially so after the establishment of a separate court of Common Pleas at Westminster. The king, busied with other matters, turns over the consideration of some of these questions as they arise to his confidential adviser, his chancellor, the keeper of his seal, or some other officer.

In the 13th year of the reign of Edward I (1285) the ordinary transactions of commerce and the increase in personal property had reached a point which made an enlargement of the common law remedies absolutely essential. The act of

parliament of that year resulted, as we have seen, in the development of the common law actions of *Case*, *Trover*, and *Assumpsit*. These developments met for fifty years the main requirements of the increase of business and wealth, and of the growing complexity of business relations.

Most important factors in the development of the English courts were the continental possessions of the English kings. The long absences of Edward III from England produced two important changes in the framework of the English courts, 1st, the permanent establishment of the court of King's Bench at Westminster, a matter which, by its final separation of the ordinary administration of justice from the person of the king, and its committal of the same to trained lawyers, tended largely to give definite form to legal proceedings and to make law more uniform; and 2nd, a thing small in itself, perhaps, but really the origin of the great court of chancery, the issuance of a general order by the king (Edward III) in 1348, referring *all such matters as were of grace* to the chancellor. This order was intended to turn over generally to this officer the consideration of the applications for favor which had theretofore been considered by the king, or, on special reference, by his chancellor, as already stated. Your special attention is called to the language of this order (*matters of grace*), as on its terms depends largely the nature and extent of equity jurisdiction and jurisprudence.

A glance at the condition of affairs in England will help to make clear the effect of this important order. The strong, firm government of Simon de Montfort and of the Edwards had been rapidly creating a community of wealth and power. About the commencement of the reign of Edward I an astute lawyer had invented the feoffment to uses, and these were now gradually becoming common. Since the time of John, England had been paying tribute to Rome. Aware of their increasing strength the English now refused this payment. The name of Rome was odious to the nation. These are the days of Wickliffe. Roman law—a body of rules unknown to the English—shared in the general hatred of Rome. And such hatred was

not altogether ill-founded, for Roman law meant to the Englishman two things, first, that his case would be tried and his conduct judged by rules concerning which he was wholly ignorant and which were not taken into consideration at the time of acting; and second, that his case might be dragged down to Avignon, in the south of France, for consideration, where delay would succeed delay, and procrastination would be worse than defeat. The Barons loudly protested they would never suffer the kingdom to be governed by any laws save those of England. The judges prohibited the citation of the Roman law in the courts, and stood firmly in favor of English liberty against Roman oppression. In the political struggles is seen the reason of the failure of the common law courts to extend their powers under the statute as to writs *in consimili casu.*

In the complications of politics the King was now on this side, now on that. His chancellor was, however, always an ecclesiastic. From the time of Richard II till the time of Henry VIII no lawyer was chancellor of England. In shutting out the Roman law from the law courts the judges had banished the Roman doctrine of trusts. Uses were growing in importance, the *cestui que use* had no *legal* title, the law courts would not recognize him. If he were defrauded his sole redress lay in applying to the king to right his wrong. This order of Edward III came just at this time. It threw into the hands of this ecclesiastic chancellor arbitrary power in vast numbers of cases of great importance. For fifty years parliament after parliament remonstrated bitterly against the power of the chancellor under this order. Parliament after parliament was met with the answer that the king would preserve his prerogative. The prerogative was recognized and the unpleasant answer deemed sufficient, though some claimed that the prerogative right could not be delegated. After fifty years of unavailing protest against the existence of the chancery jurisdiction, lords and commons addressed themselves finally to its regulation. In this effort they succeeded. By the statute of 17 Richard II (1394), parliament indirectly affirmed the

existence of the court of chancery by restricting the exercise of its powers to cases *where no remedy was afforded by the common law*. Order and statute combined gave the court of chancery permanent form and permanent powers and firmly established its jurisdiction. The law courts had now acquired such a degree of efficiency and impartiality as to make any inefficiency of theirs a less evil in ordinary cases than the exercise of arbitrary power by the chancellor. Through the reigns of Henry IV and Henry V the fight over the jurisdiction of the chancellor in common law cases was kept up, but only to result in repeated and final re-enactments of the rule that the powers of chancery were never to be exercised (though the jurisdiction might exist) in cases where a remedy existed at the common law. From the order of 1348 and the statute of 1394 the court of chancery takes its rise. The powers and jurisdiction of equity courts to-day depend on these old provisions and no true understanding of equity jurisprudence and jurisdiction can be obtained without comprehension of the two.

A curious application of these two rules appears where a case has been brought in chancery where the common law affords a remedy. By the order, the matter being *of grace*, the chancellor has jurisdiction. By the old act he is forbidden to exercise his jurisdiction. The rule is well settled in such case that if the objection is taken promptly in the pleadings the chancellor will refuse to hear the case, but that if the objection is not taken until final hearing the chancellor may, and ordinarily will, go on and determine the case, and that his determination in such case will be final and not open to question for lack of jurisdiction (*a*).

Those cases, where chancery once gave a remedy, but was forbidden to do so by these statutes, are said to belong to the *obsolete* jurisdiction of chancery. They are, you notice, the cases which were originally brought to the King by reason, *not* of the inadequacy of the common law remedies, but of the inefficiency of the courts. The law courts have become quite

(*a*) Wiswall vs. Hall, 3 Paige, 313; Russell vs. Loring, 3 Allen 121; Crump vs. Ingersoll, 49 N. W. Rep. 739.

as efficient in their sphere as the equity courts in theirs; and there is no need of any such chancery jurisdiction.

The powers of the chancellor were for hundreds of years purely arbitrary. He acted as they said, "according to his conscience". His administration of justice was the butt of the wits at the bar of the law courts. The famous characterization by Selden* was true enough even in his day for an epigram. Even during the reigns of Henry VIII and Elizabeth, some chancellors still seem to have considered themselves entitled to decide simply according to their private ideas of right; but with the accession of Francis Bacon to the woolsack came a change. He found the court of chancery the abode of all sorts of evils and delays; cases were years in arrears. In his short term he cleared up the whole mass of delayed cases. His orderly, legal mind brought forth his Ordinances, which established the practice of the court and to-day are the ground-work of the rules of equity procedure in both England and the United States. From the Ordinances dates the modern court of equity. They imparted to the procedure and to the rulings of the court a uniformity which they had never before known. One might even say that they introduced there the reign of law.

Upon these broad foundations the great modern chancellors built up the science of equity jurisprudence. The first of them Sir Heneage Finch (Lord Nottingham) showed in his decisions that a new character had been given the court. He announced it as a cardinal principal of the court of chancery that "With such a conscience as is only *naturalis et interna*, this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures" (*a*).

Withal, the system of equity has retained a power of expansiveness in all directions utterly unknown to the common law,

*"Equity is a roguish thing. For law we have a measure and know what we "trust to. Equity is according to the conscience of him that is chancellor; and as "that is larger or narrower, so is equity. 'Tis all one as if they should make his "foot the standard for the measure we call a chancellor's foot. What an uncertain "measure would this be. One chancellor has a long foot, another a short foot, a "third an indifferent foot. 'Tis the same thing in the chancellor's conscience."

(*a*) Cook vs. Fountain, 3 Sw. 585, 600.

and it is the boast of equity that it will not suffer a wrong without a remedy.

For a more full consideration of what I have here been outlining I will refer you to the works mentioned in the footnotes (*a*).

We must now turn our attention for a few moments to the simple beginnings of chancery procedure. The court of chancery entered upon its existence with some habits and customs attached to it derived from the desultory action of the chancellor and king in the previous 250 years. Among the most important of these were the following:

1.) a method of being set in motion;

2.) a power to consider the rights of all the different parties interested and to have them all before it at once;

3.) a method of getting unwilling parties to come before it;

4.) a method of getting at the facts in the case;

5.) a discretion to act, or no, or to such extent only as it chose, as its sense of fairness might require upon all the facts in the case;

6.) a discretion to accord whatever remedies seem adapted to the case, and to apportion them in such manner and upon such terms as it saw fit.

1.) Its method of being set in motion was quite simple. The party aggrieved made out and filed in the chancellor's office a written statement of the facts in the case, showing how wronged he was, and how much in need of the assistance of the chancellor. This statement was called his "bill".

In the bill the orator, as he was called, simply detailed the facts. No special phraseology was at first required, nor was it necessary that the cause of suit be set out in any such set or definite terms as were required in a declaration in an action at law. The bill was not founded on any *regula juris*; it frequently sought relief against some rule of law. All the plaintiff had to show was that his was a case entitled to relief under the powers given by the general delegation. Early bills almost

(*a*) 1 Pom. Eq. Jur., Secs. 10-67; 1 Spenc. Eq. Jurisd., pp. 87-128.

universally pray for a subpœna, sometimes for a different writ, sometimes for several different processes; many of them fail to comply with the later rules concerning the requisites of the bill. They always conclude in terms of supplication such as "for the reverence of God, and for work of charity", the plaintiff sometimes adding "and he shall ever pray for you", which in its modified form of "and your petitioner shall ever pray" was the ordinary conclusion of a bill down to the most modern times.

A copy of an early bill will be found in Barton's Suit in Equity, note 1, page 25, to which your attention is directed. It is a bill belonging to the obsolete jurisdiction of equity.

2.) It had also been adopted by the chancellors as a cardinal rule, that they would have all the immediate parties to the dispute before them in order to hear all sides of the question, and dispose of all the questions involved at once. And as the number of parties did not in any way obstruct the apportionment of relief among the parties, there was nothing against, and everything in favor of the excellent plan of insisting on having everyone before the court whose presence was necessary to a final determination of the questions involved. As it made no difference in apportionment of the relief, what the parties were named, the only classification in entitling the bill and proceedings, was into *a*), the exhibitors of the bill, the plaintiffs, *b*), all others, the defendants; and additional defendants, and sometimes plaintiffs could be brought into the case without serious disturbance, or in a similar way improper parties could be excluded. The whole system was highly flexible.

3.) The means of bringing unwilling persons before the court was the writ of subpœna, a writ commanding the individual to appear *sub pœna*, (under pain) of the penalties which the chancellor would impose in case of default.

In ancient times, the chancellor before issuing the writ of subpœna, would examine the bill, and at times would advise with the judges in peculiar instances as to the advisability of taking any steps in the matter. The whole proceeding was eminently an exercise of the prerogative of grace. As bills

grew more numerous, the certificate of counsel, a trusted and high officer of the court, that the bill was well founded, took the place of the preliminary examination by the chancellor of the bill.

Sometimes indeed, in the early times before issuance of the writ, the chancellor would write a letter urging the defendant to do justice to the plaintiff, and only upon refusal would the chancellor take the step of issuing a subpœna. It was the efficacy of this writ of subpœna which made the contest between chancery and parliament already referred to.

4.) One of the most important matters brought into their procedure by the chancellors was their habit of having the defendant come into court and tell his side of the story himself—a thing never permitted in the common law courts till the most recent times, and then only by statute. This chancery method was not an unnatural method of procedure, but it differed from the common law method in many important ways.

Defendant was to tell the whole story; he was to give the evidentiary facts; and when he had done so his answer was evidence in the case both for him and against him; moreover all this was reduced to writing and signed by him; differences which in course of time led to important developments of which we shall see more in due time.

5.) The matters referred to the chancellor were matters *of grace*. No suitor in equity demanded as *of right*, the orator humbly petitioned as *of grace*, and it was *of grace*, a favor, when relief was granted him. From this feature of the jurisdiction, spring some of the most important doctrines of equity, jurisprudence; such as are sustained by the maxims, "He who seeks equity must do equity"; "He who comes into equity must come with clean hands"; "Equity aids the vigilant, and not those who slumber on their rights".

6.) Untrammeled by strict rules of procedure, able to have many differing interests before them at once; able to act or no as *of grace*; the chancellors saw their opportunity, and felt their power to accord such relief, on such terms, to such persons, and in such measure as they saw fit. Herefrom flows

the truth of such great maxims as "Equity will not suffer a wrong without a remedy", and the like.

In addition to these practices the old ecclesiastical chancellors brought to their work some knowledge of the Roman law; estates to uses were coming rapidly into favor during the reign of Richard II; and to these two facts we owe to a great extent the deep root in English equity taken by the doctrine of trusts, so largely borrowed from the Roman law of *fidei commissa.*

The whole proceeding in equity took the form familiar to the ecclesiastics learned in the Roman law. The first step was a statement by the plaintiff to the court, of the facts on which he sought relief. If the chancellor deemed it a case where he would care to act, he subpœnaed the defendant to come in and tell what he knew of the facts in the case. This written statement by the defendant was termed his answer. In early days the pleading continued at length, but in modern times the only subsequent step in the pleading is a general replication by which the plaintiff reasserts the allegations of his bill, and denies the new matter of the answer. Any confession and avoidance of the answer is now done by amendment of the bill, and not by subsequent pleadings.

Out of the disclosure contained in the answer arose the classes of bills formerly of so great importance, known as bills of discovery, and bills to take testimony *de bene esse*, of which the object was solely to obtain a statement of facts, which could be used as evidence.

Pleadings are fundamentally of the same nature in equity as at law; but pleadings in equity, from the nature of the cases frequently do not admit of the same precision as at law; moreover the disclosures of equity pleading entail an additional element of much importance. But all the general rules of statement which govern pleadings at common law obtain likewise in equity, though sometimes in a slightly modified form; and in matter of substance the same strictness is required in equity as at law (*a*).

(*a*) Burditt vs. Grew, 8 Pick., 108; Hood vs. Inman, 4 John. Ch., 437.

A. CAPACITY TO SUE.

The first question as to parties is, of course, who is entitled to exhibit a bill in equity. The following are absolutely disabled from exhibiting bills: (outlaws, excommunicates), alien enemies, and persons attaint. All other persons may sue in equity, either in their own persons or vicariously (*a*).

A possible exception to these disabilities exists where one under disability is sued at law, and needs the assistance of the Equity court to perfect his defense, and possibly also in a case of alien enemy under some special circumstances (*b*).

Under the equity system a suit by the state is brought in the official name of the attorney general as plaintiff and the first pleading is denominated an *information* instead of a *bill.*

Where the suit immediately concerns the rights and interests of the state, the public officer so sues without uniting the name of any other person as plaintiff. But where the suit does not immediately concern the rights or interests of the state, but only of those under its peculiar protection, or the subject-matter is *publici juris*, there the attorney general more commonly sues *upon the relation* of some person indirectly interested, who is named in the bill as *relator.* The main object of having a relator is to secure to the defendants their costs, in case the information is improperly filed. He is not a party to the suit(*c*). It sometimes happens that the relator has an interest in the matter in dispute. In this case he must be joined as a party plaintiff, and his personal complaint incorporated with the information of the attorney general and the whole constitutes, and is termed an information and bill. If the information is well founded, and the bill not, the information will be retained and the bill dismissed (*d*).

Corporations and all persons *sui juris* sue and are sued in their own names. Persons under partial disabilities are (except so far as altered by statute) *femes covertes*, minors, idiots, lunatics, and other persons under some special disabilities, as in some states, common drunkards or other persons under guardianship.

(*a*) Story, Eq. Plead., Secs. 50 and 51. (*b*) Id., Secs. 52 and 53.
(*c*) Atty. Gen. vs. Parker, 126 Mass., 221; Atty. Gen. vs. Butler, 123 Mass., 304. (*d*) Atty. Gen. vs. Parker, 126 Mass., 221.

Infants, in the equity practice, are deemed incapable of exhibiting a bill (or acting as relator or guardian) as well on account of supposed indiscretion, as of their inability to bind themselves, or make themselves liable for costs. The infant, therefor, institutes suit either by his guardian, if any, or by his *prochein ami* (next friend) (*a*).

The *prochein ami* is substantially any person who chooses to act whether with or without the infant's consent.

The *prochein ami*, however, is treated as an officer of the court, and is held responsible accordingly. Upon suggestion that the suit is not for the benefit of the infant, the Court will direct an inquiry by one of the masters of the court* and, if he reports that the suit is not for the benefit of the infant, the court will stay proceedings (*b*).

A married woman, under the old disabilities, joined her husband except where they had conflicting interests, in which case she sues by *prochein ami*, for similar reasons as an infant, (*c*) but her consent is necessary to the appearance of her *prochein ami* (*d*).

Idiots and lunatics sue by their guardians or next friends, unless some special appointment is provided for by law or by the court (*e*).

Where persons are incapable of acting for themselves, though not strictly idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as next friend. In every private suit there must be some person responsible for costs.

Further information as to the capacity to sue can be found in Story's Equity Pleading, Secs. 49-66.

B. OF CAPACITY TO BE SUED.

The state is exempt from suit in its own courts. Of foreign states and sovereigns, no jurisdiction can be acquired. The diffi-

*A master in chancery is an officer of the court who acts as assistant to the chancellor; to him are commonly delegated many subordinate duties in the course of a suit in equity; among the most important duties so delegated to him are the following, making inquiries, taking the testimony of witnsses, taking accounts in suits, and reporting the results to the chancellor.

(*a*) U. S. Equity Rule, No. 87.

(*b*) Story, Eq. Plead., Secs. 57 and 60. (*c*) U. S. Equity Rule, No. 87. (*d*) Gambee vs. Atlee, 2 De G. & Sm., 745. (*e*) U. S. Equity Rule, No. 87.

cult questions arising as to jurisdiction of the United States courts in cases where a state is attempted to be sued under section 2, of article III, of the U. S. constitution we will not attempt to consider. Bodies politic and corporate, and persons not under disabilities are sued, and defend a suit by themselves. The absolute disabilities to sue are not disabilities to being sued. The defendant cannot plead his own outlawry in his own defense.

Infants, idiots, and lunatics, defend by their guardians, *ad litem*, appointed by the court, subject to such orders as the court may make for the protection of the infant, idiot, or lunatic (*a*).

But the only step required of the plaintiff as to such parties is as follows: If any of the defendants are known to be infants under age, or otherwise under guardianship, the prayer for process in the bill shall state the fact so that the court may take order thereon as justice may require upon the return of the process (*b*). If the infant appears, he applies for a guardian for himself. In case of his default the court will take order thereon.

Married women, if under the old disabilities, should have their husbands joined, and their answer should be joint. But where a husband brings suit against his wife, or he is a defendant, and she claims in opposition to him, she may answer as a *feme sole*; as also where she is restored to her capacity by the common law exceptions or by statute. If the husband is outside of the jurisdiction, the plaintiff can obtain an order that she answer separately, and in some similar cases, the wife may answer separately. Otherwise she can defend only conjointly with her husband (*c*).

For a further discussion of the capacity to be sued, I will refer you to Story's Equity Pleading, Sections 67 to 71.

C. OF THE JOINDER OF PARTIES.

Courts of equity have adopted two leading principles for determining the proper and necessary parties to a suit, viz:

(*a*) U. S. Equity Rule, No. 87. (*b*) U. S. Equity Rule, No. 23. (*c*) Story, Eq. Plead., Sec. 71,

First. The rights of no man shall be finally decided by the court, unless he first have his opportunity to be heard—his day in court.

Second. When a decision is made upon any particular subject matter, the rights of all persons, whose interests are *immediately* connected with that decision and affected by it, shall be provided for as far as they reasonably may. Hence it is a general rule in equity (subject to exceptions) that all persons materially interested, either legally or beneficially in the subject-matter of a suit, ought to be made parties to it either as plaintiffs or defendants, however numerous they may be, so that a complete decree may be given that will bind them all (*a*). Or, as stated by Lord Hardwicke: All persons ought to be made parties before the court who are necessary to make the determination complete and to quiet the question (*b*).

Considered as a rule this is somewhat vague, but the principle of decision is clear, and there is left a great deal of elasticity in the application of the rule. This very elasticity has enabled the courts to prevent the rule's becoming an instrument of injustice, for they will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances render the application of the rule wholly impracticable. On the other hand if complete justice between the parties before the court cannot be done without others being made parties, whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings even though such other parties cannot be brought before the court; for in such cases the court will not, by its endeavor to do justice between the parties before it, risk doing positive injustice to other parties not before it whose claims are or may be equally meritorious (*c*).

Sometimes, however, parties in equity, while *proper* are not *necessary* or *indispensable* parties, (though the terms "proper" and "necessary" are frequently confounded) (*d*).

(*a*) Story, Eq. Plead., Sec. 72. (*b*) Poore vs. Clark, 2 Atk., 515. (*c*) Hallett vs. Hallett, 2 Paige, 15; West vs. Randall, 2 Mason, 190-196. (*d*) Story, Eq. Plead., Secs. 156,186, and 193, notes; Hagan vs. Walker, 14 How., 37; Jerome vs. McCarter, 94 U. S. 734; Delabere vs. Norwood, 3 Swanst., 144, note.

If the necessary parties were not made, the defendant could raise the question by demurrer to the bill, by plea, by answer, or he might object at the hearing that the necessary parties were wanting, or the Court of its own motion might refuse to proceed, or the decree might be reversed on rehearing or on appeal, or even if the objection were not made in any of these ways, as the decree binds none but those who have had their day in court, the successful party might afterwards find that he had but an empty and fruitless decree. It should perhaps be observed that objections of this character are viewed with less and less favor as the case progresses (*a*).

The doctrines as to parties constitute one of the great distinctions between legal and equitable procedure. In general courts of law require no more than that the persons directly interested in the subject matter of a suit, and whose interests are of a strictly legal nature be joined. All other persons are not only unnecessary, but a misjoinder might be fatal to the suit. All the plaintiffs must be entitled to judgment against all the defendants; except in the one case of defendants in tort actions. Joint parties must join and be joined on one side. No others can be joined. But in equity the rule is far different. Persons having joint interests may appear on different sides of the case or even may not all be parties. Parties with diametrically opposite interests may be defendants together with one who has a joint interest with the plaintiff..

For instance, in equity one of joint legatees might sue for construction of a will and make his co-legatee, the executors, the heirs-at-law, and the next of kin, all, parties defendant to the bill. At law executor and heir (as such) could never be joined, but in such a suit in equity these are all proper and, in some cases, if establishment of the will is sought, necessary parties to the suit.

Every necessary party who is not a plaintiff ought to be made a defendant. No person should ever be joined as a plaintiff who is not interested in the relief sought, as a want of

(*a*) Whiting vs. Bank of U. S., 13 Pet., 6, 14; Story, Eq. Plead , Sec. 237.

interest in one of joint plaintiffs is fatal to the suit (*a*). Ordinarily in cases of doubt you can make the questionable individual a defendant, and there is ordinarily no objection to such a course. An improper or unnecessary defendant can himself object to his joinder, but his joinder is no ground of objection in favor of the other defendants (*b*).

Parties having no common interest in the subject-matter of controversy, but asserting several and distinct rights, cannot unite and seek redress in a joint suit though their several rights are against the same person, but parties whose interests depend upon the same right, and who would be alike affected by the judgment, may be joined, even though their titles and in some respects their interests are not joint. Otherwise unconnected parties may join in bringing a bill, where there is one connected interest among them all centering in the point in issue in the cause (*c*).

Who must be made defendants? All necessary parties who are not plaintiffs. And who are necessary parties? The general rule we have already seen. We may give it some further consideration, dividing the subject as follows,

1. Who are, in the absence of special circumstances, so immediately interested in the subject matter of a suit as to be proper and necessary parties?

We may point out certain classes of persons who may be properly omitted.

a.) Persons interested only consequentially in the matter (*d*).

b.) Persons between whom and the plaintiff there is no privity (*e*).

c). Persons claiming under a title paramount to the controversy (*f*).

d.) Mere agents and others having no interest in the suit (*g*).

(*a*) Story, Eq. Plead., Secs. 232, 509. (*b*) Whitbeck vs. Edgar, 2 Barb. Ch., 106; Goncelier vs. Foret, 4 Minn., 13; Lewis vs. Williams, 3 Minn., 151; Story, Eq. Plead., Secs. 232, 509, 544. (*c*) Hawes, Parties to Actions, Sec. 96 and cases cited. (*d*). Dandridge vs. Curtis, 2 Pet., 377. (*e*) Utterson vs. Mair, 2 Ves. Jr., 95. (*f*) Eagle Ins. Co. vs. Lent, 6 Paige, 635; Banning vs. Bradford, 21 Minn., 308. But see Wilson vs. Jamison, 36 Minn., 59. (*g*) Lyon vs. Tevis, 8 Ia., 79.

But if fraud be charged and the agent participated therein he *may* be joined (*a*).

e.) Mere witnesses. But in cases of defendant corporations officers and even stockholders have been thought properly joined where they had information which they ought to give in the answer, since the corporation can make no disclosure otherwise than through them (*b*). Somewhat similarly in some cases an assignor in bankruptcy has been joined where his disclosure was needed.

Generally the holder of the legal title to the property in controversy should be brought in. In cases of joint ownership, obligations, or claims, all the joint parties should ordinarily be brought in either as plaintiffs or defendants.

Sometimes by framing the bill so as to waive some claim which lies against that person only, an inconvenient party will cease to be necessary (*c*).

A large number of authorities on proper parties in individual cases are collected and carefully classified in Story's Equity Pleading, sections 136 to 238, and to these I must refer you for further discussion of this point.

2. Under certain circumstances parties ordinarily necessary can be dispensed with. Hereunder we may state briefly three cases all alike grounded on the impracticability of making the persons parties.

a,) Where the necessary person has no existence and this is shown in the bill. As for instance where a personal representative of a deceased person is a necessary party and the representation is in litigation (*d*).

b,) Where the necessary person is unknown to the plaintiff, and this appears by the bill, and the bill seeks a discovery of him (*e*).

c,) Where the Court cannot get jurisdiction of the necessary person, he being merely a passive object of the judgment of the court and his rights merely incidental to those of the parties before the court.

(*a*) Bowles vs. Stewart, 1 Sch. & Lefr., 227; LeTexier vs. Anspach, 15 Ves., 164; Marshall vs. Sladden, 7 Hare, 428; Attwood vs. Small, 6 Cl. and F., 352. (*b*) French vs. First National Bank, 7 Ben. 488. (*c*) Story, Eq. Plead., Sec. 228. (*d*) Story, Eq. Plead., Sec. 91. (*e*) Fenn vs. Craig, 3 Y. & Coll., 216, 224.

If such absent persons are to be active in the performance or execution of the decree; or if they have interests wholly distinct from those of other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties; and under such circumstances, their being out of the jurisdiction, constitutes no ground for proceeding to a decree against them or their rights or interests; but the suit as far as they are concerned will be stayed. In many instances this objection will be fatal to the suit. In others it will not prevent a decision of other questions between the parties actually before the court, even though such a decision may incidentally touch on the rights of the absent parties, but such absent parties will not be concluded by the decree (*a*).

Two important modifications of this old doctrine of equity may be adverted to. The ancient maxim was that equity acted *in personam* and not *in rem*. This rule was one of the outcomes of the struggle between the chancellors and parliament. Under that doctrine, unless the court of equity got actual personal jurisdiction of the defendant it could not bind him at all (*b*). But in the United States this doctrine has met with some qualification and here equity sometimes proceeds *quasi in rem*. When the property affected is in the possession or control of the court, the absent defendant must be joined, and after notice in accordance with the rules of court or provisions of statute the court in many cases may and will proceed against the absent defendant to the extent of the property in its custody (*c*). On the other hand, in the United States Federal practice jurisdiction of the case would frequently be ousted by joining otherwise proper parties, on account of citizenship, and if a decree can be made without such parties the court will dispense with them (*d*). But if these parties are indispensable to any

(*a*) Shields vs. Barrow, 17 How. 130; Story, Eq. Pleading, Secs. 78 to 90; U. S. Equity Rule, No. 47; U.S. Rev. Stat. (1878), Sec. 737. (*b*) Smith vs. Hibernian Mine Co., 1 Sch. & Lefr., 240; Kirwan vs. Daniel, 7 Hare, 347. (*c*) 1 Pom. Eq. Jur., pages 118 and 119; Cassidy vs. Shimmin, 122 Mass.; 406; U. S. Rev. Stats. (1878), Sec. 738; Lydiard vs. Chute, 45 Minn., 277. (*d*) U. S. Equivt Rule, No. 47; Harrison vs. Urann, 1 Story, 64; Drake vs. Goodrich, 6 Blatchf., 151.

decree, the court will not proceed, but will dismiss the bill (*a*).

3. In certain classes of cases the court, owing to the impracticability of making all persons direct parties to the suit, will deem the objects of the rule accomplished if such persons are indirectly parties, in a manner to be briefly described, and their interests suitably represented.

Reference is not had under this head to such cases as that of executors, who are deemed to represent the estate so that in suits against the estate mere legatees are not properly joined; such cases are not properly to be classed under this head, as the legatee is not necessary, but comes under the head of improper parties; here the person indirectly made a party, is in some sort an actual party to the suit, and may, if he will, actually appear and participate in the proceedings, as follows:

Where the parties are exceedingly numerous (in Small vs. Atwood, there would have been over four hundred) and to join them all would be impracticable owing to the difficulties of obtaining jurisdiction, constant abatements by death of parties, etc., etc., the court will not insist, in certain cases, on their all being made actual parties, but will permit a few to be made parties on behalf of themselves and all others in like position, and will then give a decree which will bind all alike. This class of cases is carefully limited. The fact of numerousness must be made to appear on the face of the bill. It must also, especially in case of defendants, in every case appear that enough are made actual parties to fairly represent the rights of the whole number (*b*).

The cases where this is permitted, the above-mentioned circumstances existing, may be subdivided into three classes, as follows:

a,) Where the question is one of *one same common or general interest* and one or more sue or defend for the benefit of the whole number having such interest. Hereunder we may put the case of a few of the crew of a privateer bringing suit on behalf of themselves and the rest of the crew against prize

(*a*). Conn vs. Penn., 5 Wheat., 424; Ribon vs. R. R. Co. 16 Wall., 446; Dormitzer vs. Ills. & St. L. Bridge Co., 6 Fed. Rep., 217. (*b*) Adair vs. New River Co., 11 Ves., 445.

agents for an account and their proportion of the prize money. If the bill is brought by a few of the crew on their own behalf *only*, others being unpaid, the bill will be dismissed for lack of such others, but if brought *on behalf of themselves and of all the rest of the crew who have not received their share* this defect will be cured (*a*).

Under this class come too the very common cases of creditor's bills for marshalling and administration of assets of a deceased or bankrupt debtor (*b*). Similarly one legatee may frequently sue on behalf of himself and all other legatees (*c*).

If the exhibitor of the bill has not a common interest with those whom he seeks to represent he cannot so proceed under this class. Thus a mortgagee cannot sue on behalf of himself and of all unsecured creditors without first surrendering his security. Otherwise, the rights are not homogeneous, or for objects equally beneficial to all; others might desire to contest the exhibitor's mortgage (*d*).

b,) Members of a voluntary association, stockholders of a corporation, members of a stock company, partners, *when very numerous* may so sue and be sued (*e*). If any stockholders or members of the association have interests specially adverse to those of the others, they ought of course to be made actual parties (*f*). Sometimes, though rarely in cases of this sort, if relief is prayed only against the actual defendants, it has been held that the court will dispense with making all others parties (*g*).

c,) The third class of these cases is the most peculiar; here as before, the parties must be very numerous, so that it is impracticable to bring them all before the court, and yet they have several and distinct interests, but there exists a common right which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, to narrow, or to take away, and the court has before it enough actual parties

(*a*) Leigh vs. Thomas, 2 Ves. Sr., 312; West vs. Randall, 2 Mason, 193; Good vs. Blewitt, 19 Ves., 336. (*b*) Hallett vs. Hallett, 2 Paige, 18; Pritchard vs. Hicks, 1 Paige, 270. (*c*) Manning vs. Thesiger, 1 Sim. & Stu., 106. (*d*) Burney vs, Morgan, 1 Sim. and Stu., 358, 362; Newton vs. Egmont, 5 Sim., 37. (*e*) Small vs. Atwood, Younge, 407; Meux vs. Maltby, 2 Swanst., 284; Clements vs. Bowes, 16 Jur., 96; Wood vs. Dummer, 3 Mason, 315, 319; Hichens vs. Congreve, 4 Russ., 562, 576; Crease vs. Babcock, 10 Met., 532. (*f*) Richardson vs. Hastings, 7 Beav., 323; Clinch vs. Financial Co., L. R., 4 Ch., 117, 122. (*g*) Anon., 2 Eq. Abr., 166 pl. 7.

honestly, fairly, and fully to ascertain and try the general right. As an example of this class of cases, we may take the early case of York vs. Pilkington. In that case the bill was brought to quiet the plaintiffs' right of fishery in the River Ouse, of which plaintiffs claimed the sole fishery. The actual defendants were owners in severalty of different tracts bordering on the river, between whom there was no privity. The bill was sustained (*a*). Hereunder, too, come cases by tax-payers on behalf of themselves and all others subject to a tax to restrain its assessment or collection (*b*).

A full discussion of this branch of the subject of parties in equity is found in Story's Equity Pleadings, Secs. 77 to 136.*

In concluding this discussion of parties in equity, it may be added that the fullest liberty of amendment by adding proper parties who have been omitted, is ordinarily allowed at all stages of the proceeding (*c*).

And even if the bill should be dismissed for defect of parties, it will be without prejudice to another bill (*d*).

(*a*) Mayor of York vs. Pilkington, 1 Atk., 282; Weale vs. Water Works Co., 1 Jac. & Walk., 369. (*b*) 1 Pom. Eq. Jur., p. 278, note 1, and cases there cited. (*c*) Story, Eq. Plead., Secs. 237, 541, and 884; U. S. Equity Rules, Nos. 28, 29, 52, and 53. (*d*) House vs. Mullen, 22 Wall., 42.

*NOTE. The doctrines concerning parties inconveniently numerous, set out on pages 19, 20, and 21, are somewhat modified in the United States practice by the provisions of the U. S. Equity Rule, No. 48, to which attention is directed. The rule will be found given in full on page 90, *infra*.

LECTURE II.

OF BILLS IN EQUITY.

The general course of procedure in equity is as follows: the bill, by the plaintiff; the answer, by the defendant; the replication, by the plaintiff; trial of the issues, findings by the court, and decree; besides these steps, there are, of course, numerous collateral and incidental steps in the proceeding, to which we shall be able to give some attention later. In this lecture we shall devote ourselves to the first step in a proceeding in equity—the bill—the plaintiff's application to the chancellor for relief.

Bills in equity are divisible into two great classes, I, ORIGINAL BILLS, which relate to some matter not previously litigated in the same court, by the same persons, standing in the same interests; II, BILLS NOT ORIGINAL, which relate to some matter already litigated in the same court, by the same persons, standing in the same interest.

I. Original bills are in turn divided into two sub-classes: *a*,) Bills praying relief; and *b*,) Bills not praying relief. In a broad and general sense, all bills pray relief, since they seek the aid of equity, but this nomenclature has been adopted as describing, under the head of bills praying relief, such as seek in that very suit a decision upon the merits of some matter of controversy, and the award of a decree ascertaining and protecting present rights, or giving redress for present wrongs; while, under the head of bills not praying relief, are not inaptly described certain kinds of bills which merely ask the aid of the court in obtaining evidence for use in other suits, either in the same or in other courts.

a.) Original bills praying relief are of three kinds:

(1.) Bills praying the decree or order of the court touching some right claimed by the party exhibiting the bill in opposition to some right, real or supposed, claimed by the party

against whom the bill is exhibited, or touching some supposed wrong done in violation of the plaintiff's right. This is the ordinary bill in equity by which a proceeding is instituted. It is sometimes spoken of as an English bill.

(2.) Bills of Interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the person exhibiting the bill. A bill of this kind is ordinarily exhibited where two or more persons claim the same debt, duty, or thing from the plaintiff, and he not knowing to which he ought rightly to render the same, and fearing injury if he decide wrongly, prays that they be called on to state their adverse claims so that the court may adjudge to whom the debt, duty, or other thing belongs. The plaintiff must state his own rights and negative any interest in the thing in controversy; and must also state the several claims of the defendants so that it will appear that each has a claim of right. He must moreover append an affidavit that he is not in collusion with either party. The plaintiff, if there is any money due must bring it into court, or at least offer to do so in the bill.

Sometimes where the plaintiff is also entitled to some further relief himself, he may bring a bill in the nature of a bill of interpleader (*a*).

(3.) Bills of Certiorari, which pray a writ of certiorari in order to remove a cause from an inferior court of equity for the purpose of having it further proceeded in and decided in the superior court of equity in which this bill is filed, and to which the process is returnable. They are rarely if ever used in this country.

b.) Original bills not praying relief are of two kinds.

(1.) Bills to Perpetuate Testimony and bills to examine witnesses *de bene esse*, for use in actions or suits in any court.

Such a bill must show the subject-matter and right touching which, plaintiff is desirous of giving evidence. It must show that he has an interest therein which may be endan-

(*a*). Story, Eq. Plead., Secs. 291-297 b.

gered. It must also show what facts the witnesses can testify to. It must further show that defendant has an interest to contest plaintiff's title. It must also show necessity for perpetuating the evidence.

It must pray that the witnesses be examined to the end that their testimony be perpetuated. It must not pray that defendant abide the order and decree, or it may be dismissed as being a bill for relief which states no case for relief. Bills to perpetuate testimony are used where no present action can be brought at law; bills to take testimony *de bene esse*, are sustainable only in aid of suits already pending; otherwise they are substantially the same (*a*).

(2.) Bills of Discovery, technically so-called, that is bills simply for the discovery of facts resting in the knowledge of the party against whom they are exhibited, or of deeds, writings, or other things in his custody or power, for use in some action either pending, or to be brought to which the defendant is or is to be a party. As in the preceding class, the bill must show the facts constituting the plaintiff's right to discovery, and must not pray relief (*b*).

These bills of discovery are an outgrowth of the evidentiary nature of the answer in equity, and were the ordinary means of obtaining the testimony of your opponent for use in an action at law where, under the old law, he was not permitted to testify. Bills of discovery, to perpetuate testimony, and to take testimony *de bene esse* are, in this country, substantially obsolete, their places having been taken by statutory remedies of a more simple character (*c*).

II. Bills not original are of two classes.

a.) Bills in addition to or in continuance of an original bill, these are of three kinds.

(1.) Supplemental Bills, which are merely in addition to the original bill, setting up facts which have arisen since the filing of the original bill, and are substantially like pleas *puis darreign continuance* at law. Matters occurring before the filing

(*a*). Story, Eq. Plead , Secs. 300-310; (*b*). Story, Eq. Plead., Secs. 311-325; (*c*). Cf. Gen. Stat. 1878 (Minn.), Cap 73, Secs. 6-14 and 36-52.

of the bill but discovered later are properly to be shown by amended and not by supplemental bill. But sometimes where the matters are discovered too late to be incorporated by amendment, they may be set up by supplemental bill (*a*).

(2.) Bills of Revivor, which are continuances of original bills bringing some new party before the court when by death, or otherwise, the original party has become incapable of prosecuting or defending the suit, and the latter is, as it is termed in equity, abated thereby. An abatement, in the sense of the common law, is an entire overthrow of the suit. But in equity, abatement signifies only a present suspension of all proceedings. At law, an action when abated is absolutely dead. In equity, a suit when abated is merely in a state of suspended animation and may be revived. A bill of revivor is the method of reinstatement of the suit (*b*).

(3.) Combinations of the preceding two, called bills of Supplement and Revivor (*c*).

(4.) Bills in the nature of any of these (*d*).

b.) Bills for the purposes of cross-litigation, or of controverting, or suspending, or reversing, some decree or order of the court or carrying it into execution. Hereunder are the following kinds:

(1.) Cross-bills, by a defendant in the original suit asking aid against the plaintiff or another defendant in the suit, touching some matter of litigation mentioned in the original bill. These are either for discovery in aid of the defendant, or for relief, so that all parties may obtain the relief to which they are entitled (*e*). We shall see somewhat more of these in speaking of the defense to a suit.

(2.) Bills of Review, brought to examine and reverse a former decree of the court, which has been enrolled and thereby become a record. A bill of review lies in the same court, first, for error of law apparent on the face of the pleadings and decree; secondly, a bill of review may be brought on the discovery of new matter in cases substantially similar to those

(*a*). Story, Eq. Plead., Secs. 332-344. (*b*). Story, Eq. Plead., Secs. 354-376.
(*c*). Story, Eq. Plead., Sec. 387. (*d*). Story, Eq. Plead., Secs. 345-353, 377-386.
(*e*). Story, Eq. Plead., Secs. 389-402.

where at common law a motion for a new trial would lie on this ground.

Except for appeals, a bill of review, or a bill in the nature thereof, is the only way of re-examining a decree in equity (*a*).

(3.) Bills to impeach decrees on the ground of fraud. This sort of bill is sometimes called an original bill in the nature of a bill of review. In equity, a decree obtained by fraud will be completely annulled. This kind of bill is the instrument therefor, as the relief will not be granted on petition (*b*).

(4.) Bills to suspend the operation of decrees in special circumstances, or to avoid them on the ground of matter which has arisen subsequently to the decree. Bills of this kind are very rare (*c*).

(5.) Bills to carry former decrees into execution. Sometimes, owing commonly to delay in the enforcement of the decree, subsequent events call for an additional direction of the court. Application should then be made therefor by a bill of this class (*d*).

(6.) Bills in the nature of one or more of the preceding.

All of these numerous classes of bills are outgrowths of the ordinary original bill praying relief, of the first class, and are constructed on similar principles so far as the same are applicable to the peculiar circumstances of the case. Some of them, as for instance bills of discovery and bills to perpetuate testimony, are either actually obsolete or practically superseded, under American practice, their places having been taken by other and simpler remedies.

Turning now to the ordinary original bill praying relief:

In order to enable the court to understand the case and to administer the proper remedial justice, as well as to apprise the opposite party of the nature of the claim, and of the redress sought, and to enable him to make the proper defense thereto, the bill should contain a clear, exact, and unambiguous statement of all the material facts. It should therefore show, with

(*a*). Story, Eq. Plead., Secs. 403-425. (*b*). Story, Eq. Plead., Secs. 426-428.
(*c*). Story, Eq. Plead., Sec. 428, a. (*d*). Story, Eq. Plead., Secs. 429-431.

reasonable certainty, the right of the plaintiff, the manner in whieh he is injured, the person by whom the injury is committed, the material circumstances of time, place, and manner, and other incidents, and the particulars of the assistance he wants from the court, or in other words, the relief he asks. It must of course appear, too, that the case is one proper to be considered by a court of equity. To all the statements of fact made in the bill, the rules we have considered under Common Law Pleading apply with substantially like force as at law, though the more lenient doctrine obtained in equity that certainty to a common intent was sufficient; but in modern times this doctrine has been adopted also at law, and both are now governed by substantially the same rules.

Early bills were simple affairs, but in the hands of great equity pleaders the bill developed into a complicated and formidable instrument of many subdivisions and subserving many purposes. In particular, attention was given to forcing the defendant to detail his defense, and to extracting from him admissions of important matters.

It is but a very small part of equity pleading to draw a bill which states a cause of action; the thing in a bill in equity which shows mastery of the subject is the ability with which the pleader brings into prominence all the strong points in his client's case; keeps in the background all its weak points, and at the same time forces from the defendant by the interrogatories and the general frame of the bill all possible admissions in favor of the plaintiff; and wrests from the defendant by the clearness and adroitness of the bill his opportunities of raising issues; and withal pleads in so clear, orderly, and simple a manner, that the whole question may be grasped readily by the chancellor at a single reading of the bill.

If one has a cause for relief nothing either in law or equity so aids it as a clear, orderly, and simple presentation of it. If no other reason existed for following accustomed forms it would be reason enough that they are more familiar to the chancellor and consequently more readily understood by him.

The bill as developed by the English equity pleaders con-

sisted of nine parts; all of these may be used in our United States courts, though several of them are, as we shall see, ordinarily omitted. These nine parts are as follows:

1.) THE DIRECTION, or address of the bill. This, of course, contains the appropriate and technical description of the court.

2.) THE INTRODUCTION. This part contains the names and descriptions of the persons exhibiting the bill, called in the bill "your orators" and "oratrixes," according to their sex, and also the names of the defendants. Moreover, besides the names of the several parties there are given also their places of abode, their titles of dignity or office, the character in which they sue or are sued, whether they sue *in autre droit*, and such other description as is necessary and proper.

In all cases in the Federal courts where the jurisdiction is founded on the citizenship of the parties (the ordinary case) the citizenship of each party must clearly appear, as by stating in this portion of the bill that the plaintiff is a citizen of the state of New York and defendant a citizen of the state of Minnesota (*a*).

In the United States Federal practice these first two parts are by rule of court amalgamated into one and termed the introductory part, and its form is, in substance, as follows:

"To the Judges of the Circuit Court of the United 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:" etc. (*b*).

3.) THE PREMISES, or stating part of the bill. Here are to be set out all of the facts on which the plaintiff grounds his right to relief. In rare cases averments in other parts of the bill will help out defective averments in the premises, but ordinarily and properly the bill stands or falls by its stating part, and evidence cannot be given of any facts not set up in this part (*c*).

(*a*). Jackson vs. Ashton, 8 Peters, 148; Bingham vs. Cabot, 3 Dall., 382. (*b*). U. S. Equity Rule, No. 20. (*c*). Flint vs. Field, 2 Anst., 543; Clarke vs. Turton, 11 Ves., 240; Houghton vs. Reynolds, 2 Hare, 264, 266, and note of Reporter.

It is to this part in particular, especially fulfilling as it does the part of a pleading at law, that the rules of statement which we have studied in connection with common law pleading apply. In regard to the statements in the bill we find such familiar doctrines laid down as the following: "Equity pleadings, " like those at law, are taken most strongly against the pleader; " and where the bill contains general and specific allegations as " to the same matter, the general allegations will be referred " to the particular and specific ones" (*a*).

4.) THE COMMON CONFEDERACY CLAUSE. This is a formal clause charging the defendants generally with conspiring together and with other persons unknown to the plaintiff (who, it is prayed, when discovered, may be made defendants) to defraud the plaintiff. It seems to have been inserted in ancient times owing to an idea that it was a means of making sure of having a ground for the exercise of equitable jurisdiction, and with the further view of having a ready means or pretext for amending by the joinder of additional defendants, subsequently found necessary. In either aspect it is entirely unnecessary, and in fact mere surplusage (*b*).

5.) THE CHARGING PART. It has already been called to your attention that all confession and avoidance of the defenses set up in the answer is done in the bill and not by subsequent pleadings. In order to meet the defenses, which plaintiff expects the defendant may set up, it is of course necessary that the plaintiff should in some way intimate the nature of the expected defense, he accordingly here states that, as he supposes, defendant will attempt to set up such and such justification or discharge, and then charges other matters in avoidance or disproof of the supposed defense. The charging part is useful, at times, in three ways, viz., by enabling the plaintiff in the original draft of his bill to confess and avoid supposed defenses, so that, mayhap, the defendant will not seek to raise them; by giving plaintiff a foundation (necessary as we shall see) on which to base interrogatories to the defendant; and,

(*a*). Ellis vs. Colman, 25 Beav., 662; Pinney vs. Fridley, 9 Minn., 34; Bank vs. Boom Co., 41 id., 141. (*b*). Story, Eq. Plead., Secs. 29, 30; U. S. Equity Rule, No. 21.

thirdly, by enabling plaintiff to state his case over again, with some amplification of detail, and so get the whole matter still more clearly before the court. The facts avoiding or disproving the supposed defenses should properly all be stated positively in the stating part of the bill, though there are decisions holding that if such facts are stated *in detail* in the charging part it will suffice. But a mere general charge that the contrary of these pretenses is the truth will not suffice (*a*).

The charging part of the bill was often omitted in the English equity practice and is commonly so in the United States practice (*b*).

In the United States practice the charging part may be, and perhaps commonly is, when used, incorporated into, and made a mere allegation in the premises of the bill (*c*),

Let me add that the charging part of the bill is a dangerous weapon, liable in unskillful hands to do far more harm than good.

6.) The Jurisdiction Clause. This is merely a formal averment that the acts of the defendant are contrary to good conscience and to equity and that the plaintiff is remediless at the common law. The clause is superfluous and utterly useless. It will not of itself confer jurisdiction. If the bill appears otherwise to be of equitable cognizance the bill will be sustained though the clause be omitted. On the other hand if there does not otherwise appear to be a case for equitable interference the court will dismiss the bill despite the jurisdiction clause. In the United States practice the clause is fully as well omitted (*d*).

7.) The Interrogatory Part. This part of the bill was originally a mere prayer that the parties complained of might answer all the matters contained in the former parts of the bill, not only according to their knowledge of the facts stated, but also according to their remembrance, to the information they have received, and the belief they are able to form on the subject.

(*a*). Houghton vs. Reynolds, 2 Hare, 264; Att'y Gen. vs. Whorwood, 1 Ves. Sr., 534; Story, Eq. Plead., Secs. 31-33. (*b*). U. S. Equity Rule, No. 21. (*c*). U. S. Equity Rule, No. 21. (*d*). U. S. Equity Rule, No. 21; Story, Eq. Plead., Sec. 34.

One of the principal ends of the answer in equity is to supply the plaintiff with proof of the matter necessary to support his case. This, remember, is the only way that the testimony of either party could be had in any case on the facts in issue. The answer, in response to the interrogatory part became evidence in the cause, as well as pleading; evidence, too, both for and against the plaintiff. The answer was, of course, under oath. Under this general interrogatory defendant ought to answer fully and explicitly. But it was very soon apparent that the substance of the matter might be avoided with comparative ease by answering the bill according to the letter only. The remedy was speedily found in the addition to this part of the bill of special interrogatories as to each fact, as to which disclosure was specially desired, and each several circumstance attendant thereon; and this method soon became the common practice. Hence this part gets its name, as thereby the plaintiff questions the defendant as to the truth of the several statements and charges in the bill.

The extent of the interrogation originally was as to the statements contained in the former parts of the bill, and as the old interrogating clause grew up into the complicated interrogatory part this limitation clung to it. All interrogatories must be founded on the prior allegations of the bill. Therefor, if there is nothing in the prior parts of the bill to warrant a particular interrogatory, the defendant need not answer it. Consequently when a question arises on the sufficiency of the answer to an interrogatory, we are to examine and see if the allegations of the bill justify the interrogatory. If however the defendant do answer an unjustifiable interrogatory, and it be replied to, the informality is cured (*a*). Of course, a number of interrogatories may be founded on a single allegation, and these may go more fully into detail than did the allegation.

Special interrogatories are not a necessary part of the bill. Early bills frequently contain no interrogatories. But special interrogatories often are a useful means of eliciting evidence from the defendant, if he is reluctant.

(*a*). Att'y Gen. vs. Whorwood, 1 Ves. Sr., 538.

Important changes have been made in the United States practice in this part of the bill. By the rules the interrogatory part is introduced by the following form of words:

"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, informa- " tion, and belief full, true, direct, and perfect answer make to " such of the several interrogatories hereinafter numbered and " set forth, as by the note hereunder written they are respec- " tively required to answer; that is to say,

" 1. Whether, etc." (*a*).

Here follow the interrogatories divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer are specified in a note at the foot of the bill that "The " defendant (A. B.) is required to answer the interrogatories " numbered respectively 1, 2, 3, etc."

Further, "if the complainant, in his bill, shall waive an " answer under oath, or shall only require an answer under oath " with regard to certain specified interrogatories, the answer of " the defendant, though under oath, except such part thereof " as shall be directly responsive to such interrogatories, shall " not be evidence in his favor, unless the cause be set down " for hearing on bill and answer only." (*b*).

"The note at the foot of the bill, specifying the interroga- " tories which each defendant is required to answer, shall be " considered and treated as part of the bill" (*c*).

It is not necessary to interrogate a defendant specially upon any statement in the bill unless the complainant desires to do so, to obtain a discovery (*d*).

In the old chancery practice the interrogatory part was a fairly dangerous weapon to the interrogator. But under the foregoing rules, one must be even more careful than before.

(*a*). U. S. Equity Rule, No. 43. (*b*). U. S. Equity Rule, No. 41, as amended in 1872, 13 Wall., XI. (*c*). U. S. Equity Rule, No. 42. (*d*). U. S. Equity Rule, of December Term, 1850; 10 How. IV., repealing Rule No. 40.

As long as the answer was evidence anyway one risked comparatively little in interrogating specially; but now that the answer is not ordinarily evidence for the defendant, but the answers to special interrogatories are evidence of more than ordinary weight, as we shall see later (*a*), it is at considerable risk that one interrogates a defendant specially. It should never be done where one has other means of proof at command.

8.) THE PRAYER FOR RELIEF. "The prayer of the bill "shall ask the special relief to which the plaintiff supposes "himself entitled, and also shall contain a prayer for general "relief" (*b*). The prayer is special, for the relief to which the orator thinks himself entitled, as for instance, reformation of a contract, or foreclosure of a mortgage, and after that general, for such other and further relief in the premises as shall be just and agreeable to equity. The use of the general prayer is, that, if the plaintiff has, in his special prayer, mistaken the relief to which he is entitled, the Court may yet grant him the relief which his case warrants; or it may be resorted to, to extend and make more effectual the specific relief sought. The general prayer can never be safely or properly omitted. Unless the plaintiff needs an injunction or a writ of *ne exeat*, pending the suit, the general prayer will ordinarily suffice to procure him such decree as his case requires, provided the relief asked at bar is authorized by the facts pleaded and proven, even though in the special prayer the plaintiff have mistaken his remedy (*c*).

In some cases the plaintiff cannot feel at all sure what view the Court will take as to the proper relief upon the facts. He should then be careful to frame his bill, with a double aspect, as it is termed. This rule for framing a bill with a double aspect does not go so far as to permit the pleader to allege two inconsistent states of facts and ask relief in the alternative; but he may state the facts and ask alternative relief according to the conclusion of law which the Court may draw from them (*d*).

(*a*). Lecture IV, infra; see also Story, Eq. Plead., Sec. 849 a. (*b*). U. S. Equity Rule, No. 21. (*c*). Texas vs. Hardenbergh, 10 Wall., 68; Hayward vs. National Bank, 96 U. S., 611; Tayloe vs. Insurance Co., 9 How., 390. (*d*). Rawlings vs. Lambert, 1 Johns. & H., 458; Marsh vs. Keith, 1 Dr. & Sm., 342; Redmond vs. Dana, 3 Bosw. (N. Y.), 615; Davies vs. Otty, 2 DeG. J. & S., 238; Colton vs. Ross, 2 Paige, 396; Lloyd vs. Brewster, 4 Paige, 537.

The prayer for relief in a bill in equity demands attention and care.

9.) THE PRAYER FOR PROCESS. By this part of the bill the orator prays for the process of the Court to compel the defendant to appear, answer, and abide the decision of the Court. The names of all persons who are intended to be made parties must be inserted here; for it is a general rule that none are parties to a bill in equity against whom process is not prayed, even though named in the introduction (*a*).

In the United States practice, "If any person other than "those named as defendants in the bill, shall appear to be neces- "sary or proper parties thereto, 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" (*b*). The averment should be in the third part of the bill and this prayer in this ninth part. The United States Equity Rules further provide: "The prayer for process of subpœna in the bill shall contain "the names of all the defendants 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" (*c*). "If an injunction, or a writ of *ne 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" (*d*). This last clause of the rule alters the old English practice.

Every bill must, in conclusion, be signed by counsel. The counsel by his signature makes himself responsible for the contents of the bill; and this responsibility is insisted on by the courts (*e*).

(*a*). Story, Eq. Plead., Sec. 44. (*b*). U. S. Equity Rule, No. 22. (*c*). U. S. Equity Rule, No. 23. (*d*). Id. (*e*). Carey vs. Hatch. 2 Edw. Ch., 190; Partridge vs. Jackson, 2 Edw. Ch., 520; Beames Ord. in Ch., 25, 69, 70, 165-167; Dwight vs. Humphrey, 3 McLean, 104; Stinson vs. Hildrup, 8 Biss., 376; Roach vs. Hulings, 5 Cranch, C. C., 637.

By the United States rule "every bill shall contain the sig-" nature 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" (*a*).

The bill, in the United States practice is then reduced to four necessary parts, as follows: the introductory part, the stating part, the prayer for relief, and the prayer for process. Beside these the interrogatory part is frequently useful, as is also the charging part (which last may however be incorporated into the premises). The other parts are ordinarily omitted.

We have already seen that the general rules of statement which obtain at common law apply also in equity. The allegations must be certain and unambiguous; the papers must not be unnecessarily prolix. But owing to the nature of procedure in equity surrounding circumstances, collateral facts and evidentiary matters are frequently pleadable, as laying foundation for interrogation of the defendant, or for ascertaining the measure or kind of relief to which plaintiff may be entitled, or as affecting generally the equities of the cause, or even the question of costs.

And where any statement in the bill may, if admitted by defendant, so affect the decision, it is relevant, material, and proper in the bill (*b*). But care must be taken not to overload the bill by superfluous allegations, or redundant or unnecessary statements, or by impertinent or scandalous matter. Imperti nent matter is matter which cannot affect the decision of the case, which is not relevant thereto. Pertinent matter can never be scandalous, but impertinent matter may be. Scandalous matter is impertinent matter (whether true or not) bearing cruelly on the moral character of individuals. And while mere impertinent matter concerns only parties to the suit, scandalous matter may be stricken out of the bill, even, by leave of court, upon the application of a stranger to the suit (*c*).

The remedy of a party for impertinent matter is, as we

(*a*). U. S. Equity Rule, No. 24. (*b*). Hawley vs. Wolverton, 5 Paige, 523; Mechanics Bank vs; Levy, 3 Paige, 606. (*c*). Coffin vs. Cooper, 6 Ves., 514; Williams vs. Douglas, 5 Beav., 82; Ex parte Simpson, 15 Ves., 477.

shall see, by exceptions; for scandal the stranger has the remedy of petition. It may be noted that counsel and plaintiff are both held responsible for scandal in the bill.

"Every bill shall be expressed in as brief and succinct terms " as it reasonably can be, and shall contain no unnecessary re- " citals of deeds, documents, contracts, or other instruments, in " *haec verba*, or any other impertinent matter, or any scandalous " matter not relevant to the suit. If it does, it may on excep- " tions 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" (*a*).

Again, a bill must not be multifarious. Multifariousness is the improper joinder of distinct and independent matters in one bill, either against all the defendants or against some of them. To support the objection of multifariousness, because the bill contains different causes of suit two things must concur: first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient, as stated, to sustain a bill. If the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole, the objection does not apply. It is not indispensable that all the matters in the suit should affect all the parties; it will suffice as against this objection if each has an interest in some matters in the suit, and such matters are connected with the others. If two plaintiffs should in one bill bring a joint demand and a separate several demand of one of them the bill would certainly be multifarious (*b*). But this objection of multifariousness must be taken by demurrer or it will be waived (*c*). Some cases

(*a*). U. S. Equity Rule, No. 26. As to the manner of taking and enforcing exceptions see U. S. Equity Rule, No. 27. (*b*). Harrison vs. Hogg, 2 Ves., Jr., 323, 328; Boyd vs. Hoyt, 5 Paige 65. (*c*). Bissell vs. Beckwith, 33 Conn., 357.

illustrating this fault will be found in the notes (*a*). An extended discussion of the subject of multifariousness and of conflicting cases thereunder will be found in Story's Equity Pleading, Secs. 271 to 286 *b*.

A bill may however be defective for the opposite fault to that of multifariousness, that is for an undue splitting up of a single cause of suit and so multiplying litigation. This fault is termed multiplicity. For example, one may not exhibit a bill for part of an account, but must dispose of the whole in one suit (*b*).

In all bills it must clearly appear from the premises that plaintiff has a right to assistance, and that the case is one proper for the exercise of equity powers.

The bill when framed may, if deemed desirable, be verified by the orator, though this is not necessary.

The bill when thus framed and signed by counsel is filed with the clerk of court, and the suit is thereby instituted.

It frequently happens that the plaintiff finds his bill defective ; very liberal are the provisions for amendment. In the early stages of the proceeding the rule in the United States practice is as follows : "The plaintiff shall be at liberty, as a "matter of course, and without payment of costs, to amend his "bill in any matter 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, misdescription 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 reference to the places "where the same are to be inserted. And if the amendments "are numerous, he shall furnish in like manner, to the defend-

(*a*). Bedsole vs. Monroe, 5 Ired. Eq., 313; McCabe vs. Bellows, 1 Allen, 269; Kennebec R. R. vs. Portland R. R., 54 Me., 173; Pope vs. Oil. Co., 115 Mass., 286; Winsor vs. Bailey, 55 N. H., 218; Lewis vs. Iron Works, 50 Vt., 477; Brewer vs. Boston Theatre, 104 Mass., 378; Coates vs. Legard, L. R. 19 Eq., 56. (*b*). Newland vs. Rogers, 3 Barb., Ch. 432.

"ant, 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" (*a*).

But to insert a wholly different case is not an amendment even under the above very liberal provisions (*b*).

Matters which have occured since the filing of the original bill cannot ordinarily be introduced by amendment of the bill, but must be brought in if at all by supplemental bill, or some bill in the nature of a supplemental bill (*c*).

The proper procedure in amending is to file what is termed an amended bill, which states no more of the original bill than is necessary to make the amendment intelligible, and not to interline the original bill (*d*). But if the amendments are merely a word or two here and there and are not numerous they may be interlined (*e*).

Care must especially be taken that the bill presents the real case. It is immaterial how good a case the evidence shows unless the same case is presented by the bill. In equity relief is granted only *secundum allegata et probata.* In some cases however the court will permit an amendment even at the hearing of the case (*f*).

In conclusion I will refer you to Barton's Suit in Equity, pages 38 to 62 where you will find some forms of bills which will doubtless materially assist your comprehension of these subjects.

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a. U. S. Equity Rule, No. 28. (*b*). Shields vs. Barrow, 17 How., 130; Goodyear vs. Bourn, 3 Blatchf., 266. (*c*). Copen vs. Flesher, 1 Bond, 440; Swatzel vs. Arnold, Woolw., 383. (*d*). Pierce vs. West, 3 Wash. C. C., 354. (*e*). Luce vs. Graham, 4 Johns. Ch., 170; Willis vs. Evans, 2 Bali & Beat., 225; see also Bennington Iron Co. vs. Campbell, 2 Paige, 159; Hunt vs. Holland, 3 Paige, 82. (*f*). Neale vs. Neales, 9 Wall. 1; The Trenton Patent, 23 Wall., 518; Battle vs. Life Insurance Co., 10 Blatchf., 418.

LECTURE III.

OF APPEARANCE OF THE DEFENDANTS, AND OF DEFENSES TO A SUIT.

Our last lecture dealt with the application to chancery for relief, and closed with the filing of the bill with the clerk of court.

Before proceeding to the consideration of the subjects of compelling appearance and appearing, we may properly turn our attention for a moment to the office of the clerk, his powers and duties under the Federal practice.

"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 interlocu- " tory motions, orders, rules, and other proceedings, preparatory " to the hearing of all causes upon their merits (*a*)."

"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 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 (*b*)." This first Monday in the month is commonly known as "Rule day in Chancery."

"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 * * * require any allowance or order of " the court, or of any judge thereof, shall be deemed motions

(*a*) U. S. Equity Rule, No. 1. (*b*) U. S. Equity Rule, No. 2.

"and applications grantable of course by the clerk of the "court. But the same may be suspended, or altered, or "rescinded by any judge of the court, upon special cause 'shown (*a*)."

In the Federal practice the process of subpœna constitutes, in all suits in equity, the proper mesne process, in the first instance, to require the defendant to appear and answer the exigency of the bill (*b*). "No process of subpœna shall issue "from the clerk's office in any suit in equity until the bill is "filed in the office (*c*)." It follows that no suit in equity can be begun otherwise than by filing the bill. "Whenever a bill is "filed the clerk shall issue the process of subpœna thereon, as "of course, upon the application of the plaintiff" (*d*). This application is made in writing and is termed a *praecipe*. It should show the nature of the writ desired, to whom it is to run, at whose suit, and when it is to be made returnable into court. Where there is more than one defendant, plaintiff, at his election, may have a joint subpœna against all the defendants, or, except in the case of husband and wife defendants, may have a separate writ to each defendant (*e*). Further, plaintiff has the right to elect whether he will have the writ made returnable at the next rule day occurring after twenty days from the time of issuing the writ, or the next but one (*f*).

The writ of subpœna from the United States Circuit Court bears teste in the name of the chief justice of the United States, and commands the defendant to appear and answer the bill and to do further whatever the court shall have considered in that behalf. It is signed by the clerk, and bears the seal of the court. It runs in the name of the president of the United States (*g*).

At the bottom of the subpœna is 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, or otherwise the bill may be taken *pro confesso* (*h*).

(*a*) U. S. Equity Rule, No. 5. (*b*) U. S. Equity Rule, No. 7. (*c*) U. S. Equity Rule, No. 11. (*d*) U. S. Equity Rule, No. 12. (*e*) U. S. Equity Rule, No. 12. (*f*) U. S. Equity Rule, No. 12. (*g*) U. S. Rev. Stat., Secs. 911-913. (*h*) U. S. Equity Rule, No. 12; an example of a writ of subpœna is shown in Barton's Suit in Equity, page 65.

"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. In the latter case, the person serving the " process shall make affidavit thereof" (*a*). And the courts see to it that their officers exercise due diligence in the performance of these duties (*b*).

"The service of all subpœnas shall be by delivery of a copy " thereof, by the officer serving the same, to the defendant " personally, or by leaving a copy thereof at the dwelling-house " or usual place of abode of each defendant, with some adult " person who is a member or resident in the family" (*c*).

But no subpœna can so be served outside of the district for which it is issued (*d*). The only other means in the Federal equity practice of reaching a defendant is under the recent statutory provisions to which reference has been made (ante, Lecture I, pg. 18). But of course appearance without objection waives all defects in the service (*e*) as also the lack of a prayer for process in the bill (*f*). And voluntary appearance always confers jurisdiction as full as could be acquired by any service (*g*).

"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" (*h*).

"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" (*i*).

"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 day shall be the next rule day " succeeding the rule day when the process is returnable" (*k*).

(*a*) U. S. Equity Rule, No. 15; U. S. vs. Montgomery, 2 Dall., 335; Hyman vs. Chales, 12 Fed. Rep., 855; Jobbins vs. Montague, 5 Ben., 429. (*b*) Ins. Co. vs. Adams, 9 Pet., 573; Harriman vs. Rockaway Co., 5 Fed. Rep., 461; U. S. vs. Moore, 2 Brock., 317; Breuer vs. Elder, 33 Minn., 147. (*c*) U. S. Equity Rule, No. 13, as amended in 1872, 21 Wall., v; O'Hara vs. McConnell, 3 Otto, 151; Phœnix Co. vs. Wulf, 9 Biss., 285. (*d*) Jobbins vs. Montague, 5 Ben., 429. (*e*) Gracie vs. Palmer, 8 Wheat., 299; Marye vs. Strouse, 5 Fed. Rep., 494; Knox vs. Summers, 3 Cranch, 496. (*f*) Segee vs. Thomas, 3 Blatchf., 11. (*g*) Nelson vs. Moon, 3 McLean, 319; Carrington vs. Brent, 1 McLean, 167; Jones vs. Andrews, 10 Wall., 327; Virginia Co. vs. U. S., Taney, 418; Osborne vs. U. S. Bank, 9 Wheat., 739; Shelton vs. Tiffin, 6 How., 163. (*h*) U. S. Equity Rule, No. 14. (*i*) U. S. Equity Rule, No. 16. (*k*) U. S. Equity Rule, No. 17.

If a defendant fails to appear, the bill may be taken *pro confesso*, or if an answer is necessary to the relief sought by the plaintiff, and taking the bill *pro confesso* will not suffice, steps may be taken to compel appearance and answer substantially as in case of failure to answer. Attention will shortly be given to the methods in such case.

Appearance is either personal or by solicitor, and consists ordinarily in filing a written request to the clerk to enter the appearance. This is termed a præcipe for appearance. The appearance is thereupon on the day thereof entered by the clerk in the order book (*a*). This is a book kept by the clerk, concerning which we find the following provisions: "All mo- " tions, 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 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 re- " quired. 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" (*b*).

From these provisions it will be seen that proceedings in equity in the Federal practice are carried on in the court, and not outside, as is so largely the case in our State practice.

(*a*) U. S. Equity Rule, No. 17. (*b*) U. S. Equity Rule, No. 4.

Notices are not ordinarily served, nor are pleadings or other papers in a suit. The papers are filed in the clerk's office, and the filing entered by the clerk in his books; and it is for the solicitor to keep watch of what is being done. Every step, properly, is taken in court, and is shown in the records and files of the proceeding.

At the time of entering appearance, the defendant, in the natural course of events, takes a copy of the bill out of the clerk's office, and by so doing puts the first abridgement on the plaintiff's right to amend the bill (*a*).

It is the duty of the defendant to file his defensive pleading on the rule-day next succeeding that of his appearance; though the time may be enlarged, for cause shown, by a judge of the court, upon motion for that purpose (*b*).

It may not, perhaps, be improper to call attention here to two further rules of the Federal courts applicable to the making of motions, although the motion just mentioned is one that may be made without notice, and therefore not within the following provisions.

"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" (*c*); and "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

(*a*) U. S. Equity Rule, No. 28; Ante, Lecture II, pg. 37. (*b*) U. S. Equity Rule, No. 18. (*c*) U. S. Equity Rule, No. 3.

" 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" (*a*).

In case the defendant fail to file his answer, demurrer, or plea, within the time provided the plaintiff may, at his election, have an order entered (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 any time after the expiration of thirty days from and after the entry of said order, 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 (*b*).

"When the bill is taken *pro confesso* the court may proceed " to a decree at any time after the expiration of thirty days " from and after the entry of the order to take the bill *pro* " *confesso*, and such decree rendered shall be deemed 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" (*c*).

A decree entered under this rule is merely *nisi* until the succeeding term of court; moreover, until that time, a default

(*a*) U. S. Equity Rule, No. 17. (*b*) U. S. Equity Rule, No. 4. (*c*) U. S. Equity Rule, No. 19.

will usually be set aside on motion, on condition that defendant will plead to the merits and go to trial (*a*). If the defendant has in any way appeared, notice should be given of application for a decree, after order *pro confesso* (*b*).

Where substituted service is had the judgment may be opened as provided in the Revised Statutes (*c*).

OF THE DEFENSE TO A SUIT IN EQUITY.

We come now to the consideration of the pleadings which are at the command of a defendant in an equity suit. They are of the following kinds: Demurrers, Pleas, Answers, Pleadings combining any two of the last three, or all three, Disclaimers and Cross-bills. In addition we may place with these, as part of the armory of the defendant in pleading his cause, the remedy of exceptions to the bill. These different weapons of the defendant we may now consider, beginning with exceptions.

1.) Of Exceptions to the Bill. As we have already seen, a bill is to be expressed in as brief and succinct terms as it reasonably can be, and must contain no impertinent or scandalous matter. And if it does contain such matter the impertinence and scandal may be expunged on reference to a master (*d*). It is, of course, frequently useful to the defendant to have the bill purged of scandalous and impertinent matter, so that he may know by the decision of the court what he has to meet; indeed, at times other reasons exist which make it important that such improper matter be stricken out. The means of obtaining this remedy is by exceptions, as they are termed, to the bill (*e*). Exceptions to the bill are allegations in writing, signed by counsel, stating that the bill is scandalous or impertinent, and describing the particular passages considered to be such. Such exceptions to the bill must be filed, if at all,

(*a*) O'Hara vs. McConnell, 3 Otto, 150; Kemball vs. Stewart, 1 McLean, 332. (*b*) Bennett vs. Hoefner, 17 Blatchf., 341. (*c*) U. S. Rev. Stat. (1878), Sec. 738. (*d*) Ante, Lecture II, pages 35 and 36; U. S. Equity Rule, No. 26. (*e*) U. S. Equity Rule, No. 27.

on or before the next rule day after the process on the bill is returnable. The bill may thereupon be referred to a master by the judge, by order of reference; 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 on or before the next rule day, or the master shall certify that he needs further time (*a*). Upon the coming in of the master's report, the matter will be disposed of according to the same, subject, of course, to review by the court. A similar course of practice obtains as to other pleadings, as we shall see later. This remedy by exceptions is wholly interlocutory in its nature. By demurring, pleading, or answering one waives all objections that the bill contains impertinent matter, though the presence of scandalous matter is not so waived (*b*).

2). Of Demurrers. A demurrer in equity is, in its general nature, quite similar to a demurrer at law. In each procedure it is a method of calling attention to some defect apparent on the face of the antecedent pleadings. But there are several important differences. To begin with, in equity demurrer does not lie to any pleading except the bill. An answer is never to be demurred to in equity. If plaintiff deems himself entitled to the relief he seeks, on the face of the bill and answer, or plea, he has his means of relief, but it is not a demurrer. On the other hand, just as the bill is a more complicated instrument than a declaration, so the demurrer has been developed to meet it. As we have already seen, a bill in equity for relief ordinarily seeks relief and also disclosure. To understand the demurrer in equity, this distinction must be kept constantly in mind, as must also the double office of the answer, as defensive pleading and disclosure. In equity, the defense of a suit is properly separable into two great divisions, first, protecting the defendant from the necessity of answering; secondly, defending on the merits. The demurrer and the plea in equity are regarded primarily as dilatory pleadings useful in defenses of the first class (*c*).

(*a*) U. S. Equity Rules, Nos. 26 and 27. (*b*) 1 Barbour's Chancery Practice, page 101; Anon., 2 Ves. Sr., 631. (*c*) U. S. Equity Rules, Nos. 31 to 38.

The general form of a demurrer in equity will be found in Barton's Suit in Equity, page 86, and in Story's Equity Pleading, Section 455, notes 1 and 2. Under the Federal practice a demurrer must be signed by counsel and further must be accompanied by 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 (*a*). When so made out, certified, and verified, the demurrer is filed with the clerk of the court. The plaintiff must then set down the demurrer for argument on the rule-day when the same is filed or on the next succeeding rule day, or he will be deemed to admit its sufficiency and his bill will be dismissed as of course, unless he be allowed further time by one of the judges (*b*).

Demurrers are subdivided in the first place as at law into general and special demurrers; and no defect of form can be taken advantage of on demurrer that is not specified in the demurrer. But, on demurrer to the whole bill, defects of substance, not so specified, may be urged *ore tenus*, at the hearing. As at law, too, no defect can be raised on demurrer which is not apparent on the face of the bill. A demurrer by which one seeks to bring in facts outside the record is termed a "speaking demurrer." A speaking demurrer is invariably bad (*c*). Where there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good and allowed as to one of the defendants, and be bad and disallowed as to the others, for this defense may be good as to one defendant and be wholly inapplicable as to another. But on the other hand if there be several plaintiffs and one ground of demurrer be assigned against them all, and that ground be bad as to one plaintiff the demurrer will be overruled. There is a clear distinction between a demurrer which is too large as to the defendants, and one too large as to the plaintiffs (*d*). In this regard there is a wide difference between law and equity,

(*a*) U. S. Equity Rule, No. 31; National Bank vs. Ins. Co., 14 Otto, 54. (*b*) U. S. Equity Rule, No. 38; Newby vs. Oregon R. R., 1 Sawy., 63; National Bank vs. Ins. Co., 14 Otto, 54. (*c*) Campbell vs. Mackay, 1 Mylne & Craig, 603, 613; Edsell vs. Buchanan, 2 Ves. Jr., 83; Brooks vs. Gibbons, 4 Paige, 375. (*d*) Story, Equity Pleading, Sec. 445; Barstow vs. Smith, Walk. Ch. 394; N. Y. & N. H. R. R. vs. Schuyler, 17 N. Y., 592; Gibson vs. Jayne, 37 Miss., 164.

for at law a joint pleading bad as to one is bad as to all.

Demurrers in equity are either to the whole bill or to but a part thereof.

a). DEMURRERS TO RELIEF. These are substantially like demurrers at law, and are based on the claim that the whole bill, on its face, fails to present a case for relief of any kind against the demurrant. This may be for a lack of substance in the bill, or want of jurisdiction, or for a defect in the frame or form of the bill, as defect of parties.

In the English practice on demurrer to the relief, if the bill stated merely grounds for discovery, and showed none for relief, but went on to pray relief, the bill would be entirely dismissed, but in the American practice a more liberal rule obtains and in such case if a demurrer to the relief be sustained the bill may still be retained as a bill for discovery. Otherwise a demurrer to relief operates as a demurrer to the whole bill. A statement of the grounds for demurrer to the relief will be found in Story's Equity Pleading, Sections 466 to 544.

b). DEMURRERS TO DISCOVERY. Bills merely for discovery have given rise to a great deal of litigation and demurrers to such bills, demurrers to discovery, present many delicate questions. These are discussed at length in Story's Equity Pleading, Sections 545 to 610 *a*.

Where the bill is for discovery and prays relief, the defendant may, if he pleases, demur to the relief and answer to the discovery. But he cannot demur to the discovery and answer to the relief, when the discovery sought is merely incidental to the relief.

c). DEMURRERS TO PARTICULAR INTERROGATORIES. Further the defendant may demur to any particular interrogatory in a bill on the following special grounds: *a*). That it is immaterial to the purposes of the suit; *b*). That the answer may subject the defendant to a penalty or forfeiture, or would compel him to criminate himself, or would have a tendency thereto; *c*). That it would involve the breach of some confidence which it is the policy of the law to preserve inviolate;

d). That the matter sought to be discovered appertains to the title of the defendant and not to that of the plaintiff; *e*). That defendant is a bona fide purchaser without notice for value (*a*).

Of course in all cases of demurrer it is understood that the defect must be apparent on the face of the bill.

Care should be taken in drawing a demurrer not to include some part which is good along with what is objectionable, for in such case the demurrer being too broad will be overruled, the demurrer being entire (*b*). If a demurrer be overruled a second demurrer to the same extent cannot be allowed. Since on argument of a demurrer any ground of substance can be assigned, *ore tenus*, a new demurrer would be merely a rehearing of the former demurrer. However, by leave of court, a demurrer may be withdrawn and a less extensive demurrer put in. Ordinarily application to do so must be made before judgment is pronounced on the first demurrer, though the court may act without such prior application (*c*).

In the English practice the principle was adopted that if a demurrer did not cover so much of the bill as it might by law have extended to it would be held bad, and further that if the defendant answered to any part of the bill to which his demurrer extended, the demurrer would be overruled on argument, in consequence. Both of these doctrines were adopted on the principle that by omitting to protect himself where he might have done so by the same objection, and answering despite the objection, the defendant had waived his protection. In the Federal practice these doctrines have been changed by the rules, and no demurrer will be held bad solely because it does not cover as much of the bill as it might have extended to, or because the answer extends to some part of the matter covered by the demurrer (*d*).

If a demurrer to the whole bill be sustained the bill is out of court(*e*). But after sustaining a demurrer the court may in its discretion allow the bill to be amended and reinstated (*f*). But this is a matter of discretion and not reviewable on ap-

(*a*) Story, Eq. Plead., Secs. 545, 603. (*b*) Dimmock vs. Bixby, 20 Pick., 368; Beach vs. Beach, 11 Paige, 161. (*c*) Baker vs. Mellish, 11 Ves., 68. (*d*) U. S. Equity Rules, Nos. 36 and 37. (*e*) Smith vs. Barnes, 1 Dick., 67. (*f*) U. S. Equity Rule, No. 35. Hunt vs. Rousmaniere, 2 Mason, 342; Bank vs. Stevenson, 7 Allen, 489.

peal except for abuse of discretion (*a*). If the allowance of a demurrer to the whole bill is clearly on the merits of the question, the decision, unless amendment is allowed, is a bar to another suit. If not clearly decided on the merits it is not a bar (*b*). The allowance of a partial demurrer leaves the part of the bill not demurred to in the court to be proceeded with as though no demurrer had been had.

If a demurrer be overruled the judgment is *respondeut ouster.* Thereupon the defendant may have recourse either to a plea or to an answer (*c*).

The principal objects of demurring in equity, since the provisions of the rules as to delay, are to avoid a discovery, which may be prejudicial to the defendant, or to cover a defective title, or to prevent unnecessary expense. If no one of these is attained there is little to be gained by demurring. In general if a demurrer would hold to the bill, the court, although defendant answers, would refuse relief upon the hearing. It is said that in some rare cases the court has given relief on the hearing when it would have sustained a demurrer. Such cases are exceedingly rare, except in cases of form, where either an amendment or a new bill would be possible (*d*).

3). OF PLEAS. Sometimes this object of avoiding answering cannot be attained by demurrer because the facts do not sufficiently appear on the face of the bill. If the defendant submitted to answer it was a rule that to so much of the bill as he attempted to answer, he must answer fully. Accordingly, a pleading was invented by which the defendant might protect himself from answering, when the facts entitling him to such protection, did not appear on the face of the bill. And this pleading is called a plea. A plea is a special sort of defensive pleading showing one or more things as a cause why the suit should be either dismissed, delayed, or barred, or why the defendant should not make some discovery required of him by the bill; and it demands the judgment of the court in the first instance whether the special matter urged by it does not debar the plaintiff of his apparent right to the answer which the bill requires.

(*a*) Smith vs. Babcock, 3 Sumner, 583. (*b*) 1 Daniel's Ch. Plead., page 598.
(*c*) U. S. Equity Rule, No. 34. (*d*) Story, Eq. Plead., Sec. 447.

In most cases, the office of a plea is to save the parties from the expense of an examination of the witnesses at large, a consequent rule as to pleas is that they must be single unless in special cases the court, in its discretion, grant permission to interpose a double plea (*a*).

Sometimes the showing by a plea consists in a denial of allegations in the bill, sometimes of other matter. A plea contains no disclosure, and is not evidence for the defendant; any disclosure must be made by answer. If the plea denies an allegation of the bill, it must be accompanied by an answer, making discovery as to the truth of the allegation so denied, for as to any allegation of the bill that defendant denies the plaintiff is entitled to a discovery from the defendant, unless he excuses himself from making the discovery on some of the grounds before mentioned. Pleas which merely set up new matter do not need to be so accompanied by an auxiliary answer, and are termed *pure* pleas, pleas which are so accompanied by answer auxiliary to the plea are termed *impure*. In every case where the bill specially charges fraud or combination, a plea to such part must be accompanied by an answer fortifying the plea and explicitly denying the fraud and combination and the facts on which the charge is founded (*b*). Like demurrers, pleas may be to the whole bill, to the relief, to the discovery, or to separate parts of the discovery demanded.

a.) PLEAS TO RELIEF. As in the case of demurrers, a plea to the relief is ordinarily effective as a plea to the whole bill. Pleas to relief are of four kinds, as follows: 1) to the jurisdiction; 2) to the capacity of the person; 3) to the frame or form of the bill; 4) in bar of the bill (*c*).

1.) Pleas to the jurisdiction are, like those of the same name at law, to the effect that some other tribunal is the appropriate tribunal, as that the matter is properly cognizable at law and not in equity (*d*). Unless this particular defense is raised by demurrer or plea, or at latest by answer, it is, as we have seen, ordinarily denied (*e*). A plea, too, is the only way in the federal practice of raising the question of jurisdiction by

(*a*) Story, Eq. Pl., Secs. 654, 657, and notes. (*b*) U. S. Eq. Rule, No. 32. (*c*) Story, Eq. Pl., Secs. 704 and 705. (*d*) id. Secs. 706-721. (*e*) Ante, Lecture I, page 5.

denying the citizenship of the parties. A denial in the answer is insufficient, it seems, as answering is an admission that the court has jurisdiction (*a*).

2.) Pleas to the Person. These are either that the plaintiff has not capacity to sue or that the defendant has immunity from suit, or further that the parties do not sustain the character stated in the bill, as heir, administrator, etc. (*b*).

3.) Pleas to the Frame or Form of the Bill. These are either that there is another suit pending, or that there is a defect of parties, or pleas of multiplicity, or pleas of multifariousness (*c*).

4.) Pleas in Bar of the Suit. These are of the following classes:

(*a.*) Pleas founded on a bar created by statute—

(1.) Statute of Limitations.
(2.) Statute of Frauds.
(3.) Miscellaneous statutes.

(*b.*) Pleas of matter of record or as of record in some court.

(*c.*) Pleas of Matter in Pais—

(1.) Release.
(2.) Account stated.
(3.) Settled account.
(4.) Award.
(5.) Purchase for a valuable consideration without notice.
(6.) Title in defendant.
(*a.*) By will.
(*b.*) By conveyance.
(*c.*) By length of time and adverse possession (*d*).

b.) Pleas to the Discovery. These are used only to bills of discovery (*e*).

c.) Pleas to Particular Interrogatories. These are for use in substantially the same cases as demurrers of the same kind (*f*).

(*a*) Story, Equity Plead., Sec. 721. (*b*) Story, Equity Plead., Secs. 722-734. (*c*) Story, Equity Plead., Secs. 735-747. (*d*) Story, Equity Plead., Secs. 748-815*a*. (*e*) Story, Equity Plead., Secs. 816-825. (*f*) See Ante., pp. 48 and 49.

Pleas in the United States practice are to be accompanied by the same certificate and affidavit as demurrers, and further by an affidavit of the defendant that the plea is true in point of fact (*a*).

Both pleas and demurrers were formerly always drawn with a protestation. The only use of this was to prevent any conclusion in another suit. Its usefulness has disappeared under modern statutes and it is sometimes omitted. This was the first part of a plea; then followed a statement of the extent to which the plea went, as to part of the bill or the whole thereof, in the former case specifying such part particularly; then followed the substance of the plea. Lastly came a statement that these matters were relied on as an objection to the jurisdiction, or to the person, or otherwise, concluding with a prayer for the judgment of the court whether the defendant ought to be compelled to make other answer.

The plea when thus framed is filed with the clerk. The plaintiff may then either take issue thereon or set down the plea for argument. If upon an issue the facts stated in the plea are determined for the defendant, they shall avail him as far as in law and equity they ought to avail him (*b*). It is a rule of equity that if plaintiff take issue on the plea he admits its sufficiency, and in such case if the plea be to the whole bill and be found true, dismissal of the bill is merely a matter of course. If the plaintiff deem the plea insufficient in point of law he should set it down for argument (*c*). If the plea is allowed and sustained, the bill so far as the plea is so allowed will be disposed of, though the court may allow the plaintiff to amend as in case of demurrer (*d*). If the plea is overruled the defendant will be assigned to answer (*e*).

If the plaintiff fails to reply to a plea or to set it down for argument his bill shall be dismissed as of course (*f*).

As in the case of demurrers no plea will be held bad solely because it does not extend to so much of the bill as it might

(*a*) U S. Equity Rule, No. 31. (*b*) U. S. Equity Rule, No. 33. (*c*) U.S Equity Rule, No. 33. (*d*) Myers vs. Dorr, 13 Blatchf. 22; Gernon vs. Boecaline, 2 Wash. C. C., 199; Story, Eq. Plead., Sec. 697. (*e*) U. S. Equity Rule, No. 34. (*f*) U. S. Equity Rule, No. 38.

have done, nor solely because the answer put in extends to some part of the matter covered by the plea. (*a*).

Where the defendant attacks but part of the bill by plea or demurrer he must at the same time file his answer to the residue of the bill (*b*).

If his demurrer or plea be overruled defendant must then answer, in default whereof the bill may be taken *pro confesso* and the matter be proceeded in accordingly (*c*). If on the other hand plaintiff is permitted to amend he must do so within the allotted time or the cause will proceed as if no application to amend had been made (*d*).

Pleas and demurrers in equity are technical instruments and in the Federal practice they are by no means favored; the tendency is to dispense with pleas and demurrers as far as possible and allow all excuses for failure to answer parts of the bill to be set up in the answer itself. The two following rules explain themselves.

"The rule, that if the 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 en- "titled in all cases by answer to insist upon all matters of de- "fense (not being matters of abatement, or to the character "of the parties, or matters of form) in bar 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 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 defense. Thus for example, "a *bona fide* purchaser for a valuable consideration, without "notice, may set up that defense 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 dis- "covery of his title than he would be in any answer in support "of such plea" (*e*).

(*a*) U. S. Equity Rules, Nos. 36 and 37. (*b*) U. S. Equity Rule, No. 32. (*c*) U. S. Equity Rule, No. 34. (*d*) U. S. Equity Rule, No. 30. (*e*) U. S. Eq. Rule, No. 39.

"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, notwith- "standing he shall answer other parts of the bill from which "he might have protected himself by demurrer" (*a*).

As a result of these rules the use of the plea is rare in the Federal practice, except in cases of the denial of the citizenship of parties, of matters of abatement, or of matters going to the character of the parties, or to the form of the bill.

In any case where the objection can be taken by answer it is advisable, unless one feels very sure of his ground, to abstain from the use of a plea. The question, what defenses cannot be raised by answer, will be considered in connection with the subject of answers (*b*).

Certain forms of pleas will be found in Barton's Suit in Equity on pages 93 and 94.

(*a*) U. S. Equity Rule, No. 44. (*b*) Infra, Lecture IV, pages 59, 60, and 61

NOTE.—With regard to the effect of taking issue on a plea under the United States Equity Rule No. 33 (ante page 53), the student may consult with advantage the following recent cases, which, however, do not seem to be altogether harmonious: Matthews vs. Lalance etc. Co., 2 Fed. Rep., 232; Myers vs. Dorr, 13 Blatchf., 22; Theberath vs. Rubber etc. Co., 5 Bann. & A., 384; Cottle vs. Krementz, 25 Fed. Rep., 494; Hughes vs. Blake, 6 Wheat., 453, 473; Farley vs. Kittson, 120 U. S., 303.

LECTURE IV.

OF ANSWERS, CROSS-BILLS, AND REPLICATIONS.

Before taking up the subject of answers in general, we may give attention for a moment to a peculiar pleading in equity, which is sometimes termed a variety of answer.

It occasionally happens that one who is made a party defendant in an equitable suit does not desire to contest the plaintiff's application for relief, and is willing to admit that he claims no interest in the subject matter of the suit. In such case, such defendant may file a "disclaimer." In the old equity practice, where appearance and pleading to the bill were regularly enforced, and the system of taking the bill *pro confesso* had not become the ordinary method of procedure against non-answering defendants, such a pleading was of importance. But it is, by no means, always open to a defendant to file a disclaimer alone. A defendant who desires to disclaim may have had an interest which he has parted with, and plaintiff is entitled to a disclosure (made by answer accompanying the disclaimer) sufficient to show whether or no such is the case, and, if so, plaintiff may require further disclosure, to enable him to make the proper person a party, instead of the disclaiming defendant. Moreover, one cannot shelter himself from answering by a disclaimer in cases where, though he has no interest, others may have an interest against him. Liability cannot be disclaimed, but only interest in the demand. Further, a disclaimer by one defendant cannot be permitted to prejudice the plaintiff's right against the others (*a*).

A disclaimer has the formal commencement and conclusion of an answer. Further, it contains simply an assertion that the defendant disclaims all right and title to the matter in demand. It is put in and filed in the same way as an answer, and is al-

(*a*) Williams vs. Jones, 1 Younge, 252.

most invariably supported by an auxiliary answer for the purposes stated.

Of course, the defendant cannot by answer claim what he repudiates by his disclaimer. If answer and disclaimer are inconsistent, they will be construed against the defendant. Sometimes, on a strong showing by defendant of mistake or ignorance of his rights, the court will allow a defendant to withdraw his disclaimer and put in an answer (*a*).

The disclaimer is now rarely used, and is of little practical importance, except occasionally as affecting the right to costs.

OF ANSWERS.

If a defendant can neither protect himself by demurrer or plea from answering the bill, nor disclaim all right and interest in the subject of the suit, he must put in an answer, either to the whole bill, or to such parts of it as are not covered by his demurrer or plea (*b*). Formerly, chancery enforced specific obedience to this rule, but now, if taking the bill *pro confesso* will suffice, the court, instead of compelling an answer, will proceed to decree without answer (*c*).

Where there are several defendants, each is entitled, if he chooses (subject to questions of costs), to put in a separate answer, even though all the defendants have a common defense. But ordinarily defendants having a common defense join in answering.

No defendant is ordinarily called on to answer any part of the bill except what applies to or concerns himself.

The answer of a defendant consists, first, of such statements, material to his case, as he may think it necessary or advisable to set forth as defenses to the plaintiff's demand, and secondly, of defendant's answers to the discovery sought by the bill; or, if he has plead or demurred to a portion of the bill, to the discovery sought by the portions of the bill not covered by the demurrer or plea. These two offices of the answer as disclosure and as pleading must be kept clearly in mind, or confusion will result.

(*a*) Story, Eq. Plead., Secs. 838-844; 1 Daniel's Ch. Pl. & Pr., pp. 706-710.
(*b*) U. S. Equity Rules, Nos. 32 and 18. (*c*) U. S. Equity Rule, No. 18.

The answer as a pleading is constructed on the same general principles as a common law plea in bar, though this difference should be kept in mind, that much that would at law be deemed merely evidentiary matter is properly pleadable in an answer in equity, even apart from the disclosure, as affecting the equities of the case or the relief to be granted.

A defendant, in his answer may set up as many defenses as he has; but he may not make inconsistent statements (*a*). He may put in an answer with a double aspect, that is, he may set up as many defenses, as the consequence of the same state of facts, as his case will allow, or the ingenuity of his legal advisers may suggest. If the defendant sets up certain facts as evidence of one particular case, which he claims as a consequence of those facts and upon which he rests his defense, he will not be permitted afterwards to use the same facts for the purpose of establishing a different defense from that to which, by his answer, he has called the plaintiff's attention (*b*). Nor is defendant permitted to make statements of fact in the alternative. None of the facts stated must be inconsistent with any of the defenses set up, but where different views of the law show different defenses on the same state of facts, there the different defenses may all be set up together, even though additional facts are required to substantiate some of the defenses (*c*). But these rules will not preclude one from at once denying the plaintiff's title and setting up a further defense, good against the plaintiff, or any one else having title.

In stating the facts constituting his defense, defendant must use so much certainty as will inform the plaintiff of the case to be made against him. Defendant is not held to the same strictness in his answer as in a plea, nor even to quite snch strictness as is required in a bill. But the defense set up must be stated positively, without ambiguity or prolixity, and with certainty to a common intent (*d*).

The answer must further be full and perfect to all the material allegations of the bill, and should confess or traverse

(*a*) Jesus College vs. Gibbs, 1 Y. & C. Ex., 145, 160. (*b*) 1 Daniel's Ch. Pl. & Pr., pp. 712 and 713; Bennett vs. Neale, Wightw., 324. (*c*) Jesus College vs. Gibbs, 1 Y. & C. Ex., 145. (*d*) 1 Daniel's Ch. Pl. & Pr., pp. 711-716.

them severally. It must state facts, and not arguments (*a*). It may either traverse or confess and avoid the allegations of the bill; or may traverse some and confess and avoid others; or, as we have seen, it may traverse the case made by the bill and also avoid it without confessing (*b*).

The determination of the question what defenses may be raised by answer is somewhat dependent for its solution on whether the defense is sought to be interposed to the relief (to the whole bill), or only for the purpose of protecting the defendant from making disclosure. In general, nearly all defenses to the relief may be interposed by answer. But, 1), defenses which are proper for a plea to the jurisdiction must be raised by plea, and cannot be raised by answer (*c*). 2), Defenses to the relief on account of the incapacity of the parties must be raised by demurrer or plea (*d*), except in the cases of pleas of bankruptcy or insolvency of the plaintiff, and pleas that plaintiff or defendant does not sustain the character charged in the bill; these last defenses are substantially matters in bar and may be raised by answer (*e*). 3), Coming to pleas to the frame or form of the bill, we meet with more difficulty. The defense of another suit pending in a court of equity should be taken by demurrer or plea, though it may perhaps be sustained if taken by answer (*f*). Objections on the ground of defect of parties are properly to be taken by demurrer or by plea, and when the objection is so taken it meets with more favor than if taken later; but the objection may be taken by answer or at the hearing, or even on bill of review, or on appeal (*g*). The defense of multiplicity of suits is exceedingly rare; it would seem that the method of raising this objection would bear much analogy to that in the case of the defense of multifariousness. This last defense is properly to be raised by demurrer, if apparent on the face of the bill, otherwise by plea; it may, however, be raised by answer, though the objection is viewed with less and less favor as the suit progresses; if the objection is not taken in the

(*a*) Story, Eq. Plead., Sec. 852. (*b*) Carte vs. Ball, 3 Atk., 496. (*c*) Story, Eq. Plead., Sec. 708; Livingston vs. Story, 11 Pet., 351; Dodge vs. Perkins, 4 Mason, 435. (*d*) Story, Eq. Plead., Sec. 708; Gilbert vs. Lewis, 1 DeG. J. & S., 38. (*e*) Story, Eq. Plead., Secs. 726-734. (*f*) Long vs. Storie, 9 Hare, 542; Hertell vs. VanBuren, 3 Edw. Ch., 30; Cooper's Pleading, 274; see also Lucas vs Holder, 1 Eq. Ca. Abr., 41, pl. 3. (*g*) Story, Eq. Plead., Secs. 75 and 236; ante, Lect. I, p. 15.

pleadings, it is deemed waived, so far as the parties are concerned, though the court may raise the objection of its own motion, even at the hearing (*a*). 4), All defenses to the relief proper for pleas in bar may be taken by answer (*b*).

We turn now to the consideration of the answer in its other office, that of a disclosure to the bill. It is to the answer in this aspect that the rule especially applies, that the defendant, if he answers, must answer fully, save only in so far as he may have protected himself by plea or demurrer. This rule is almost inflexible (*c*). It means that the defendant must, step by step, make full disclosure as to each interrogatory propounded to him, without reservation, using his utmost effort to give all the information he has or can by any reasonable means acquire, as far as he is affected by the bill (*d*). The United States Equity Rules have made some changes in this matter. Prior to their adoption, the only exceptions to the rule seem to have been the following: the defendant, instead of demurring or pleading, could in his answer assign the following excuses for failure to respond, viz., 1), that the particular discovery sought is wholly irrelevant, immaterial, scandalous, or impertinent (*e*); 2), that the particular discovery sought will tend to subject him to penalty, forfeiture, or punishment (*f*); 3), that the disclosure would involve a breach of professional confidence (*g*); and 4), that the particular discovery sought is of facts respecting his own title, and not respecting that of the plaintiff (*h*).

To these may be added the statute of limitations, and the defense of lapse of time, which are as effectually raised by answer as by plea (*i*). But the language, "must answer fully" is to be understood with this qualification, that defendant is not compelled to answer matters which are not well pleaded; thus, to matters of law and inferences of law, he need not

(*a*) Story, Eq. Plead., Sec. 284*a*; 1 Daniel's Ch. Pl. & Pr., p. 346 and notes 4 and 6; Lahadie vs. Hewitt, 85 Ills., 341; Greenwood vs. Churchill, 1 M. & K., 559. (*b*) Story, Eq. Plead., Sec. 708. (*c*) Story, Eq. Plead., Secs. 846-847; Leigh vs. Birch, 32 Beav., 399; Financial Corporation vs. Railway, L. R., 3 Eq., 422. (*d*) Financial Corporation vs. Railway, L. R., 3 Eq., 422; Bank vs. Messereau, 7 Paige, 517. (*e*) Agar vs. Canal Co., Cooper, 212; Hardemann vs. Harris, 7 How., 726. (*f*) Adams vs. Porter, 1 Cush., 171. (*g*) Jones vs. Pugh, 12 Sim., 470. (*h*) Story, Eq. Plead., Sec. 846; but see 1 Cush., 171. (*i*) Norton vs. Turvill, 2 P. Wms., 144; Maury vs. Mason, 8 Porter, 213; VanHook vs. Whitlock, 7 Paige, 373; Story, Eq. Plead., Secs. 503, 751, and 847.

answer. Matters ill pleaded, in equity, are ordinarily matters wholly irrelevant and immaterial, but there may occasionally arise cases of matter ill pleaded, which, if well pleaded, would not be wholly irrelevant.

Further, no discovery can be required of an infant, or other person under disability (*a*); nor can a public officer when sued in his official capacity be required to make disclosure (*b*).

But the defendant could not by answer excuse himself from making discovery on the following grounds: that plaintiff had no right to equitable relief, or had no interest in the subject, or that defendant had no interest in the subject, or is a purchaser for valuable consideration, or that the bill does not declare a purpose for which equity will assume jurisdiction to compel discovery, or that plaintiff is under some disability. If the defendant desired protection from making disclosure on any of these grounds, he must take his objection by demurrer or plea (*c*). If the defendant failed to answer sufficiently, the plaintiff could then raise the question of insufficiency in a manner to be described shortly. In addition to the above matters, there seems to have been a single exception in the case of a defendant who is a trustee or in the nature of a trustee. Such a defendant, and only he, is permitted to state upon his answer *generally* that he is a stranger to the several matters or things in the bill mentioned, and can set forth no other or further answer to the bill, either as to his knowledge, his belief, or otherwise. In such a case, if it appear clearly that no benefit would result to the plaintiff from requiring an answer as ordinarily to each charge, allegation, and interrogatory separately, the answer will be treated as sufficient (*d*). In all other cases for discovery a separate statement must be made by the defendant to each requirement of the bill. General denials of a number of statements are inadequate (*e*), and the court will insist on the answer being full to every particular (*f*). De-

(*a*) Lucas vs. Lucas, 13 Ves., 274; 1 Daniel's Ch. Pl. & Pr., 169; Foster, Fed. Prac., p. 219; Micklethwaite vs. Atkinson, 1 Coll., 173. (*b*) Davison vs. Attorney General, 5 Price, 398; U. S. vs. McLaughlin, 24 Fed. Rep., 823. (*c*) 1 Daniel's Ch. Pl. & Pr., 720. (*d*) Story, Eq. Plead., Sec. 846*a*. (*e*) Story, Eq. Plead., Sec. 852. (*f*) Story, Eq. Plead., Sec. 852; testimony of Mr. Bell before the Chancery Commissioners, answer to question 25, Story, Eq. Plead., Sec. 46, note 1; Foster, Federal Practice, page 227; U. S. Equity Rule, No. 64.

fenses to a discovery which might be taken by plea, other than those above excepted were not effective to protect the defendant from making discovery, unless, taken by plea. They could not bar discovery when taken by answer (*a*). Thus the defense of *bona fide* purchaser if raised by plea would protect the defendant from answering, but if raised by answer it would be no bar to the discovery sought, but only to the relief (*b*).

Such were the relations of answer and plea in the older equity practice; but by the adoption of the U. S. Equity Rules, Nos. 39 and 44 (*c*), the Federal practice has been largely changed in this respect, and now, in the United States courts, under these rules, a defendant may avail himself by answer of any excuse for not answering that he may have, except only such as are matters of abatement, or to the character of the parties, or matters of form, and are not apparent on the face of the bill.

In making discovery to the interrogatories the defendant must answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief. If he asserts ignorance as to any matter he must aver that he is ignorant both of his own knowledge and as to information and belief (*d*); and if he asserts ignorance of any matter presumptively within his knowledge, or in which the bill charges that he was personally engaged, it may be treated as an admission (*e*). To so much of the bill as it is necessary for the defendant to make discovery, he must speak directly and without evasion, and he must not merely answer the several charges literally but he must confess or traverse the substance of each charge (*f*).

In the Federal practice the plaintiff may waive an answer under oath to the bill. In such case the answer becomes merely a defensive pleading and in no way a disclosure. Under such circumstances of course the provisions for complete disclosure do not apply.

The answer should be entitled in the cause so as to agree

(*a*) Story, Eq. Plead., Sec. 851. (*b*) Story, Eq. Plead., Secs. 847 and 851. (*c*) Ante, Lect. III, pages 54 and 55. (*d*) Brooks vs. Byam, 1 Story, 296. (*e*) Mead vs. Day, 54 Miss., 58; Carey vs. Jones, 8 Ga., 516; and see Wheaton vs. Briggs, 35 Minn., 470. (*f*) Story, Eq. Plead., Sec. 852.

with the names of the parties as they appear in the bill at the time the answer is filed. The answer should then begin substantially as follows: "The answer of A. B. one of the above " named defendants to the bill of complaint of the above-nam- " ed plaintiff." Next followed formerly a clause reserving to the defendant any and all advantages that might be taken by exception to the bill. This clause is useless and is frequently omitted (*a*).

Then follows the substantive part of the answer, setting up the matters of defense and making the requisite disclosure. And the answer then concludes with a general traverse denying the general clause of combination and all other matters contained in the bill. This clause is probably unnecessary in an answer. Demurrer and plea in equity like demurrer and plea at law admit everything that is not denied (*b*) but it is not so with an answer. Failure in an answer to deny an allegation does not operate as an admission of its truth so long as some answer is made (*c*). A statement that defendant believes an allegation to be true is equivalent to admission (*d*) but the statement that the pleader has no knowledge seems to be equivalent to a denial, although if discovery has been required, such an answer is subject to exception for insufficiency (*e*). But it is a very wise and cautious practice to insert the general denial in every answer. On the other hand the answer must not contain either scandal, impertinence, or needless prolixity.

The answer when framed in accordance with the above provisions must be signed by the person making it. If an answer under oath has not been waived it must be sworn to before a proper officer (*f*).

An infant is a great favorite in a court of equity, and this is perhaps nowhere better illustrated than by certain provisions with regard to answering. We have seen how strenuously the court insists on disclosure; but when an infant is called upon to answer, it is usual for his guardian to file a mere general answer

(*a*) Story, Eq. Plead., Sec. 870; Foster, Fed. Prac., p. 222. (*b*) Foster, Fed. Prac., Sec. 106; Story, Eq. Plead., Secs. 452 and 694. (*c*) Brown vs. Pierce, 7 Wall., 205, 211; Brooks vs. Byam, 1 Story, 296; Young vs. Grundy, 6 Cranch, 51; Kittredge vs. Claremont Bank, 1 W. & M., 244 (*d*) Brooks vs. Byam, 1 Story, 296. (*e*) Brown vs. Pierce, 7 Wall., 205, 212. (*f*) U. S. Equity Rule, No. 59, as amended, Oct. Term, 1888, 129 U. S., 701.

that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, while the infant throws himself on the protection of the court. And under such an answer an infant is able to take advantage of almost every defense. Still, if the infant has any substantive affirmative defence, he should plead the same (*a*).

An example of an answer will be found in Barton's Suit in Equity, on pages 97 and 98.

When the answer is framed, signed, and verified, it is filed with the clerk of court.

The answer when thus filed is effectual in two different ways, as defensive pleading, and as evidence. As defensive pleading, it is effectual as far as its allegations entitle it to be. It should however, be noted that ordinarily no affirmative relief can be granted the defendant on his answer, either against the plaintiff, or against another defendant.

But in two classes of cases such relief seems to be so afforded. These are suits for an account, in which it finally appears that the balance is in favor of the defendant, and bills for specific performance of contracts, where the parties differ as to the terms of the contract, and the question is decided in defendant's favor; in these cases, the court will give decrees, respectively, for the sum found due the defendant, and for performance of the contract as established, without further pleading, on defendant's part, than the answer (*b*). In other cases, if the defendant desires affirmative relief against the plaintiff, or against another defendant, his remedy is in general by a different pleading which we shall consider shortly, viz., a cross-bill.

As an instrument of evidence, the answer is effective not only in favor of the plaintiff, but also against him. Unless an answer under oath is waived in accordance with the provisions of the United States rule, the sworn statement of the defendant in direct response to an allegation of the bill, is deemed to be true, unless contradicted by two witnesses, or by one witness

(*a*) Foster, Fed. Prac., p. 223. (*b*) Clarke vs. Tipping, 4 Beav., 588; Campbell vs. Campbell, 4 Halst. Eq. (N. J.), 740; Fife vs. Clayton, 13 Ves., 546; Bradford vs. Bank, 13 How., 57; Foster, Fed. Prac., Sec. 171; Story, Equity Pleading, Sec. 394.

and corroborating circumstances (*a*). There are however certain important limitations of this doctrine concerning the evidentiary weight of the answer. An answer though under oath is *not* evidence for the defendant, which must be so overcome, in the following cases:

1). As to new averments or matters in avoidance or discharge (*b*).

2). As to matters in respect to which the answer is absurd or contradictory, or so sets forth the circumstances as to render the allegations of the bill more probable (*c*).

3). When the answer is not direct, positive, and unequivocal in its denials or explanations (*d*).

4). When the answer is on information and belief (*e*).

5). When the answer itself shows, or it is apparent from the defendant's situation or condition, that, though the answer is positive, yet defendant swears to matters of which he either could not or did not have personal knowledge (*f*).

6). Where an answer on oath is discredited as to one point, its effect as evidence as to other points is impaired or destroyed as the case may be (*g*).

7). Where the defendant in an answer upon oath professes ignorance as to matters stated in the bill, his ignorance is, of course, without evidentiary weight (*h*). But where such matters are presumably within the defendant's knowledge, or his means of knowledge, and are so charged in the bill, such answer of ignorance may be construed as an admission (*i*).

8). In the United States practice, "If the complainant, in his " bill, shall waive an answer under oath, or shall only require " an answer under oath with regard to certain specified inter- " rogatories, the answer of the defendant, though under oath, " except such part thereof as shall be directly responsive to such " interrogatories, shall not be evidence in his favor, unless the

(*a*) Story, Eq. Plead., Sec. 849*a*. (*b*) Hart vs. TenEyck, 2 Johns. Ch., 62; Seitz vs. Mitchell, 94 U. S., 580; Randall vs. Phillipps, 3 Mason, 378; N. E. Bank vs. Lewis, 8 Pick., 113. (*c*) Cunningham vs. Freeborn, 3 Paige, 557; East India Co. vs. Donald, 9 Ves., 275. (*d*) Farnam vs. Brooks, 9 Pick., 212, 250; LeNeve vs. LeNeve, 1 Ves. Sr., 66. (*e*) Town vs. Needham, 3 Paige, 545; Atl. Ins. Co. vs. Wilson, 5 R. I., 479. (*f*) Watson vs. Palmer, 5 Pike, 501; Fryrear vs. Lawrence, 5 Gilm., 325; Garrow vs. Carpenter, 1 Porter, 359; Lawrence vs. Lawrence, 4 Bibb, 357. (*g*) Forsyth vs. Clark, 3 Wend., 637. (*h*) Brown vs. Pierce, 7 Wall., 205, 211-212. (*i*) Mead vs. Day, 54 Miss., 58; Carey vs. Jones, 8 Ga., 516; and see also Wheaton vs. Briggs, 35 Minn., 470.

" cause be set down for hearing on bill and answer only " (*a*).

A discussion of what circumstances will be deemed sufficiently corroborative of one witness, so that they will outweigh an answer under oath, will be found in Story's Equity Pleading, Sec. 849 a, notes and cases there cited.

"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 re-sworn 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 defenses, or qualifying or altering the original state- " ments except by special leave of the court or of a judge " thereof, upon motion and cause shown after due notice to the " adverse party, supported, 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 there- " from" (*b*). But in general the courts are chary of allowing a defendant to make any substantial amendments of his answer. Permission to change the disclosure would give too large an opportunity for false evidence in many cases, and especially so after the testimony has been made known in the case (*c*).

If any new matter is discovered by the defendant after putting in the answer which existed at the time of answering this should be set up by supplemental answer (*d*). But if the defense *arise* after defendant has filed his answer it should be put in by a cross-bill in the nature of a plea *puis darrein continuance* at law (*e*).

OF COMBINATION PLEADINGS.

As we have seen, a demurrer or a plea may run to but part of a bill. A defendant may demur to one interrogatory, plead to a second, and answer to a third. In every case where

(*a*) U. S. Equity Rule, No. 41. (*b*) U. S. Equity Rule, No. 60. (*c*) Calloway vs. Dobson, 1 Brock., 119; Smith vs. Babcock, 3 Sumn., 583. (*d*) Suydam vs. Truesdale, 6 McLean, 461; Talmage vs. Pell, 9 Paige, 413. (*e*) Fenton vs. Williams, 11 Paige, 18; post, page 68.

the defendant attacks but part of the bill by demurrer or plea he must at the same time answer to the residue of the bill; and such a pleading we may perhaps properly call a combination pleading. We have seen, too, that courts of equity are very chary of allowing double pleas; but the rule that a defendant cannot plead several matters must not be understood as precluding a defendant from putting in several pleas to different parts of the bill; it merely prohibits his pleading, without previous leave, a double defense to the whole bill or to one same portion of it. The defendant may plead different matters to separate parts of the same bill, and likewise may put in different demurrers to different parts of the same bill (*a*). And in such case only such portion of the bill as is not covered by the several pleas and demurrers need be answered, except in so far as in the case of impure pleas the answer is auxiliary to the plea. In such cases if plea or demurrer to part of the bill be overruled the defendant must then complete his answer to the corresponding extent.

The provisions of the United States rules that 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 (*b*), and that no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea (*c*), are not so extensive as to permit one to demur, plead, and answer to the same portion of a bill. Where a plea and a demurrer are put into the same matter simultaneously the plea waives the demurrer and in the same way an answer waives the protection of both plea and demurrer so far as the answer extends (*d*).

In other respects these combination pleadings are sufficiently described for our purpose by what has been said concerning demurrer, plea, and answer. In the United States practice under Rule No. 39, it is simpler and easier to take ob-

(*a*) 1 Daniel's Ch. Pl. & Pr., pages 584 & 610 (*b*) U. S. Equity Rule, No. 36. (*c*) U. S. Equity Rule, No. 37. (*d*) Crescent City Co. vs, Butcher's Union Co., 12 Fed. Rep., 225; but see Hayes vs. Dayton, 18 Blatchf., 420.

jections by answer when an answer is to be put in at all, consequently the use of a plea or a demurrer to part of the bill in conjunction with an answer to the rest of it is disappearing.

OF CROSS BILLS.

It frequently happens that a defendant in order to maintain his defense needs some discovery from the plaintiff or some other defendant, or, in order to get the whole matter disposed of needs some affirmative relief against the plaintiff or some other defendant. Until very recent times no party to a suit in equity could be examined as a witness. No discovery could of course be obtained by means of demurrer, plea, or answer. Likewise no affirmative relief could be obtained by either demurrer or plea, and only in rare cases by answer (*a*). Accordingly recourse had to be had to some other form of pleading. The method adopted in equity was for a defendant to institute a cross-proceeding in the same suit by a bill, which differs from an original bill in no way except that it is brought in a suit already begun. Such cross-bill would then have to be demurred, plead, or answered to by those against whom it was exhibited, and bill and cross-bill and all further steps thereon would be dealt with as one proceeding and disposed of at one hearing.

The cross-bill was used too, for one other purpose. If a new defense *arose* after answer, or after the cause was at issue, it could not be raised by demurrer, plea, or answer so it was raised by cross-bill which thus filled the place, on defendant's part, of a plea *puis darrein continuance* (*b*). But if the matter arose before answer and is discovered after answer it is not matter for a cross-bill but for a supplemental answer (*c*).

"If the facts which a defendant wishes to set up destroy the " plaintiff's apparent cause of action, they constitute a defense, " and should be set up by answer or plea ; but if they only " furnish a reason why the court should make a decree depriv- " ing the plaintiff of his cause of action, they must be set up

(*a*) Ante, page 64. (*b*) Story, Eq. Plead., Sec. 393; Fenton vs. Williams, 11 Paige, 18. (*c*) Ante, page 66.

"by a cross-bill" (*a*). For instance, if the plaintiff's rights depend on a contract which is voidable, and not void, ordinarily the defendant should set up the facts by cross-bill instead of by answer (*b*).

"Where a defendant in equity files a cross-bill for discov-
" ery only against the plaintiff in the original bill, the defend-
" ant 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" (*c*).

Leave must be obtained before filing a cross-bill, or it may be set aside (*d*).

A cross-bill is a mere auxiliary suit, and must deal only with matters connected with the subject of the original bill (*e*). No new parties can be brought in (*f*). The subpœna to answer the cross-bill is sufficiently served on the attorneys for the parties. And the cross-bill is so far a part of the original proceeding, that no objection to the jurisdiction of a United States court can be taken on account of the altered positions of the parties, if the parties were of such citizenship as to confer jurisdiction in the original bill (*g*); and in all equity courts the original cause will not be heard till the cross-bill is answered, so that the whole controversy may be disposed of at once (*h*). If, after the cross-bill is filed, the plaintiff dismiss the original bill, the defendant is entitled to a decree *pro confesso* on the cross-bill (*i*).

A defendant is not ordinarily bound to seek affirmative relief by cross-bill, unless ordered to do so by the court, but may seek the relief desired by an independent bill (*k*); but this, of course, does not apply to cases where the cross-bill seeks discovery or relief solely for defense to the plaintiff's demand, but only to cases where he seeks a more complete adjudication and remedy.

(*a*) Langdell, Eq. Plead., Sec. 155. (*b*) Ford vs. Douglas, 5 How., 143; Jacobs vs. Richards, 18 Beav., 300; but see Osborne vs. Barge, 30 Fed. Rep., 805 (*c*) U. S. Equity Rule, No. 72. (*d*) Bronson vs. R. R. Co., 2 Wall., 283. (*e*) Cross vs. DeValle, 1 Wall., 5; Rubber Co. vs. Goodyear, 9 Wall., 807; Heath vs. Erie Ry., 9 Blatchf., 316; Putnam vs. New Albany, 4 Biss., 365. (*f*) Shields vs. Barrow, 17 How., 130. (*g*) Peay vs. Schenck, 1 Woolw., 175. (*h*) Young vs. Pott, 4 Wash., 521; Moore vs. Huntington, 17 Wall., 417. (*i*) Lowenstein vs. Glidewell, 5 Dill., 325. (*k*) Washburn vs. Scutt, 22 Fed. Rep., 710.

A cross-bill may be filed at any time before final hearing, and perhaps even thereafter, till final decree (*a*).

Between exceptions to the bill, demurrers, pleas, answers, and cross-bills, the defendant is able to advance all such defenses as he has.

OF REPLICATION AND OTHER REMEDIES OF THE PLAINTIFF.

Where a demurrer, plea, or answer is filed too late, or has some irregularity in its form, such that it ought not to be allowed to stand as a pleading, as, for instance, if a plea or demurrer is not accompanied by the necessary certificate of counsel or affidavit of the party (*b*), or if an answer is filed by a person not named as defendant in the bill (*c*), or is so evasive as to be in fact no answer (*d*), the plaintiff may move that the pleading be taken off the file. The application is "to take a " certain paper, purporting to be a demurrer (plea, or answer, " as the case may be) off the file." A further consideration of the grounds for taking pleadings off the file will be found in Foster's Federal Practice, Sections 119, 139, and 152. If the pleading is taken off the file, this is done by an entry of an order that it be so taken off, and the annexation of the order to the pleading (*e*). By setting down the cause for hearing, or filing a replication, filing exceptions, or taking any other step in the cause, nearly all the defects which can be reached by such a motion are waived (*f*).

In case of a demurrer, the only remaining step which the plaintiff can take is to set it down for argument. As we have seen, he must do this promptly, or his bill will be dismissed (*g*). In the case of the answer, and more rarely in the case of the plea, the defendant's pleading may contain matter impertinent or scandalous. In such case the plaintiff may file exceptions for the scandal or impertinence, substantially as defendant may to the bill (*h*). This remedy for scandal and

(*a*) Neal vs. Foster, 34 Fed. Rep., 496; Rogers vs. Riessner, 31 Fed. Rep. 592. (*b*) U. S. Equity Rule, No. 31. (*c*) Putnam vs. New Albany, 4 Biss., 365. (*d*) Tomkin vs. Lethbridge, 9 Ves., 178, Smith vs. Serle, 14 Ves., 415. (*e*) Foster, Fed. Prac., Sec. 119. (*f*) Foster, Fed. Prac., Secs. 119, 139, and 151. (*g*) Ante., Lecture III, page 47. (*h*) Ante, Lecture, III, pages 45 and 46.

impertinence must be pursued before any of those to be mentioned, or mere impertinence will be waived, though it is otherwise as to scandal (*a*).

An answer may further be defective as being "insufficient," that is, as not answering fully the statements and allegations of the bill. If a plaintiff conceives an answer to be insufficient, he may take exceptions to it, in writing, signed by counsel, for insufficiency. The exceptions must set out verbatim the parts of the bill which plaintiff alleges are not sufficiently answered, and the terms of the answer actually made to such parts of the bill, that the court may see the facts; and should conclude with a prayer that the defendant may in such respects make further and full answer to the bill (*b*). If the exceptions, or any of them, are allowed, the defendant will be required to supplement his answer by a further answer, as far as called for by the allowance of the exceptions (*c*). And there are provisions in the rules quite effectual for attaining this result (*d*). There, also, will be found the provisions for the method of procedure, by exceptions, for insufficiency (*e*). Such exceptions are waived by going to trial on the merits (*f*).

Where a defendant demurs or pleads to any part of the discovery sought by a bill, and answers to the residue, the plaintiff cannot take exceptions to the answer before the demurrer, or plea, has been disposed of. If he does, it will have the effect of admitting the validity of the demurrer, or plea; the foundation of this rule seems to be, that it is impossible to determine whether the answer is sufficient or not, unless the demurrer, or plea, is admitted to be good. But if the demurrer, or plea, is only to the relief prayed by the bill, and not to any part of the discovery, plaintiff may take exceptions to the answer for insufficiency without any waiver (*g*).

If a plea, or demurrer, to the relief is filed without any answer, plaintiff need take no exceptions, but the defendant, if the plea, or demurrer, is overruled, will then have to answer as

(*a*) Ante, Lecture III, page 46; Anon, 2 Ves, Sr., 631; Patriotic Bank vs. Bank of Washington, 5 Cranch, C. C., 602: Johnson vs. Tucker, 2 Tenn. Ch., 244. (*b*) Story, Eq. Plead., Sec. 864; Brooks vs. Byam, 1 Story, 296, 298; Foster, Fed. Prac., Sec. 153. (*c*) Foster, Fed. Prac., Sec. 153. (*d*) U. S. Equity Rule, No. 64. (*e*) U. S. Equity Rules, Nos. 61, 62, 63. 64, and 65. (*f*) Kittredge vs. Race, 92 U. S. 116. (*g*) Story, Eq. Plead., Sec. 866.

if no defense had been made. But, if an answer accompanies the plea or demurrer to the relief, the plaintiff must, if he deems the answer insufficient, except thereto (*a*).

The only pleading that plaintiff can interpose after plea or answer, in the ordinary course of a suit, is a general replication. Amendments to the bill and bills not original are possible at almost any stage of the case, but they are not referred to in this statement.

In ancient times the pleading went on after answer by replication, rejoinder, surrejoinder, etc., etc., but these pleadings fell into disuse and the only one of them left is the general replication. This is a formal pleading, ordinarily of considerable verbiage, but consists substantially of a denial of every statement in the answer, or plea, and is plaintiff's announcement of his determination to stand or fall on the statement contained in his bill. No evidence in avoidance can be given under the general replication. It is simply a denial. And this is the only other pleading. "No special replication to any answer " shall be filed," say the rules (*b*).

The old and well established form of a general replication is given in Barton's Suit in Equity, on pages 108 and 109 (*c*). But a much simpler form will suffice (*d*).

If a special replication be filed pleading new matter, such matter may be disregarded as surplusage (*e*). There can be no departure in the replication from the statements of the bill (*f*). If the plaintiff thinks he has stated the case correctly in the bill, including therein all matters in avoidance of the defenses set up, his step is to file this general replication (*g*). This must be done on or before the next succeeding rule-day (*h*). If the plaintiff omits to do so the defendant is 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* (*i*). But the greatest liberality

(*a*) Story, Eq. Plead., Sec. 866. (*b*) U. S. Equity Rule, No. 45. (*c*) See also Story, Eq. Plead., Sec. 878, Note 5. (*d*) Clements vs. Moore, 6 Wall., 299, 303, 310. (*e*) Duponti vs. Massy, 4 Wash. C. C., 128. (*f*) Vattier vs. Hinde, 7 Pet., 252. (*g*) U. S. Equity Rule, No. 66 (*h*) Id. (*i*) U. S. Equity Rule, No. 66; Robinson vs. Satterlee, 3 Sawy., 134.

is exercised in allowing replications to be filed *nunc pro tunc* (*a*). And if the parties go on to take testimony without a replication being filed it will be deemed waived (*b*). And such an objection will not be allowed to prevail if raised first on appeal (*c*). The answer of every defendant must be replied to without reference to the state of the cause or of the pleadings in regard to any other defendant (*d*).

Since by the general replication no avoidance of the matter of the plea or answer can be set up, it is obvious that there must be some other method of raising such defenses. The means adopted therefor in the equity procedure is amendment of the bill. As we have seen, the plaintiff by the charging part of the bill seeks to anticipate and avoid the defenses which he supposes the defendant will seek to interpose. After plea or answer he can of course do this with accuracy. Accordingly it is the regular method of procedure, when the defendant sets up new matter which has not been anticipated in the bill and which plaintiff desires to avoid, that plaintiff amend his bill by charging the defense and setting up the matter avoiding it. By the rule, "after an answer, plea, or demurrer is put 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" (*e*).

"If any matter alleged in the answer shall make it neces- " sary 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" (*f*). And this amendment may, if the plaintiff desires, consist in amplifying his interrogatories. If he thinks further interrogatories will elicit valuable information, this is his opportunity. And the plaintiff must keep in mind that he can recover only *secundum allegata et probata*; and see to it that his bill correctly states the case.

(*a*) Peirce vs. West's Executors, Pet. C. C., 351; Fischer vs. Hayes, 6 Fed. Rep., 76; Jones vs. Brittan, 1 Woods, 667. (*b*) Reynolds vs. Crawfordsville Bank, 112 U. S., 405; Jones vs. Brittan, 1 Woods, 667; Fischer vs. Hayes, 6 Fed. Rep., 76. (*c*) Clements vs. Moore, 6 Wall., 299; Fretz vs. Stover, 22 Wall., 198. (*d*) Coleman vs. Martin, 6 Blatchf., 291. (*e*) U. S. Equity Rule, No. 29. (*f*) U. S. Equity Rule, No. 45.

"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 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" (*a*).

After such further answer is perfected, the plaintiff might, if the new answer made it necessary, with leave of court, amend again; but ultimately he will come to filing his general replication, and the cause is then at issue (*b*).

One other result is possible, namely that the plaintiff come to the conclusion that, upon the bill and answer, adopting the statements of the answer as true, he is entitled to the relief he seeks. In such case, plaintiff, without filing a replication, may set down the suit for hearing on bill and answer only. This proceeding is substantially like a general demurrer at law. In such case, the answer is also evidence for the defendant, even though an answer under oath is waived (*c*), subject to the first seven restrictions set out above, on page 65.

"After replication, or such setting down for a hearing, it " (the answer) shall not be amended in any material matters, " as by adding new facts or defenses, or qualifying or altering " the original statements, except by leave of the court, or of a " judge thereof, upon motion and cause shown after due notice " to the adverse party supported, 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" (*d*).

Of course, if a material amendment is made, plaintiff is at liberty to attack the answer as amended by the above methods.

Ordinarily after replication the plaintiff's right to amend

(*a*) U. S. Equity Rule, No. 46. (*b*) U. S. Equity Rule, No. 66. (*c*) U. S. Equity Rule, No. 41, as amended May 6, 1872, 13 Wall, xi. (*d*) U. S. Equity Rule, No 60.

his bill is gone, except for making new parties, but the court may grant special permission, on cause shown, to withdraw the replication, and amend the bill (*a*), or even allow the bill to be amended at the hearing (*b*).

But ordinarily the cause is completely at issue when the replication is in (*c*).

(*a*) Story, Eq. Plead., Secs. 887, 888, and 889; U. S. Equity Rule, No. 29. (*b*) Neale vs. Neales, 9 Wall., 1, 8; Battle vs. Mutual Life Insurance Co., 10 Blatchf., 418, (*c*) U. S. Equity Rule, No. 66.

LECTURE V.

OF TRIALS AND OF DECREES.

As we saw, in the first lecture, the forms of procedure in equity were to a great extent affected by the familiarity of the ecclesiastics, who held the seal, with Roman law and procedure (*a*). In few respects was this more apparent then in the method of conducting trials in equity. At the common law, the witnesses were examined orally in open court, in the presence of judge and jury, of parties, attorneys, and spectators, at the time of the hearing and determination of the case. In equity the procedure was as different as could well be imagined. The witness was examined by an officer of the court, in private, no one of the parties or of their solicitors being allowed to be present, on written interrogatories and cross-interrogatories, all carefully prepared by one side and the other, and delivered to the examining officer before the examination of the witness began. Not only was the examination of the witness conducted in private, but his testimony when given was kept secret until all the evidence in the case was in, when publication was passed, and the contents of the examiner's report made known. And all this was done long before the hearing of this cause.

This method of procedure is regulated by the United States Equity rules as follows:

"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" (*b*).

"After the cause is at issue, commissions to take testimony " may be taken out in vacation, as well as in term, jointly by

(*a*) Ante, Lect. I., page 10. (*b*) U. S. Equity Rule, No. 69.

" both parties, or severally by either party, upon interrogato-
" ries 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, the commission may issue *ex parte* (*a*).

The commissioner, or commissioners, are named by the court, or judge, but, under an amendment of the rule, the presiding judge may give the clerk general power to name commissioners to take testimony (*b*).

In drawing up the interrogatories to be propounded to a witness, one is at liberty, of course, to frame his questions to suit himself, but interrogatories are to be perused and signed by counsel, who thereby make themselves responsible for the propriety of the interrogatories. The original interrogatories (those put by the party calling the witness), however, conclude ordinarily with the general interrogatory, which is as follows: "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 ques- " tion in this cause? If yea, set forth the same fully and at " large in your answer" (*c*). This interrogatory must be answered, or the deposition is fatally defective (*d*). It has, however, been held in England, under a rule like that just cited, that it is not necessary to append this interrogatory (*e*).

Interrogatories must be short and pertinent, and must not be leading. Leading questions are such as instruct the witness how to answer on material points, or which, embodying a material fact, admit of an answer by a simple negative or affirmative (*f*). If the questions are leading, the deposition taken thereon may be suppressed by the court. But in some cases, leading questions are permitted, and are proper on direct examination. The principal of these cases are the following: where the witness appears to be hostile to the party calling him, or to

(*a*) U, S. Equity Rule, No. 67. (*b*) U. S. Equity Rule, No. 67. (*c*) U. S. Equity Rule, No. 71. (*d*) Richardson vs. Golden, 3 Wash., C. C., 109; Dodge vs. Israel, 4 Wash., C. C., 323. (*e*) Gover vs. Lucas, 8 Sim., 200. (*f*) 1 Daniels, Ch. Pl. & Pr., 921.

be acting in the interest of the other party, or to be reluctant or unwilling to give his evidence; or where an omission in his testimony is caused by a want of recollection, which a suggestion may assist; or where, from the nature of the case, the mind of the witness cannot be directed to the subject of the inquiry without a particular specification of it. It should be observed that questions which are merely introductory of the general subject are not ordinarily liable to objection as leading (*a*). When, and under what circumstances a leading question may be put to one's own witness, lies largely in the discretion of the trial court. Cross-interrogatories are not ordinarily subject to objection as leading, but if a witness appear strongly interested in favor of the cross-examining party, it has been held that it lies in the discretion of the court to exclude leading questions put on cross-examination, and the answers thereto (*b*).

Interrogatories like all other proceedings in equity are subject to reference for scandal, though they cannot be referred for mere impertinence (*c*).

The examiner then examines the witness (deponent) to the interrogatories *seriatim*, explaining the questions to the witness as he proceeds, if necessary. The examiner may not permit the witness "to read over, or hear read any other inter-" rogatories until that in hand be fully finished; much less is he " to suffer the deponent to have the interrogatories, and pen his " own depositions, or depart after he hath heard an interrogatory " read over, until he hath perfected his examination thereto" (*d*). The answers are written down as given, and at the conclusion of the examination, the witness subscribes his testimony after it has been read over to him. After the testimony of all the witnesses to come before him has been taken, the examiner returns the testimony taken before him under seal to the clerk of court, where it remains under seal until publication passes.

When the examination of witnesses on both sides is ended,

(*a*) 1 Daniel's Ch. Pl. & Pr., 921. (*b*) Moody vs. Rowell, 17 Pick., 490, 498. (*c*) Cocks vs. Worthington, 2 Atk., 236; White vs. Fussell, 19 Ves., 113. (*d*) Beames, Ord., 188; Ketland vs. Bissett, 1 Wash., C. C

either party serves the other with an order of court importing that the depositions will be made public, unless sufficient cause is shown to the contrary, within a time therein expressed. If no cause is shown, the order is made absolute, and the testimony made public. This is termed passing publication, and absolves the examiner from his oath of secrecy (*a*).

The three months allowed by the United States rule begins to run when the issues are joined with all the defendants (*b*), and is for taking the testimony on the part of both plaintiffs and defendants (*c*), as, under this system of taking evidence, there is no advantage in calling on one party to produce his evidence before the other party. Usually after publication no new witness can be examined or new evidence taken except in special cases, on cause shown, such as accident, surprise, or fraud (*d*); but the court has a discretionary power to allow proofs to be put in after time (*e*). And the court has the power to take the testimony of witnesses in open court (*f*), and this power is not infrequently exercised for the purpose of proving the genuineness of exhibits referred to in the bill and answer (*g*).

In the Federal practice there are a number of permissive modifications of this method of taking the evidence (*h*). One of these has, with the advent of the stenographer and typewriter, and the tendencies toward unification of legal and equitable remedies, become the common mode of taking testimony in equity. By the rule (*i*), "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

(*a*) Barton's Suit in Equity, 114; see U. S. Equity Rule, No. 69. (*b*) Gilbert vs. VanArman, 1 Flippin, 421; but see Coleman vs. Martin, 6 Blatchf., 291. (*c*) Ingle vs. Jones, 9 Wall., 486. (*d*) Wood vs. Mann, 2 Sumn., 316, (*e*) Fischer vs. Hayes, 6 Fed. Rep., 76 (*f*) In re Clarke, 9 Blatchf., 372. (*g*) Barton's Suit in Equity, 116. (*h*) U. S. Equity Rule, No. 67. as amended, 17 How., IX; 1 Black, VI, 9 Wall., VII; U S. Rev. Stats., Secs. 863-875. (*i*) No. 67, as amended.

" 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 examina- " tion 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 irrele- " vant depositions, or parts of them, as may be just." "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 " deposition, authenticated by the signature of the examiner, " shall be transmitted by him to the clerk of the court, to be " there filed" (*a*).

Under this method it was soon obvious that it was important to have the plaintiff first take his evidence, and then give the defendant time to take his evidence in defense, leaving a time thereafter for plaintiff to take his evidence in reply. Accordingly, in 1869, it was provided that, when the evidence is taken in accordance with these provisions, "the court may, " on motion of either party, assign a time within which the " complainant shall take his evidence in support of the bill, " and a time thereafter within which the defendant shall take " his evidence in defense, and a time thereafter within which

(*a*) U. S. Equity Rule, No. 67, as amended.

" the complainant shall take his evidence in reply; and no " further evidence shall be taken in the cause unless by agree- " ment of the parties, or by leave of court first obtained on " motion for cause shown" (*a*).

It will be observed that there is no opportunity in any of these methods of procedure for obtaining any ruling on the competency, relevancy, or materiality of the testimony sought. Such questions are all reserved till the hearing when they are passed on by the court. And when the questions are merely of competency, materiality, and relevancy, this method of raising the question is sufficient, in view of the court's power of imposing costs for improper cumbering of the record. But, where the question is one of privilege not to make disclosure, the whole benefit of the privilege might be lost if one had to make the disclosure before the examiner. Accordingly a different remedy exists for such cases, namely a demurrer by the witness to the interrogatory, if the privilege is that of the witness (*b*), or, where the privilege is that of the party to have the witness maintain silence concerning matters coming to him in professional confidence, the remedy is to move the court to refer it to a master in chancery to inquire and make a report thereon, and upon the report to suppress the depositions (*c*). Such a demurrer by a witness to the interrogatories is not, like a demurrer to a pleading, an objection arising solely on the facts appearing upon the record, but is a statement of the facts upon which the witness relies as the ground of his objection (*d*). The grounds on which a witness may so object, are similar to those on which a party might, under the old practice, decline by answer, to make discovery to the interrogatories in the bill (*e*). They are principally: 1), that by disclosing, the witness may expose himself to a penalty or forfeiture; 2), that a disclosure may lead to a decree against the witness; 3), that the witness cannot answer without a breach of professional confidence. It has been claimed that such a demurrer may lie on the ground that the

(*a*) Amendment to U. S. Equity Rule, No. 67, of Dec. Term, 1869, 9 Wall., VII. (*b*) Winder vs. Diffenderfer, 2 Bland., 166. (*c*) Sandford vs. Remington, 2 Ves. Jr., 189. (*d*) 1 Daniel's Ch. Pl., & Pr., 942. (*e*) Ante, Lect. IV, page 60.

matter sought is impertinent, but the rule seems to extend only to scandalous matter (*a*).

When the witness so demurs to an interrogatory, the examiner has no power to pass on the objection. In a common law court, a witness' objection on such a ground is passed on at once by the court, the matter is to be passed on in equity in a substantially similar way. The examiner reduces the objection to writing, and with it the facts on which the witness bases his objection; these are verified by the oath of the witness. Then if the party propounding the interrogatory, desires an answer, he must bring the demurrer on for argument, or he will be deemed to have waived his question (*b*).

A proceeding substantially similar, obtains under the code practice in similar cases (*c*).

The depositions being published, they should be examined with care, to see if any ground exists for suppressing them. The ordinary grounds for suppression are that the interrogatories are leading, or that the depositions are scandalous, or that the proceedings have been improperly taken.

Where the depositions are taken orally, the objections to questions are made before the examiner, and embodied in his report, and argued before the court at the hearing. If the objection does not raise a question of privilege proper for demurrer by the witness, the answer is taken, subject to the objection; and question, objection, and answer are all reported to the court, and are disposed of ordinarily at the final hearing.

Publication having passed, and the depositions having been examined by the parties, the next step, in some of the districts (including Minnesota) is to have the bill, answer, replication, and evidence printed for the use of the court. The provisions of the rules are comparatively strict, and must be followed with care.

The next step is to set the cause down for hearing. The setting down for hearing is done in the clerk's office, and the parties are bound to take notice of it, and appear at the term

(*a*) Ashton vs. Ashton, 1 Vern., 165; Mulgrave vs. Dunbar, 2 Swanst., 198, n. (*b*) Mowatt vs. Graham, 1 Edw. Ch., 13; In re Shotwell, 43 Minn., 389. (*c*) In re Shotwell, 43 Minn., 389.

and time appointed for the hearing (*a*). Thereupon the case comes, ordinarily for the first time, before the judge who is to decide it. In one way and another, many troublesome matters have been eliminated, and everything has as far as possible been prepared, so that the judge may determine the controversy with as little trouble as possible.

The parties appear by their counsel when the case is called, and the case is then opened by the plaintiff; the case is argued by his counsel, on the pleadings and evidence before the court. The defendant then presents his views of the case, and the plaintiff replies. This ends the presentation of the cause to the court, with whom it now rests, to determine the facts and pronounce the judgment of the law thereon, or, in other words, to make its decree.

It not infrequently happens that a question of fact will be disputed with great strenuousness on one part and the other, and the evidence thereto will be of such a character that the court will hesitate to determine the fact. For most purposes a single judge, of fair capacity and having well-trained powers, is a far better tribunal than a numerous jury of persons untrained in the law. But for some purposes a jury is far better adapted than a judge to give a just decision. This is true preeminently in cases where the evidence, *pro* and *con*, is very evenly balanced. In such cases a judge frequently hesitates to decide the question of veracity between the parties, or of the relative accuracy and credibility of the witnesses, and chancery judges have frequently called in juries to their aid in such case. But no jury ever sits in a court of chancery, so recourse was had to feigned issues. The parties, under the direction of the court, would draw up pleadings in a feigned law action in such a way as to evolve as an issue in the action the question of which decision was sought. Thereupon, such feigned issue would be brought to trial at the bar of the law court, before a law judge and jury. And the determination by the jury would ordinarily be adopted by the equity judge as the true state of the facts, though the chancellor is under

(*a*) Barton's Suit in Equity, 132.

no conclusive obligation to adopt the finding of the jury. This method, somewhat simplified, still obtains under the code (*a*).

OF DECREES.

"A decree is a sentence or order of the court, pronounced " on hearing and understanding all the points in issue, and de- " termining the right of all the parties to the suit, according to " equity and good conscience. It is either interlocutory or " final. An interlocutory decree is: when the consideration of " the particular question to be determined, or the further " consideration of the cause, generally, is reserved till a future " hearing. The further hearing is then termed a hearing upon " further consideration, or upon the equity reserved. It seldom " happens that a first decree can be final, or conclude the " cause" (*b*).

"When a decree does not adjourn the consideration of the " cause, it is said to be a 'final decree'" (*c*).

A very common instance of an interlocutory decree is the decree of sale on foreclosure of a mortgage. The litigation is substantially terminated by the decree that a sale be had, but such a decree is not final, there still remains the sale, which must be confirmed by the court, and the rendering of judgment for a deficiency (*d*)

Care, however, must be taken not to confuse the term "final decree" as it it is here used and the peculiar use of that term in construing the statutes allowing appeals from "final decrees." A decree is frequently so far final as to permit an appeal therefrom as a final decree, when it by no means terminates the proceeding (*e*),

Decrees, in general, consist of four parts: 1), the date and the title of the cause; 2), the recitals; 3), the declaratory part (if any); and, 4), the mandatory part.

1). The decree commenced with a statement of the name

(*a*) Gen. Stat. (Minn.,) 1878, Cap. 66, Sec. 217. Under the Equity practice, too, in divorce cases a jury was frequently had. But divorce cases rarely, if ever, come up in the United States courts, and in the different states divorce procedure is regulated almost entirely by statute. Cf. Gen. Stat., (Minn.,) 1878, Cap. 66, Sec. 216. (*b*) 2 Daniel's Ch. Pl. & Pr., pp. 986-987. (*c*) Id., p. 993. (*d*) U. S. Equity Rule, No. 92. (e) Forgay vs. Conrad, 6 How., 203; Jones vs. Wilson, 54 Ala., 50; Whiting vs. Bank of U. S., 13 Pet., 15; Bronson vs. R. R. Co., 2 Black, 524.

of the court, of the date of rendering the decree, and of the names of the parties, who are to be described as in the bill.

2). Then followed formerly the recitals. Herein were formerly set out the pleadings *in extenso*, also the ordering part of any previous decree, and any report made thereon. And it was only as these papers became part of the decree that they became part of the record. But by the United States rules: " in drawing up decrees and orders, neither the bill, nor an- " swer, 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, viz.:' (Here insert the decree or order.)" (*a*).

Under this rule, the court does not ordinarily insert in the decree its findings of fact, but it may do so (*b*). In consequence of this distinction in the form of the decree, there is an apparent difference in the scope of a bill of review. In the English practice, a bill of review lies for errors apparent on the face of the decree. In the Federal practice, the bill of review lies for errors apparent on the face of the bill, answer, and other pleadings, and decree, which constitute what is properly the record, in the United States courts of equity; so that the difference is only apparent, and not real (*c*).

3). The next part of a decree is the declaratory part. It often happens that an important part of the relief sought by a bill is a mere declaration of rights, and not an enforcement thereof. Thus we have suits by trustees for the construction of instruments. Any such declaration is here set forth.

4). The fourth part of the decree is the ordering or mandatory part, which contains the directions of the court upon the matter before it. "Nothing is more elastic and less arbi- " trary than this part of a decree in equity. The directions to

(*a*) U. S. Equity Rule, No. 86. (*b*) Whiting vs. Bank of U. S., 13 Pet., 5, 14; Putnam vs. Day, 22 Wall., 60, 67. (*c*) Whiting vs. Bank of U. S., 13 Pet., 5, 14.

" the different parties may be separate, reciprocal, direct, or " inverted, as long as they are not inconsistent" (*a*).

"Clerical mistakes in decrees, or decretal orders, or errors " arising from any accidental slip or omission, may at any time " before an actual enrollment thereof be corrected by order of " the court or a judge thereof, upon petition, without the form " or expense of a rehearing" (*b*)

A decree can regularly be entered only during a term of the court, but the court has power to allow a decree to be entered even in vacation as of a previous term, *nunc pro tunc*, and will ordinarily exercise that power if delay has been due to the inadvertence or neglect of the court or one of its officers (*c*).

Decrees are enforced by courts of equity in ordinary cases by some of the following five means: 1), by writ of execution; 2), by attachment; 3), by writ of sequestration; 4), by writ of assistance, and, 5), by the action of the court itself through the medium of a master or receiver. By these various methods and the special writs at its command a court of equity is amply able to see its directions obeyed (*d*).

Where a party to a suit feels himself aggrieved by a final decree of the court, there are open to him numerous ways in which he may apply to have the decree reversed, set aside or varied. As we have just seen he may petition before actual enrollment for correction of a clerical or accidental error (*e*).

Secondly, he may petition for a rehearing. This is the proper method of correcting in a decree before enrollment errors therein which are not clearly clerical or accidental (*f*). " 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

(*a*) Foster, Fed. Prac., Sec. 325. (*b*) U. S. Equity Rule, No. 85. (*c*) Campbell vs. Mesier, 4 Johns' Ch., 334; Bank of United States vs. Weisiger, 2 Pet., 481, Vroom vs. Ditmas, 5 Paige, 528; Emery vs, Parrott, 107 Mass., 104; Foster vs. Woodfin, 65 N. C., 29; 2 Daniel's Ch. Pl. & Pr., 1016, note 7. (*d*) For a discussion of these means of enforcement of a decree see Foster, Fed. Prac., Cap. 26; and 2 Daniel's Ch. Pl. & Pr., 1042-1070. (*e*) U. S. Equity Rule, No. 85. (*f*) Foster, Fed. Pr., Sec. 352.

" time 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 " term before the end of the next term of the court, in the " discretion of the court" (*a*).

Rehearings are discretionary with the court (*b*) and are allowed only where some plain mistake or omission has been made (*c*) and not *ex parte*, but only on notice (*d*). If a rehearing be granted the cause or matter is heard again as if for the first time.

Thirdly, there is open to him the remedy by bill of review, or bill in the nature thereof, or a supplemental bill in the nature thereof, In order to maintain such a bill the party must ordinarily have performed the decree, but under certain circumstances this may be dispensed with (*e*).

Fourthly, the aggrieved party may bring a bill to set aside the decree on the ground of fraud, accident, or surprise (*f*).

Fifthly, he may file a bill to suspend or avoid the operation of the decree (*g*).

And, sixthly, he may, in many cases, appeal. The provisions regarding the right of appeal in the Federal courts will be found in the United States statutes. When an appeal is taken in equity from a whole decree the cause is ordinarily reheard and the cause proceeded with in the appellate court exactly as if it were an original hearing (*h*).

Before leaving our subject one further matter, which is, perhaps, not in strictness a part of our subject, may be spoken of that you may see how under the old practice equity was able to prevent injustice through the strictness of the law. I allude to the method by which a defendant in an action at law might avail himself of an equitable defense.

In the law courts, legal rights set up by plaintiff must be met in the same action by legal rights set up by defendant.

(*a*) U. S. Equity Rule, No. 88. (*b*) Daniel vs. Mitchell, 1 Story, 198; American etc. Co.,vs. Sheldon, 18 Blatchf., 50; Roemer vs. Bernheim, 132 U.S., 103, 106. (*c*) Jenkins vs. Eldredge, 3 Story, 299. (*d*) Giant Powder Co. vs. Cal. V. P Co., 6 Sawy., 531; S. C., 5 Fed. Rep., 199. (*e*) For a discussion of these bills see Foster, Fed. Prac., Secs. 353-357 and Story, Equity Plead., Secs. 403-425. (*f*) Stevens vs. Guppy, 1 Turn. & Russ., 178; Story, Eq. Plead., 426-428. (*g*) Story, Eq. Plead., Sec. 428 *a*. (*h*) Durkee vs. Stringham, 8 Wis., 1; Perkins vs. Fourniquet, 6 How., 206; Barton's Suit in Equity, p. 162; U. S. Rev. Stat., Sec. 698.

If defendant had an equity which, when worked out, would defeat the plaintiff's recovery, his mode of redress was to commence an independent suit in chancery, by which he might enforce his equity, in some cases by getting it transformed into a legal right, of which he might avail himself as a defense in the action at law; in others, by getting a permanent injunction against the prosecution of the legal action; further steps by the plaintiff in the law action being meanwhile stayed, by an injunction on him, issued in the chancery suit. A familiar case will illustrate this clearly. A has entered into a contract with B for the purchase of a tract of land. A has paid the full purchase price, and has gone into possession of the land, but has neglected to get his deed from B, though fully entitled to it. B then brings ejectment against A. A has no legal defense to this action at law. His equitable title, his right to have a legal title is not recognized by the court of law. In this state of affairs, he brings an equitable suit against B, praying that B may be compelled to convey to him (A) the legal title to the tract, and that, pending the suit in equity, B be enjoined from further proceeding at law. Upon an equitable decree, compelling B to convey to A, and its execution, A can come back into the law court with his chancery-acquired legal title, and successfully defend against the legal action of B. In some cases it might be impossible to get the relief of a conveyance of the legal title. In such cases a permanent injunction preventing B's asserting his legal title, though a less full and complete remedy, would, nevertheless, suffice to prevent a recovery by B in the law action.

By this method, the equitable system so far supplemented the legal system, as to prevent the working of injustice through the failure to recognize equities at law.

In this very brief sketch of Equity Pleading and Procedure much that is of great importance has been allowed to go without mention; while concerning the matters chiefly brought to your attention but very little has been said, and in no direction has anything more than a bare outline been attempted.

We must here close our brief sketch of this subject.

As said by Mr. Justice Story: "Upon a careful re-
" view of the whole subject the attentive reader will perceive
" that the task of mastering so complicated a science will
" require from him the employment of many hours of deep
" study, of laborious research, and of undivided diligence. He
" must give his days and his nights to it with an earnest and
" unflinching devotion. But the rewards will amply repay his
" toil. He who has attained a thorough knowledge of equity
" pleadings cannot fail to have become a great equity lawyer.
" He need not shrink from the most difficult and complicated
" engagements of his profession. Nay, he will find, that while
" many others are willing to rely on their own genius, with a
" rash and delusive self-complacency, to carry them through
" the intricacies of a controverted suit, he may far more justly
" and safely repose on a solid learning, which will secure
" respect, and a trained and varied discipline, which will com-
" mand confidence. To no human science better than to the
" law can be applied the precepts of sacred wisdom in regard
" to zeal and constancy in the search for truth. Here the race
" may not be to the swift; but assuredly the battle will be to
" the strong" (*a*).

(*a*) Story, Eq. Plead., Sec. 906.

ERRATUM.

Attention should have been called in the first lecture (page 19) to the United States Equity Rule No. 48, which is as follows:

"Where the parties on either side are very numerous, and " cannot, without manifest inconvenience and oppressive de- " lays 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."

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