

COMMENTARIES
ON
EQUITY PLEADINGS,
AND
THE INCIDENTS THEREOF,
ACCORDING TO THE
PRACTICE OF THE COURTS OF EQUITY
OF
ENGLAND AND AMERICA.

BY JOSEPH STORY, LL. D.,
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Ordine Placitandi servato, servatur et jus. Co. Litt. 303, a.

In eâ (consuetudine) autem jura sunt, quæ ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ Prætores edicere consueverunt. Cic. De Invent. cap. 22.

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ADVERTISEMENT
TO THE SECOND EDITION.

IN preparing this new edition for the press I have availed myself of the opportunity of revising the entire text, of making such corrections, and qualifications thereof as a more thorough examination seemed to require, and of adding such illustrations and new doctrines, as the authorities, published since the former edition, have brought to my notice. With this brief statement I venture to ask an indulgent consideration by the profession of the work in its present form.

CAMBRIDGE, (near Boston),
September, 1840.

TO THE HONORABLE

JEREMIAH MASON, LL.D.

SIR,

I esteem it a great privilege to have the opportunity of dedicating this work to you. Few circumstances in my life could be more grateful, than those, which enable me to inscribe on the pages, which contain my own imperfect juridical labors, the memorials of my private friendships, as well as the avowals of my reverence for the great, the good and the wise. Your own enviable distinction, so long held in the first rank of the profession, and supported by an ability and depth and variety of learning, which have had few equals, and to which no one can bear a more prompt and willing testimony than myself,—would alone entitle you to a far higher tribute, than any I can bestow. I well know, that I speak but the common voice of the profession on this subject; for they have well understood the vigor and the weight of that lucid argumentation, which has spoken in language for the cause, and not merely for its ornament; neque id ipsum, tam leporis causâ, quam ponderis. But I confess myself more anxious to be allowed to consider this dedication, as a tribute to your exalted private worth, spotless integrity, and inflexible public principles, as well as a free expression of my own gratitude for your uniform friendship;—a friendship, which commenced with my first entrance among the Bar, in which you were then the acknowledged leader (a period, when the value of such unexpected kindness could not but be deeply felt, and fully appreciated), and which has continued, undiminished, up to the present hour. Such reminiscences are to me more precious than any earthly honors. They fade not with the breath of popular applause; and they cheer those hours, which, as age approaches, are naturally devoted to reflections upon the past, for instruction, as well as for consolation.

I am, with the highest respect, your obliged friend,

JOSEPH STORY.

Cambridge, January 1, 1838.

PREFACE.

THE present work constitutes an appropriate sequel to my former work on Equity Jurisprudence. In that, my endeavor was, to bring together the leading principles of that highly important branch of the science of Law; in this, the principles, there developed, are connected with the forms, of the proceedings, by which rights are vindicated, and wrongs are redressed, in Courts of Equity. The principles are thus seen in their actual practical applications; and many otherwise unobserved limitations of them will be easily perceived and constantly illustrated.

As the present work is confessedly one of a purely technical character, and many of the rules are either of an arbitrary nature, or of a conventional form, it is not easy, in a great variety of instances, to find the exact reasons, on which they are built, or by which they are sustained. For the purpose of order, and just method, and reasonable certainty, and simplicity, in the proceedings of Courts of justice, it seems indispensable, that there should be some prescribed forms, in which the allegations and statements of the grievances complained of, and the matters of defence should be set forth, and the times when, and the modes by which, they are to be insisted on, should be established. Otherwise, every suit would be involved in endless perplexity or confusion; and it might be difficult, if not impracticable, to ascertain, what in reality constituted the true points of the plaintiff's claim, or of the defendant's defence. Hence, in every system designed for the administration of public justice, there will be found to have been some regular modes prescribed for

the ordinary cases put in litigation ; and from time to time, as new cases have arisen of an unusual and extraordinary character, the old forms have been modified, or new forms have been introduced. Since there must be some rules, the choice is often a mere measuring cast between one regulation and another ; and yet that choice must be made ; and, when made, the regulation must be uniformly acted on. The surprise, therefore, is not, that we should sometimes be unable to assign a satisfactory reason for one particular regulation, in preference to another. But it rather is, that so many regulations can be expounded upon grounds of general convenience, and vindicated, as reasonable and just in themselves.

I am aware, that in a treatise so purely technical, there is little room for any thing more than dry details, and clear and accurate statements. The subject forbids ornament ; and it must be discussed with a close and almost servile obedience to authority. When, however, a doctrine seemed to me to require some qualification, or to admit of a fuller exposition, which might be usefully brought before the attentive Reader, I have endeavored to make the notes the vehicle, either of criticism, or of information. I have quoted passages from leading authorities on particular points, with a view to convey to the student some views, which a brief text would scarcely suggest to his thoughts. They will be found, as I trust, useful in explaining difficulties, and in promoting accurate inquiries, and in furnishing hints for future practice. This has not been the least laborious part of the work.

The structure of every Treatise on the subject of Equity Pleadings, must be essentially founded on Lord Redesdale's admirable work on Pleadings in the Court of Chancery. That Treatise has been well described by Lord Eldon to be "a wonderful effort to collect, what is to be deduced from authorities, speaking so little, what is clear. And the surprise is not from the difficulty of understanding all he has said ; but that so much can be understood."¹ Sir Thomas Plumer, in his masterly judgment in a cause of great celebrity has also said ; "To no authority,

¹ Lord Eldon, *Lloyd v. Johnes*, 9 Ves. 54.

living or dead, could reference be had with more propriety for correct information respecting the principles, by which Courts of Equity are governed, than to one, whose knowledge and experience have enabled him, fifty years ago, to reduce the whole subject to a system with such a universally acknowledged learning, accuracy, and discrimination, as to have been ever since received by the whole profession as an authoritative standard and guide. *Vivienti tibi præsentes largimur honores.*"¹ The learned Judge and the noble author have, since that sentence was pronounced, both passed to the grave; and we, who survive, feel the truth and value of this tribute, with all the affectionate reverence, which belongs to posthumous praise. Never could the voice of praise come to an author, with a higher grace, than from the lips of such eminent men. It is the privileged case;—*Laudari a viris laudatis*.

I have transferred into my own pages all the most valuable materials of Lord Redesdale's Treatise; and generally, where I could, in his own language, which I have not the presumption to think, I could improve; and from which I have rarely deviated, except to insist upon some qualification, or to make his text occasionally more definite and clear. I have also freely used the materials in Mr. Cooper's and Mr. Beames's excellent Treatises on Equity Pleadings, as auxiliaries to that of Lord Redesdale. Each of them is under the same obligations to him as myself, having drawn many of their materials from the same great source.

There is one prominent defect in all these treatises, and that is the want of a comprehensive and accurate view of the principles, which govern that most intricate and important branch of Equity Pleadings, the subject of the proper and necessary Parties to Bills. My aim has been, as far as I could, but perhaps not with entire success, to supply this defect. I had not an opportunity of seeing Mr. Calvert's Treatise on Parties to Bills in Equity, until, after my own chapter on the same head had been completed, and the work itself was in the press. Upon a review of his book, I have the consolation to find, that I had

¹ *Cholmondeley v. Clinton*, 2 Jac. & Walk. 151.

not overlooked any very important authorities bearing on this subject. I have, however, availed myself of his learned researches for a few suggestions, which had not before so closely attracted my attention.

In submitting the present volume to the profession, I beg to return my grateful acknowledgments for the kind manner, in which my former labors have been received; and to ask an indulgent consideration for that, which is now offered. The task has been one of severe, and exhausting effort, scarcely relieved by any consoling circumstance, except the consciousness of the performance of duty. It has been difficult to keep up a continued attention to the dry details of technical learning in the midst of my other various judicial and professorial engagements. At some future day I hope to find leisure to complete my original design by furnishing an elementary outline of the Practice of Courts of Equity, from the first inception of the cause, through all its various stages, to the execution of its final decree, under the orders of the Highest Court of Appeal. Let me in conclusion say, to the diligent student, that a thorough mastery of the science of Equity Pleadings, if not absolutely indispensable to professional success and eminence, will, at all events, be found in a very high degree to promote them. Let him ponder well upon the admonition contained in the language of that great jurist of antiquity, Cicero—*Sic igitur instructus veniet ad causas; quarum habebit genere primum ipsa cognita; erit enim ei perspectum, nihil ambigi posse, in quo non aut res controversiam faciat, aut verba; res, aut, de vero, aut de recto, aut de nomine; verba, aut de ambiguo, aut de contrario.*¹

Cambridge, January 1, 1838.

¹ Cicero, Orator, ch. 34.

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COMMENTARIES

ON

EQUITY PLEADINGS.

CHAPTER I.

INTRODUCTORY CHAPTER.

→ § 1. HAVING in a former work treated of the nature, origin and extent of Equity Jurisprudence, as administered in England and America, and of the principles, by which the jurisdiction in Equity is governed and limited, the path is now open for us to direct our inquiries into the forms and modes, in which this remedial justice is applied to the actual business and concerns of human life, in order to protect and vindicate rights, or to prevent and redress wrongs. It is obvious, that in every system of jurisprudence, professing to provide for the due administration of public justice, some forms of proceeding must be established to bring the matters in controversy between the parties, who are interested therein, before the tribunal, by which they are to be adjudicated. And, for the sake of the despatch of business, as well as for its due arrangement with reference to the rights and convenience of all the suitors, many regulations must be adopted to induce certainty, order, accuracy and uniformity in these proceedings. Hence it will be found, that the jurisprudence of every civilized country, ancient and modern, has established certain modes, in which the complaints and defences of parties are to be brought before the public tribunals ;

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and has authorized the latter, by rules and orders, to prescribe the time, the manner, and the circumstances, in which every suit is to proceed, from its first institution to its final determination.

→ § 2. This is emphatically true in the jurisprudence of England and America ; and is not only exemplified in the proceedings in suits at Common Law, but in those also, which are governed by the larger and more liberal doctrines of Equity. Indeed, in the latter, as well as in the former, there are many rules altogether founded in artificial reasoning, but which, nevertheless, may be affirmed, with few exceptions, to be greatly promotive of public justice, and subservient to private convenience. If, here and there, any of them work an apparent hardship or mischief, it will, on close examination, be found, that they also accomplish much general and permanent good ; and in this respect they partake only of the infirmity of all general rules, which must, in particular cases, give rise to some inequalities, and shut out some individual equities and rights.

→ § 3. The design of the present Commentaries is to present a general, but at the same time, an accurate outline of the proceedings in Courts of Equity from the original institution of a suit to its close, and to accompany the same with such explanations and illustrations, as may serve to develop the principles, on which they are founded, and the reasons, by which they are sustained. It will not, indeed, be possible, in all cases, to ascertain these principles and reasons ; for they are sometimes lost in remote antiquity, and sometimes they depend upon rules of such a purely artificial character, although arising from the exercise of a sound discretion, as to be incapable of any very satisfactory exposition.

→ § 4. The subject naturally divides itself in two great

heads, the Pleadings in framing a suit in Equity, and the Practice in conducting a suit in Equity. By the Pleadings we are to understand the written allegations of the respective parties in the suit, that is to say, the written statement of the plaintiff, containing, in a due legal form, the facts of the case, on which he grounds his title to relief, or to some equitable interposition or aid from the Court; and the written answer or defence of the defendant to the charges of the plaintiff, either denying them altogether, or admitting them, and relying on some other matters, as a bar to the suit, or admitting them, and insisting upon the want of title in the plaintiff to the relief sought, or to the interposition or aid of the Court; and the written reply thereto by the plaintiff.¹ By the Practice in a suit in Equity we are to understand all the various proceedings in the suit, whether by the positive rules or the usage of the Court, and whether interlocutory or otherwise, which may become necessary or proper for the due conduct thereof from the beginning to the final determination thereof.

→ § 5. Although in a general sense the distinction be-

¹ In Bacon's Abridgment, title Pleas and Pleading, it is said, that, "Pleading in general signifies the allegations of parties to suits when they are put into a proper legal form." And again, "Pleading, in strictness, is no more than setting forth that fact, which in law shows the justice of the demand made by the plaintiff, or the discharge and defence made by the defendant." Mr. Justice Buller has given a definition, which has equal terseness and accuracy. "Pleading (says he) is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence." *Read v. Brookman*, 3 T. R. 159. Each of these definitions is equally as applicable to pleadings in Equity as to pleadings at Law. But it may serve to make the real nature of pleadings in Equity in a technical sense better known, to state, that they consist of the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments, to the Court. In a popular sense the oral arguments, of counsel, and especially their addresses to juries or to the Court are often called pleadings. But this is not the true legal sense.

tween the pleadings and the practice in a suit is sufficiently obvious from the foregoing description of their respective characters and objects; yet it is not easy, even if it be practicable, wholly to separate the considerations belonging to the one from those belonging to the other. The principles, which regulate the pleadings, are sometimes so intimately connected with the practice of the Court, as to the time, the manner and the circumstances, which affect their introduction and use, that any discussion of the former without adverting to the latter would be very deficient in the appropriate details, and imperfect in the just expositions belonging to the subject. Thus, for example, it is the proper office of pleading to ascertain, what facts should be charged in the plaintiff's statement of his case; but if the facts are imperfectly stated, the time and manner and circumstances, in which the plaintiff will be permitted to make a more perfect statement of his case by way of amendment, properly belong to the practice of the Court. But a treatise, which should embrace the subject of the amendment of pleadings without adverting to the time, the manner, and circumstances, under which such amendment could be made, would be manifestly defective in its most important details.

→ § 6. In the present Commentaries, therefore, matters of practice, when mixed up with matters of pleading, will be occasionally introduced, whenever they may serve better to explain the particular topic under consideration. In other respects these subjects will be successively discussed under separate and independent heads. And in the first place, we shall treat of the subject of PLEADINGS IN EQUITY; and this again requires a subdivision into pleadings on the part of the plaintiff, and pleadings on the part of the defendant. The former will naturally constitute the first topic of our inquiries.

CHAPTER II.

BILLS IN EQUITY—GENERAL NATURE AND FORM.

- § 7. WHEN a private party has a case, which he is advised is redressible only by an application to a Court of Equity, he commences his suit by preferring to the Court having jurisdiction a written statement of his case, which is called a Bill in Chancery, or a Bill in Equity, which is in the nature of a petition to the Court, and sets forth the material facts, and concludes with a prayer for the appropriate relief, or other thing required of the Court, and for the usual process against the parties, against whom the relief or other thing is sought, to bring them before the Court to make due answer in the premises.¹ The bill is sometimes called an English Bill, when it is addressed to the High Court of Chancery in England, in order to distinguish it from the proceedings in suits within the ordinary jurisdiction of that Court as a Court of Common Law, which latter, though now in the English language, were anciently in the French or Norman tongue, and afterwards in the Latin; whereas Bills in Chancery were always, or at least from very early times, preferred in the English language.²
- § 8. When the suit is instituted on behalf of the Crown or Government, or of those, who partake of its prerogative (such as idiots and lunatics³), or whose rights

¹ Mitf. Eq. Pl. by Jeremy, 7; 3 Woodes. Lect. 55, p. 367, 368, 369.

² Mitf. Eq. Pl. by Jeremy, 8. See Calendar of Proceedings in Chancery, printed by Parliament, in 1827.

³ Cooper Eq. Pl. 104; 1 Mont. Eq. Pl. ch. 3, p. 101 to 106; 1 Mont. Eq. Pl. 81—84.

are under its particular protection (such as the objects of a public charity), the matter of complaint is offered to the Court by way of Information, given by the proper officers of the Crown or Government (as by the Attorney General or Solicitor General), and not by way of petition.¹ When the suit immediately concerns the rights of the Crown or Government alone, these officers proceed purely by way of Information.² When the suit does not immediately concern the rights of the Crown or Government, its officers depend on the relation of some person, whose name is inserted in the Information, and who is termed the relator. And as the suit, though in the name of the Attorney or Solicitor General, is then carried on under the direction of the relator, he is considered as answerable to the Court and to the parties for the propriety of the suit and the conduct of it; and he may be made responsible for costs (which the Crown or Government itself never is compellable to pay), if the suit should appear to have been improperly instituted, or in any stage of it to be improperly conducted.³ Still, however, a relator in such cases is by no means indispensable; and the Attorney General may, if he pleases, proceed in the suit without one.⁴ Sometimes it happens, that the relator has an interest in the matter in dispute, in connection with the Crown or Government, of the injury to which he has a right to complain. In such a case his personal complaint is joined to and incorporated with the Inform-

¹ Mitf. Eq. Pl. by Jeremy, 7, 21, 22, 29; Cooper Eq. Pl. 101 to 107; 1 Mont. Eq. Pl. 81, 84, 85, 87.

² Cooper Eq. Pl. 101, 102.

³ Mitf. Eq. Pl. by Jeremy, 21, 22, 23; Cooper, Eq. Pl. 1, 99, 100, 101, 102, 104, 106; Attorney General *v.* Vivian, 1 Russ. R. 236, 237; 1 Mont. Eq. Pl. 85, 86.

⁴ In *Re Bedford Charity*, 2 Swanst. R. 520; Mitf. Eq. Pl. by Jeremy, 22, note (d.)

ation given to the Court by the officer of the Crown or Government, and then they form together an Information and Bill, and are so termed.¹ Informations, however, differ from Bills little more than in name and form, and therefore the same rules are in general applicable to both.² Informations respecting charities constitute the most striking exception; for in these the Court will not require the same strictness, either as to parties, or to pleadings, as is ordinarily required in bills. The other peculiarities of Informations are too few to justify any distinct examination.³ The subsequent remarks will therefore be mainly confined to the general nature and structure of Bills.

§ 9. It is obvious, that every Bill must have for its object one or more of the grounds, upon which the jurisdiction of a Court of Equity is founded. That jurisdiction, sometimes, extends to the final decision of the subject matter of the suit; sometimes, it is only ancillary to the decision of a present suit brought or to a future suit to be brought in another Court; sometimes, it is merely of a precautionary or preventive nature, to avert a meditated or threatened wrong;⁴ and sometimes, it is merely to require, that the parties really

¹ Mitf. Eq. Pl. by Jeremy, 22, 23, 99, 100; Cooper Eq. Pl. 1, Attorney General v. Vivian, 1 Russ. R. 235, 236; Attorney General v. Mayor of Bristol, 3 Madd. R. 319; S. C. 2 Jac. and Walk. 299; 1 Mont. Eq. Pl. ch. 4, p. 87. Sometimes, in cases of this sort, the Crown is represented by the Attorney General as plaintiff, and by the Solicitor General as defendant, in the same suit, where there are conflicting claims between the King and persons partaking of his prerogative or under his peculiar protection. That was the case in Attorney General v. Mayor of Bristol, 3 Madd. R. 319; S. C. 2 Jac. and Walk. 294, respecting a charity; Mitf. Eq. Pl. by Jeremy, 22 note (b); Attorney General v. Vivian, 1 Russ. R. 226.

² Mitf. Eq. Pl. by Jeremy, 99, 100; Cooper Eq. Pl. 105, 106; 1 Mont. Eq. Pl. ch. 3, p. 81 to 86.

³ Cooper Eq. Pl. 104, 105, 106, 107; Barton's Suit in Eq. 25.

⁴ Mitf. Eq. Pl. by Jeremy, 8.

interested in a controversy, should be compelled to litigate their rights, without peril or expense to a mere stakeholder, having no interest therein. The Bill may, therefore, either complain of some injury, which the party, exhibiting it, suffers, and pray relief according to the injury ; or, without praying relief, it may seek a discovery of matter necessary to support or defend another suit ; or it may seek to preserve or perpetuate testimony ; or it may complain of a threatened wrong or impending mischief, and, stating a probable ground of possible injury, it may pray the assistance of the Court to enable the party exhibiting the bill to protect or defend himself from such wrong or mischief, whenever it shall be attempted or committed.¹

§ 10. But, whatever may be the object of the Bill, the first and fundamental rule, which is always indispensable to be observed, is, that it must state a case within the appropriate jurisdiction of a Court of Equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties ; for consent cannot confer a jurisdiction not vested by law. And, though many errors and irregularities may be waived by the parties, or be cured by not being objected to, the Court itself cannot act except upon its own intrinsic authority in matters of jurisdiction ; and every excess will amount to an usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity. But of this more will be said in another place.

§ 11. In early times, as might well be supposed, Bills were in their structure of great simplicity and brevity. The cases, in which resort was then had to Equity

¹ Mitf. Eq. Pl. by Jeremy, 8.

jurisdiction, were comparatively few, and the facts were of no great complexity or difficulty of detail. The rights of parties depended upon titles exceedingly simple in their nature and origin. The wrongs to be redressed were palpable and direct. The whole business of human life flowed on in narrow and shallow channels; and it might be said, almost without a figure, that as the stream moved along with its slow and languid and winding current, it might be sounded and measured to its very depth and bottom by any common mind. The cause of every interruption in its progress was immediately visible; and the remedy to be applied was as clear, as the ripple of the stream, which indicated it, to the most careless eye.

§ 12. In some of the most ancient Bills, as appears by the records in the Tower in London, the plaintiff did not pray any relief or any process; but merely prayed the Chancellor to send for the defendant, or to examine the defendant; and in others, in which relief was prayed, the prayer of process was various, sometimes a writ of *corpus cum causa*, sometimes a *subpœna*, and sometimes other writs.¹ Afterwards, the bill assumed a more regular and uniform frame, though it was very unlike that belonging to the present day. In the form alluded to, it contained a statement of the facts of the plaintiff's case, followed by a prayer to the Court to grant suitable relief, and for that purpose that the subpœna of the Court might issue to bring the parties complained of before it. This statement and this prayer constituted the whole of the bill, and continued to do so until a comparatively modern period of time, although it is difficult

¹ Cooper Eq. Pl. 3, 4.

to fix the exact time when additions began to be made to it.¹ These additions must, indeed, have been gradually incorporated into it, as the progressive increase and complication of the common business of life, or the new exigencies of society, created an occasion or necessity for them. And as the system of the remedial justice of Courts of Equity began to be better understood, and to be more liberally administered, it was natural, that a corresponding refinement in method, and a more elaborate exposition of every case should be superinduced into the structure of the Bill by the genius, and the learning, and the scholastic astuteness of the profession. By degrees the mere naked statement of facts in the Bill was succeeded by a string of interrogatories, constituting an integral part (called the interrogatory part) of the bill, the object of which was to sift more thoroughly the conscience of the defendant as to these facts; and afterwards there was added, what is called, the charging part of the Bill, which was inserted in order to meet the defence expected to be set up, and to obviate its effect by counter allegations, which should destroy its validity.² Still, however, the statement of the case, and the prayer of the bill for relief or otherwise, always were, and continue to be to this day, the very substance and essence of the bill.³ The other parts have, indeed, their appropriate uses and functions; and, when skilfully drawn and judiciously applied, become the means of eliciting the truth, and often of sav-

¹ Cooper Eq. Pl. 4. *Partridge v. Haycraft*, 11 Ves. 574.

² Cooper Eq. Pl. 4. See *Hare on Discovery*, 223.

³ Cooper Eq. Pl. 4.

ing much delay and inconvenience and expense to the parties.¹

§ 13. Equity Pleading has, indeed, now become a science of great complexity, and a very refined species of logic, which it requires great talents to master in all its various distinctions and subtle contrivances, and to apply it, with sound discretion and judgment, to all the diversities of professional practice. The ability to understand, what is the appropriate remedy and relief for the case ; to shape the bill fully, accurately and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details ; and to decide, who are the proper and necessary parties to the suit ; the ability to do all this requires various talents, long experience, vast learning, and a clearness and acuteness of perception, which belong only to very gifted minds.² Without these, diligence and industry will not always ensure success ; although it may be as truly said, that without the latter also, genius, however high, will find itself outstripped in the race, and be compelled to pay homage to inferior minds, who may win an easy triumph by steady perseverance against the bold but irregular sallies of less wary adversaries.

§ 14. The pleadings in Equity were probably borrowed from the Civil Law or from the Canon Law, (which is a derivative from the Civil Law), or from

¹ Mitf. Eq. Pl. by Jeremy, 47 ; 2 Mont. Eq. Pl. 311. Note T. F.—Mr. Bell (one of the most experienced counsel in Chancery), in his answers to the interrogatories put by the Chancery Commissioners, gave some very interesting views of this subject, which every student would do well to peruse. See especially his answers to questions from Q. 5 to Q. 34, in the Parliamentary Report of the Chancery Commissioners, in March, 1826. Appx. p. 1 to p. 3.

² See Cooper Eq. Pl. 4.

both.¹ The early Chancellors were for the most part, if not altogether, Ecclesiastics, and many of them were bred up in the jurisprudence of the Civil and Canon Law;² and it was natural for them, in the administration of their judicial functions in the Court of Chancery, to transfer into that Court the modes of proceeding, with which they were most familiar. Hence, at almost every step, we may now trace coincidences between the pleadings and practice in Chancery, and the pleadings and practice in a Roman suit and in an Ecclesiastical suit.³ But as the Court of Chancery attained

¹ Cooper Eq. Pl. 8, 9; Gilh. For. Rom. ch. 4, p. 44; 3 Reeves's Hist. of the Law, 380; Barton Eq. Suit, 26; 3 Black. Com. 442.

² 3 Black. Com. 47.

³ See 2 Brown Civ. & Adm. Law, ch. 8, p. 347, &c. Gilbert, in his Forum Romanum, has traced an outline of the proceedings in suits under the Civil Law and in the Canon Law. (Gilbert's Forum Romanum, ch. 2, p. 20, &c., ch. 3, p. 29, &c., ch. 4, p. 44, &c.) The whole is too long for insertion in this place, but the following extracts, applicable to the pleadings, may be useful:

"When the *actor* and *reus* came before the prætor, then the *actor* did, *actionem edere*; and anciently this was done by shewing the cause of his action to the prætor, who thereupon gave him out his proper action. But afterwards the *actor* used to have his cause of complaint ready in writing, to offer to the prætor, which they called the libel, and with it produced such contracts or instruments, as were the foundation of his title or complaint; and then the *reus* was obliged to give bail to appear at the third day afterwards, which was called *dies perendinus*, and this time was given him to consider, whether he would contest or not at the third day. If he contested the suit, there were forms of questions and answers, which mutually passed between the *actor* and *reus*, in which questions the *actor* affirmed his right, and the *reus* denied it, and this was called *contestatio liti*. Likewise, before the prætor, the *reus*, without contesting the suit, might put in *exceptio declinatoria*, as also, he might desire, that the *actor* might be sworn, that the suit was not commenced out of malice; as the *actor* might have the *reus* sworn, that he did not defend it out of malice; and these oaths were called *juramenta calumniæ post litem contestatam*. The prætor gave them judges, and the libel contested was brought before the judges, and upon this libel the *actor* put in positions, to which the *reus* was obliged to put in his answer, that so they might supersede the necessity of proving, what was confessed by the *reus*. But if the *reus* de-

more extensive jurisdiction, and exercised more diversified powers, new modes of proceeding were from

nied any part of the positions, then the part that was denied, was formed into what they called *articuli*; and upon these *articuli* interrogatories were framed to be exhibited to the witnesses. But the witnesses were not obliged to answer any interrogatory, which was not framed out of one of the articles. Upon these interrogatories, one of the *judices dati* himself examined; and the depositions were taken in writing by a notary, or one of the judge's clerks. When all the witnesses were examined, both for the *actor* and *reus*, then they published the depositions, and gave out copies of them to both parties; upon which the *jurisperiti et patroni* made the orations for their clients before the judges, and then the judges pronounced their sentence, which was given to the prætor to be executed.

"But to describe this more fully, though according to the ancient form, any *Roman*, who had demand against another, might drag him to justice *oborto collo*, as they called it; yet that being found inconvenient, they came to a new method, which was, that they should first *edere actionem* before the prætor; and then the prætor gave him out his proper action, and a liberty to cite the party, and he either cited him by himself, or by a messenger; and then the defendant was either obliged to go along with his adversary, or give security to appear; and if he did neither, the *actor* might *oborto collo* force him before the prætor. When the *reus* came in before the prætor, the *actor* did produce his cause of complaint, which was sometimes called the second libel; for the first libel was in order to obtain the power of citing, and was called the *libellus supplex*, and the second to show the *reus*, what he was to answer, was called the *libellus actionis aut meritorius*; and then the *actor* asked of the prætor *polestatem agendi*, that is, the power to implead the defendant, and *formulam*, containing the form of the action, and *judicem*, who was to hear and determine the matter.

"And for that end, the *actor* did summarily shew before the prætor, how the action accrued; and if it was founded on any instrument he produced it; if not, a witness before the prætor. He, likewise, the *reus*, proposed his exceptions, either *declinatoriæ*, also called *dilatoriæ*, or *peremptoriæ*; though the *peremptoriæ* might also be put in before the judge. And thus the cause *agebatur summam*, as they call it, and the prætor determined, whether they should proceed in judgment or not. If the prætor adjudged they were to proceed, then the *reus* was either to yield, or give up the matter in demand, or contest it, which was the *litis contestatio*, and was closed before the prætor.

"When the prætor had given a judge, he was to make out a citation against the *reus* to appear before him, and there the first act was, for the defendant to answer the positions on the libel. After those positions were answered, the next citation was upon the articles, upon which the

time to time adopted, which were better fitted for its own peculiar purposes ; and the pleadings and practice in Chancery have now become a distinct and independent system.

§ 15. Before we proceed further in the consideration of this subject, it may be well to take notice of the different kinds of Bills, as the rules applicable to the frame of Bills in general are necessarily subject to many

defendant was to bring in his cross interrogatories to the witnesses, who were to be examined on the part of the plaintiff upon the articles, as likewise any witnesses of his own, which he had to produce on the matter of the articles. And at that act there was given a probatory term, within which all witnesses were to be examined, and the depositions afterwards to be published. One of the judges, who was to hear the cause, was one of the persons, who examined the witnesses, and reported as to their credit, as, whether they answered truly, or only as they were instructed. The third act was the citation after the probatory term was over, and publication had passed, in order to hear judgment ; so that in every judiciary act, there was need of a citation, lest they should proceed, *parte inaudita*, which they thought to be unjust, and contrary to the law of nature."

Again : " And the modern libel of the canonists is formed from the libel, the positions, and the articles thrown into one, and now called *libellus articulatus*, for despatch ; for so many acts are not now necessary, as were of old, when the *litis contestatio* was before the prætor, and the positions and articles before the judge. And in this libel they conclude with *clausula salutare sive salvantes*, which pray relief of *omni meliori modo*. To this libel, if the defendant puts in a negative answer, that is now reckoned a sufficient *litis contestatio* to proceed to proof upon ; though anciently, the manner was for the plaintiff to come in, and briefly affirm his libel, by way of replication.

" With us the bill is the libel, and the prayer of general relief, according to equity and good conscience, is in nature of the salutary clause, and the narrative part of the bill is in the nature of the positions, and the interrogatory part, in the nature of the articles, and the prayer of relief is after the manner of the ancient libel."

Mr. Brown, in his work on the Civil and Adm. Law (2 Bro. Civ. and Adm. Law, ch. 8, p. 347, &c.) has traced out some of the coincidences between the proceedings in the Civil Law and in Equity, and shown, that some of the rules of the latter, which would otherwise seem merely arbitrary, are founded upon the natural course of practice under the former.

exceptions and modifications, when they are applied to the peculiarities belonging to certain kinds of Bills.

§ 16. The most general division of Bills is into those, which are original, and those, which are not original. Original Bills are those, which relate to some matter not before litigated in the Court by the same persons, standing in the same interests.¹ Bills not original are those, which relate to some matter already litigated in the Court by the same persons, and which are either an addition to or a continuance of an original Bill, or both.² There is another class of Bills, which is of a mixed nature, and sometimes partakes of the character of both of the others. Thus, for example, Bills brought for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or of obtaining the benefit of a former decree, or of carrying it into execution, are not considered as strictly a continuance of the former Bill, but in the nature of original Bills.³ And if these Bills require new facts to be stated, or new parties to be brought before the Court, they are so far strictly of the nature of supplemental Bills.⁴ For all the objects of the present work, this last class may be treated as included in that of Bills not original.⁵

§ 17. Original Bills may be again divided into those, which pray relief, and those, which do not pray relief.⁶ In a broad and general sense, all Bills in Equity may

¹ Mitf. Eq. Pl. by Jeremy, 33; Cooper Eq. Pl. 43.

² Mitf. Eq. Pl. by Jeremy, 33; Cooper Eq. Pl. 43.

³ Mitf. Eq. Pl. by Jeremy, 33; Cooper Eq. Pl. 44, 62.

⁴ Mitf. Eq. Pl. by Jeremy, 96, 97; Cooper Eq. Pl. 100.

⁵ Lord Redesdale has treated this class separately. Mr. Cooper has treated it as belonging to the class of Bills not original. Mitf. Eq. Pl. by Jeremy, 33, 35, 80; Cooper Eq. Pl. 62.

⁶ Mitf. Eq. Pl. by Jeremy, 34; Cooper Eq. Pl. 43, 44.

be said to pray relief, since they seek the aid of the Court, by some decree or decretal order, to remedy some existing or apprehended wrong or injury. But in the sense, in which the words are used in Courts of Equity, such Bills only are deemed Bills for relief, which seek from the Court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree, which shall ascertain and protect present rights, or redress present wrongs. All other Bills, which merely ask the aid of the Court against possible future injury, or to support or defend a suit in another Court of ordinary jurisdiction, are deemed Bills not for relief.¹ And this distinction is not merely formal; but, as we shall presently see, may involve very important consequences; for if a plaintiff should by mistake ask for relief, when he is not entitled to it, his Bill may be demurrable, and thereby be for the purposes of jurisdiction unmaintainable.²

§ 18. Original Bills praying for relief may be again divided into 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 wrong done in violation of the plaintiff's right.³ This is the most common kind of 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.⁴ (3.) Bills of Certiorari,

¹ See *Mitf. Eq. Pl. by Jeremy*, 33, 34; *Cooper Eq. Pl.* 43, 44.

² *Post* § 312.

³ *Mitf. Eq. Pl. by Jeremy*, 34, 37; *Cooper Eq. Pl.* 43, 44.

⁴ *Mitf. Eq. Pl. by Jeremy*, 34, 48; *Cooper Eq. Pl.* 43, 45; *Wyatt Pr. Reg.* 78.

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, to which the process is returnable.¹ This last bill is of rare (if any) use in America, and is not of very frequent occurrence in England.

§ 19. Original Bills not praying relief, are of two kinds. (1.) Bills to perpetuate the testimony of witnesses, or to examine witnesses *de bene esse*. (2.) Bills of Discovery, technically so called; that is to say, Bills for the discovery of facts resting within the knowledge of the party, against whom it is exhibited, or of deeds, writings, or other things in his custody or power.² Of each of these different species of original Bills we shall treat more at large hereafter.

§ 20. Bills not original (as we have seen) are either (1.) an addition to, or continuance of an original Bill; or (2.) they are for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or carrying it into execution.³ Of the former kind are, (1.) A Supplemental Bill, which is merely an addition to the original Bill, to supply some defect in its frame or structure.⁴ (2.) A Bill of Revivor, which is a continuance of the original Bill, to bring 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 suit is, as it is in Equity technically called, abated, that is, suspended in

¹ Mitf. Eq. Pl. by Jeremy, 34, 50; Cooper Eq. Pl. 44, 50; Wyatt Pr. Reg. 101.

² Mitf. Eq. Pl. by Jeremy, 34, 51; Cooper Eq. Pl. 44, 52, 57, 58.

³ Cooper Eq. Pl. 62; Mitf. Eq. Pl. by Jeremy, 35.

⁴ Mitf. Eq. Pl. by Jeremy, 35, 38; Cooper Eq. Pl. 62.

its progress.¹ (3.) A Bill both of revivor and supplement, which continues a suit upon an abatement, and supplies defects, which have arisen from some event subsequent to the institution of the suit.²

§ 21. Of the latter kind are (1.) A Cross Bill exhibited by the defendant in the original suit against the plaintiff in that suit, touching some matter in litigation in the first Bill. (2.) A Bill of Review, which is brought to examine and reverse a decree made upon a former Bill, which has been duly enrolled, and thereby become a record of the Court. (3.) A Bill to impeach a decree upon the ground of fraud. (4.) A Bill to suspend the operation of a decree in special circumstances, or to avoid it on the ground of matter, which has arisen subsequent to it. (5.) A Bill to carry a decree made in a former suit into execution. (6.) And lastly, a Bill, partaking of the qualities of some one or more of these Bills, such as a Bill in the nature of a Bill of revivor, or in the nature of a supplemental Bill, or in the nature of a Bill of review, and others of a like character.³ Of all these different kinds of Bills not original, we shall also treat more at large hereafter.

§ 22. Original Bills praying relief, are the most usual, which are exhibited in Courts of Equity, and for this reason, as well as that they more fully illustrate the general principles of pleading adopted in those Courts, they will first pass under our consideration.

§ 23. An original Bill praying relief, is (as we have

¹ Mitf. Eq. Pl. by Jeremy, 34 ; Cooper Eq. Pl. 62. The sense of the term, *abatement*, is very different in Law from what it is in Equity. In the former it amounts to a positive destruction of the suit, so that it is quashed, and the plaintiff must begin anew ; in the latter it amounts only to a present suspension of the proceedings, which may by a revivor be put again into activity.

² Mitf. Eq. Pl. by Jeremy, 35 ; Cooper Eq. Pl. 62.

³ Mitf. Eq. Pl. by Jeremy, 35, 36 ; Cooper Eq. Pl. 62.

seen), founded upon some right claimed by the party plaintiff, in opposition to some right claimed, or wrong done, by the party defendant. 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 asked, and to enable him to make the proper defence thereto, it would seem indispensable, that the Bill should contain a clear and exact statement of all the material facts. It should, therefore, show, with reasonable certainty, the rights of the plaintiff; the manner, in which he is injured; the person, by whom it is done; the material circumstances of the time, place, manner, and other incidents; the particulars, in which he wants the assistance of the Court, or (in other words) the relief, which he seeks; the prayer therefor, and also that the defendant may answer upon oath the matters charged against him; and lastly, that the case as stated, and the relief as asked, are properly within the jurisdiction of a Court of Equity.¹

§ 24. On the other hand, the plaintiff need not, and indeed should not, state in the Bill any matters, of which the Court is bound judicially to take notice, or is supposed to possess full knowledge. Hence it need not state matters of law; or legal presumptions; or recite public acts or laws; or aver facts, which the Court are bound judicially to know; such as the divisions of counties; the recognition of foreign governments by our own; the course of practice or proceedings in the Court itself; or any other facts of a like public nature, which do or may concern the general administration of public justice.² A strong illustration of this general rule may be found in the right and duty of the Courts of the United

¹ Mitf. Eq. Pl. by Jeremy, 37; Cooper Eq. Pl. 5.

² 1 Mont. Pl. Eq. ch. 2, p. 5 to 9.

States to take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows ;¹ to take like notice of the boundaries of the several States and judicial districts ;² and in an especial manner to take like notice of all the laws and jurisprudence of the several States, in which they exercise an original or an appellate jurisdiction. The judges of the Supreme Court of the United States are on this account bound to take judicial notice of the laws and jurisprudence of all the States and territories.³ But the laws and jurisprudence of foreign nations must be averred in the Bill, and, when material, must, if denied, be proved like any other facts.⁴

§ 25. Such, in a general view, is the outline of the matter of a Bill ; of what it should contain ; and of what it should not contain. It answers to the declaration in a suit at common law, to the libel, or *libellus articulatus*, of the civil and canon law.⁵ Hence the common distich as to the matter of a Bill, is,

Quis, quid, coram quo, quo jure petatur, et a quo,
Recte compositus quisque libellus habet.⁶

But the form, in which that proper matter is to be presented and unfolded, is also important to be maturely considered ; for in Equity, as well as in Law, there is a regular order and method, in which the pleadings should display the grounds of the suit ; and forms are sometimes essential to the promotion of real justice between

¹ U. S. v. La Vengeance, 3 Dall. R. 297 ; The Apollon, 9 Wheat. R. 374 ; The Thomas Jefferson, 10 Wheat. R. 428 ; Peyroux v. Howard, 7 Peters R. 342, 343.

² Ibid.

³ Owings v. Hull, 9 Peters, 607, 624, 625.

⁴ See Story on Conflict of Laws, § 637, 638 ; Mostyn v. Fabrigas, Cowp. R. 174.

⁵ Barton's Suit in Eq. 26 ; 3 Black Com. 442, ante § 14, and note (3).

⁶ Com. Dig. Chancery, E. 2 ; Cooper Eq. Pl. 17, note (i).

the parties, not only as the means of presenting rights with certainty and clearness, but also of vindicating and securing them by just limitations, and definite and expressive phraseology. The forms of pleadings in Equity have, indeed, undergone many alterations in different ages, and many improvements have, from time to time, been engrafted on them. Lord Coke's remark is well founded in this, as well as in many other cases of scientific invention; *nihil simul inventum est et perfectum*.¹ The pleadings in Equity, though framed with a regard to certainty and uniformity, were always, in their style and character, of a more liberal and less technical cast than those at the common law. At first, however, they were somewhat loose and general in their texture. But they have gradually attained a high degree of exactness and accuracy of statement; and, without being positively bound up in mere technical niceties and subtleties they have become subjected to many rules of an artificial though useful establishment.² These will hereafter be examined at large.

§ 26. In its modern structure, a Bill is, or may be, composed of nine parts. The first part is the *Direction* or *Address* of the Bill to the Court, from which it seeks relief. This address of course contains the appropriate and technical description of the Court, and must be varied accordingly.³ The second part is the *Introduction*,

¹ Co. Litt. 230, (a); Cooper Eq. Pl. 8.

² Ante § 12.

³ Mitf. Eq. Pl. by Jeremy, 42; Cooper Eq. Pl. 9; Barton's Suit in Eq. 26, 27. In England, when the Bill is in Chancery, it is addressed to the Lord Chancellor, or Lord Keeper, or Lords Commissioners, having, for the time being, the custody of the great seal, by their proper designation. When addressed to the Chancellor, it is in the following form, viz. "To the Right Honorable John Lord Eldon, Baron Eldon, of Eldon in the County of Durham, Lord High Chancellor of Great Britain;" and so in other cases, *mutatis mutandis*. Barton's Suit in Eq. 27, 29; Van Hey. Eq.

which contains the names and description of the persons exhibiting the Bill, commonly called in the Bill by the title of "your orators and oratrixes," according to their sex. In this part, the names of the parties are not only given, but their places of abode, title of dignity, or office, or business, and the character in which they sue, if it is in *autre droit*, and such other description, as is necessary or proper to found the jurisdiction of the Court.¹ Thus, for example, if the suit is in the Exchequer in England, it is alleged, that the plaintiff is debtor and accountant to the King;² and if the suit is in the Circuit Court of the United States in America, it is alleged, that the plaintiff is a citizen of a particular State.³ The usual form is, "Humbly complaining, sheweth unto your Lordship (or your Honor or Honors, as the case may be),

Draftsman, 2. In New York, the address would be, "To the Honorable James Kent, Chancellor of the State of New York." Blake's Chan. Pr. 27. In the Circuit Courts of the United States, it would be, "To the Honorable the Judges of the Circuit Court of the United States, within and for the District of Massachusetts, sitting in Equity."

¹ Barton's Suit in Eq. 27 30, note (1); Mitf. Eq. Pl. by Jeremy, 42, 43; Swan v. Porter, Hard. R. 60. But see Cheetham v. Croop, 1 McClel. & Y. 315.

² Van Hey. Eq. Drafts. 3; Barton's Suit in Eq. p. 30, note (1); Cooper Eq. Pl. 10, note (u).

³ Bingham v. Cabot, 3 Dall. R. 382. It is indispensable, in all cases, where the right to bring the suit in the Courts of the United States is founded upon the fact, that the plaintiffs and defendants are citizens of different States, to allege that fact distinctly in the Bill, as by stating that the plaintiff is "a citizen of the State of Massachusetts," and the defendant is "a citizen of New Hampshire." On account of the omission of such an allegation, a great many cases, carried by appeal to the Supreme Court of the United States, have been dismissed for want of jurisdiction, as it has been held, that the jurisdiction of the Court must be apparent on the record. Bingham v. Cabot, 3 Dall. R. 382; Jackson v. Ashton, 8 Peters R. 148. See Lord Coningsby's Case, 9 Mod. R. 95. It seems, that now there need not be an allegation in a Bill in Equity in the Exchequer, that the plaintiff is a debtor and accountant of the Crown. See Cheetham v. Croop, 1 McClel. & Y. 315.

your Orator, A. B., of —, esquire.”¹ In this part also are sometimes contained the names and appropriate descriptions of the parties made defendants, though they are now usually found in the next succeeding part. The object in each case of giving the names and descriptions of the parties, is to enable the Court and the other parties in interest, to know, where and to whom they may resort to compel obedience to any order or process of the Court, and especially an order for the payment of costs, as well as to furnish distinct means of decision in all future controversies in regard to the subject matter and the identity of the parties.²

§ 27. The third part is the *Premises*, or, as it is more usually styled, the *stating-part* of the Bill, which contains a narrative of the facts and circumstances of the plaintiff's case, and of the wrong or grievance, of which he complains, and the names of the persons, by whom done, and against whom he seeks redress.³ This part, consti-

¹ Barton's Suit in Eq. 29, 30; Van Hey. Eq. Drafts. 3; 1 Mont. Eq. Pl. 76, note (e); 3 Woodes. Lect. 55, p. 368, 369.

² Mitf. Eq. Pl. by Jeremy, 42, 43; Barton's Suit in Eq. 30, note (1); 1 Mont. Eq. Pl. 76, and note. The usual description of the plaintiff is, “Your Orator, A. B., of —, in the County of —, and State of — esquire.” If the suit is in the Circuit Court of the United States, it is added, “and a citizen of the same State.” The like description is given as to the name and place of abode, title, profession, or business of the defendant, viz. “C. D., of —, in the County of —, &c. merchant,” &c. See 1 Montague Eq. Pl. 76, and note (f). See *Albrect v. Sussman*, 2 Ves. & Beam. 323. In what manner the omission to make a proper description of the parties, as to places of abode, &c., is to be taken advantage of, seems to be a matter of some doubt. Mr. Montague says, that Lord Redesdale, in the first edition of his *Treatise on Equity Pleadings*, said, that a demurrer would hold; but that statement is omitted in the subsequent editions, which leads to the supposition, that his Lordship, upon further reflection, thought differently. If a special demurrer would not be proper, perhaps a plea, in the nature of a plea in abatement, might be the proper mode to enforce the objection.

³ Barton's Suit in Eq. 27; Mitf. Eq. Pl. by Jeremy, 43; Cooper Eq. Pl. 9;

tuting in truth the real substance of the Bill, upon which the Court is called to act, requires great skill and judgment to frame it aright; and if it has not the proper legal certainty, the defect (as we shall presently see), unless removed, may become fatal in every subsequent stage of the cause.¹ The rules, as to the proper mode of stating the facts in this part of the Bill, will be fully considered hereafter. But it may be proper to remark, that care should be taken to frame the stating part of the Bill fully and accurately; for if a plea is put in, the validity of the Plea will be decided with reference to the stating part of the bill, and not with reference to the interrogatory part, if it varies from it.²

§ 28. It may be proper, however, to remark, that every material fact, to which the plaintiff means to offer evidence, ought to be distinctly stated in the premises; for otherwise he will not be permitted to offer or require any evidence of such fact.³ A general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances, which may conduce to prove the general charge;

3 Woodes. Lect. 55, p. 368, 369. The conclusion of the stating-part usually is (after narrating the facts of the title of the plaintiff), as follows; "And your orator well hoped, that no disputes would have arisen touching the said &c. &c." (stating the subject matter), but that the said defendant would have complied with the request of the said orator &c., as in conscience and equity he ought to have done. But, now so it is, may it please your Lordship (or Honors) that the said defendant, combining and confederating &c." Barton's Suit in Eq. 32, 33; Van Hey. Eq. Drafts. 4; 1 Mont. Eq. Pl. 76, note (g).

¹ Flint v. Field, 2 Anst. 343; Cooper Eq. Pl. 11; 3 Woodes. Lect. 55, p. 371. Post, § 241, § 242.

² Clayton v. Earl of Winchelsea, 3 Younge and Coll. 683. Post, § 36.

³ Irnham v. Child, 1 Bro. Ch. R. 94; Gilb. For. Rom. 91, 218; Wilkes v. Rogers, 6 Johns. R. 565; Gordon v. Gordon, 3 Swanst. 472; Sidney v. Sidney, 3 P. Will. 276; Watkyns v. Watkyns, 2 Atk. 96; Whaley v. Norton, 1 Vern. R. 483; Clarke v. Turston, 11 Ves. 240.

for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs.¹ Thus, under a Bill to set aside an award for fraud and partiality, a general charge of the fraud *or partiality will authorize the plaintiff to give [*25] evidence of circumstances tending to establish it, although those circumstances are not charged in the Bill.²

§ 29. The fourth part is what is commonly called the *Confederating part* of the Bill. It contains a general allegation or general charge of a confederacy between the defendants, and other persons to injure or defraud the plaintiff. The usual form of the charge is, that the defendants, combining and confederating together, and with divers other persons as yet to the plaintiff unknown, but whose names, when discovered, he prays may be inserted in the Bill, and they be made parties defendants thereto, with proper and apt words to charge them with the premises, in order to injure and oppress the plaintiff in the premises, do absolutely refuse, &c. or {pretend, &c.³ The practice of

¹ *Chicot v. Lequesne*, 2 Ves, 317, 318; *Wheeler v. Trotter*, 3 Swanst. 177.

² *Chicot v. Lequesne*, 2 Ves. 318; *Clarke v. Periam*, 2 Atk. 337.

³ *Mitf. Eq. Pl.* by Jeremy, 40, 43; *Cooper Eq. Pl.* 9; *Barton's Suit* in *Eq.* 33; *Van Hey. Eq. Draft.* 4; 1 *Mont. Eq. Pl.* 77, and note (i). The form given in *Van Heythuysen's Eq. Drafts.* 5, is as follows: "BUT NOW SO IT IS, may it please your lordship, that the said R. H. combining and confederating with divers persons [*or—if there are several defendants, then thus* :—combining and confederating with the said C. H. and M. H. and with divers other persons, *or*—the said R. H. L. M. and N. M. combining and confederating together and with divers persons] at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendants hereto, and contriving, how to wrong and injure your orators in the premises, he the said R. H. absolutely refuses to comply with such requests, and he at times pretends that &c." Then follows the matter disproving or avoiding the charging part. Sometimes the confederating

inserting this charge is said to have arisen from an idea, that, without it, parties could not be added to the Bill by amendment ; and in some cases, perhaps, it was inserted with a view to sustain the jurisdiction of the Court.¹ But in either view it is wholly unnecessary. In the first place, it never was true at any time, that new parties might not have been added by amendment after the filing of the Bill.² In the next place, the mere allegation of combination or confederacy of the defendants, simply as such, could never alone have been a just foundation for the jurisdiction of a Court of Equity in the absence of all other proper matter to sustain it. Confederacy or combination, as a gravamen, seems clearly cognizable at law.³ Indeed, although it is now usually, but not invariably, inserted in Bills, it is treated as mere surplusage ; so much so, that it is said, that the general charge of combination need not be (though it usually is) denied or responded to in the answer, when charged in the Bill ; for it is mere impertinence.⁴

clause, after averring the combination and confederacy, proceeds merely to state, that the defendant absolutely refuses to do the act or thing, which constitutes the grievance in the Bill ; as, for example, to pay a legacy, to convey land, &c. *Barton's Suit in Eq. 34.* Lord Eldon, in the *Mayor &c. of London v. Levy*, 8 Ves. 404, remarking upon this clause, said ; "I do not put it (the demurrer) upon the ground of pains and penalties. That view of the case is very important, considering to what an extent the doctrine of the law in later years has gone with reference to criminality by combination and conspiracy. It would be very difficult to abstract, from the apparent grasp of that doctrine, nine tenths of the Bills of this Court, charging combination and confederacy."

¹ Mitf. Eq. Pl. by Jeremy, 40.

² *Barton's Suit in Eq. 33*, note ; 1 *Prax. Alm. Cur. Canc.* 546, 547 ; *Cooper Eq. Pl.* 10, 11.

³ *Barton's Suit in Eq. 33*, note ; Mitf. Eq. Pl. by Jeremy, 40, 41 ; *Cooper Eq. Pl.* 10, 11.

⁴ Mitf. Eq. Pl. by Jeremy, 40, 41, 43 ; *Oliver v. Haywood*, 1 *Anst.* 82 ; *Wyatt Pr. Reg.* 63.

§ 30. If combination or confederacy is meant to be relied on, as a ground of equitable jurisdiction, it can be only in special cases ; and then it must be specially and not generally charged, to justify an assumption of jurisdiction.¹ In the case of a Peer, this general charge is never inserted in the Bill, either from respect to the * peerage, or from an apprehension, that such a [*27] charge might be construed to be a breach of privilege of the Lords² as a sort of *scandalum magnatum*.³

¹ Mitf. Eq. Pl. by Jeremy, 41

² Mitf. Eq. Pl. by Jeremy, 41 ; Barton's Suit in Eq. 33, note ; Cooper Eq. Pl. 10, 11.

³ The following passage from Lord Redesdale's Treatise, contains a full exposition of the nature and character of this clause, and therefore is here given at large.

"It is the practice to insert in a bill a general charge, that the parties named in it combine together, and with several other persons unknown to the plaintiff, whose names when discovered, the plaintiff prays he may be at liberty to insert in the bill. This practice is said to have arisen from an idea, that without such a charge parties could not be added to the bill by amendment ; and in some cases perhaps the charge has been inserted with a view to give the court jurisdiction. It has been probably for this reason generally considered, that a defendant demurring to a bill comprising persons, whose interests are so distinct, that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. The denial of combination, usually inserted as words of course at the close of an answer, is a denial of unlawful combination ; and it has been determined, that a general charge of combination need not be answered. An answer to a charge of unlawful combination cannot be compelled ; and a charge of lawful combination ought to be specific to render it material. For where persons have a common right, they may join together in a peaceable manner to defend that right ; and though some of them only may be sued, the rest may contribute to the defence, at their common charge : and if on the ground of such a combination the jurisdiction of a Court of Equity is attempted to be sustained, where the jurisdiction is properly at the common law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction by a Court of Equity. From whatever cause the practice of charging combination has arisen, it is still adhered to, except in the case of a peer, who was never charged with combining with others to deprive the plaintiff of his right, either from respect to the peerage, or perhaps from apprehension that such a charge might be construed a breach of privilege." Mitf. Eq. Pl. by Jeremy, 40, 41.

§ 31. The fifth part is what is commonly called the *Charging part* of the Bill. It usually consists of some allegation or allegations, which set forth the matters of defence, or excuse, which it is supposed the defendant intends or pretends to set up, to justify his non-compliance with the plaintiff's right or claim; and then [*28] *charges other matters, which disprove or avoid the supposed defence or excuse.¹ It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter, which it is not for the interest of the plaintiff to admit; for which purpose the charge of the pretence of the defendant is held to be sufficient.² Thus, for example, if a Bill is filed on any equitable ground by an heir, who apprehends, that his ancestor has made a will, he may state his title as heir, and, alleging the will by way of pretence of the defendant's claiming under it, make it a part of the case, without admitting it.³

§ 32. Care, however, must be taken, that the Equity of the plaintiff's case should be fully averred in the stating part of the Bill; for if it should be stated only in the charging part of the Bill, and thus consist only in the pretences, the charges in answer to those pre-

¹ Mitf. Eq. Pl. by Jeremy, 43; Cooper Eq. Pl. 9, 10; Barton's Suit in Eq. 27; 3 Woodes. Lect. 55, p. 368, 369.

² Mitf. Eq. Pl. by Jeremy, 43; Partridge v. Haycroft, 11 Ves. 575; Gregory v. Molesworth, 3 Atk. 626.

³ The form of such a charge is given in Van Heythuysen's Equity Draftsman, p. 5, and in Barton's Suit in Equity, p. 34. The common formulary is, "that the said defendant sometimes alleges and pretends, &c. (and stating the fact supposed, as, for example, that the said A. B. made a will, which was a valid disposition of the said real estate, &c.) and at other times he alleges and pretends, that &c. &c.; whereas your orator chargeth the truth to be (or the contrary thereof to be the truth) &c. &c." See also Mitf. Eq. Pl. by Jeremy, 40, 41, 43; 1 Mont. Eq. Pl. 77, and note (m).

tences, and the admissions, it will be insufficient ; for there ought first to be an equitable case averred ; and then the pretences and charges may properly be introduced to support it.¹ Therefore, when a Bill prayed an account of rents and profits, and stated the plaintiff to * be the heir at law, and the defendant to be in [* 29] possession, and then suggested, that the defendant pretended to claim under some fine and demise ; and charged, that if any such existed, the testator was^d insane at the time, which the defendant at other times admitted ; the Bill was held on demurrer to be unsupportable.²

§ 33. The charging part of the Bill is often omitted, and does not seem indispensable in any case ; for the stating part of the Bill ought fully to unfold and expound the plaintiff's case ; and the charging part in general contains little more than an enlargement of that statement.³ If the Equity of the plaintiff's case is properly

¹ Flint v. Field, 2 Anst. R. 543.

² Ibid. Cooper Eq. Pl. 11.

³ Cooper Eq. Pl. 11. As the subject of the charging part of the Bill often is to obtain a discovery of the defendant's case, it not unfrequently contains fictitious statements, and this is sometimes made a matter of serious complaint, as disreputable to public justice and oppressive upon the defendants. The explanatory paper of Mr. Beames, in the Report of the Chancery Commissioners, of the 9th of March, 1826 (Report of Ch. Commiss. p. 106, Propos. 157), uses this language with reference to fictions in injunction causes:—"An erroneous notion seems to have taken possession of the minds of some persons, that counsel are, in a particular class of causes at least, justified by the existing practice of the Court in inventing a case for the plaintiff, or, in other words, in framing a statement, which has no existence whatever, in point of fact, though it is the case gravely put forward by the Bill, and though the defendant is as gravely called upon to answer it. If this were the practice of the Court of Chancery, it would call for the most severe reprehension, and it would obviously require an alteration. But, as the notion, although to a very limited extent, has prevailed, however inconsistent in itself with the rule of the Court, which requires the signature of counsel to the bill, and

and fully set forth in the stating part of the Bill, all the objects, intended to be accomplished by enforcing

however incompatible with the best interests of justice, and with the honor of the bar, it seems expedient to provide, by an express resolution, that no counsel should prepare or settle a bill, without written instructions from the solicitor, and that the signature of counsel to a bill should, in future, be considered as a certificate, that, assuming the instructions to be correct, it is not unfit, that a bill should be filed." Sir Lancelot Shadwell's Answer to Question 271, in the Appendix to the Report, p. 206, shows, that the practice had been pursued by some eminent counsel. Mr. Gresley, in his *Treatise on Evidence in Equity* (p. 14, 15), has introduced the following remarks on the subject of fictitious charges, to elicit facts in general bills:—"The latitude, which is and ought to be allowed for mis-statements in the bill, inserted for the purpose of grounding interrogatories upon them, is full of perplexing considerations. To state deliberately as facts, matters, which are doubtful or untrue, would appear palpably unjustifiable; but as this is a necessary preliminary for putting many questions to the defendant, which he ought, for the furtherance of justice, to answer, it has become a practice, which the courts do not check: at least, they merely take care, that no scandal or impertinence is inserted, and sometimes, when the case has been very unfairly stated, they visit the plaintiff with costs. In suits, where the common injunction is prayed, the courts have been considered by a high authority to sanction the introduction of fiction, and the Chancery Commissioners, after many careful inquiries on the subject, ventured to suggest no more than that the plaintiff or his solicitor should 'annex an affidavit, stating, that the bill is not filed for delay, and only for the purpose of obtaining equitable relief, or discovery in aid of a proceeding at law.' It is true that injunction suits seek, besides discovery, another relief peculiar to themselves, but the principle contained in the proposition is a good one and applicable in all cases, in which discovery is sought. The evidence of Mr. Heald, who suggested such an affidavit, gives, as reasons for not extending it to the belief of the plaintiff in the truth of all the matters contained in the bill, that 'a draftsman, in forming an injunction bill, ought to put that sort of question to the defendant, which counsel at *Nisi Prius* would put to a witness on cross-examination;' and that 'when a case of facts, from whence a fraud was intended to be deduced, has been brought to an experienced counsel to draw a bill, the context of the circumstances often suggests to his mind material circumstances, which the instructions did not suggest, but which he thinks probable the circumstances contain. He therefore inserts them, and frequently finds, that the circumstances come out so.' These of course 'the plaintiff could not swear to; indeed, he never had an idea of them before the draftsman

a discovery of the circumstances in the charging part, may be fully attained by interrogating the defendant specially as to the facts material to the case. Indeed, until a comparatively recent period, the charging part constituted no distinct allegation of the Bill.¹

§ 34. The sixth part of the Bill is, what is called the *Jurisdiction clause*, and is intended to give jurisdiction of the suit to the Court by a general averment, that the acts complained of are contrary to Equity, and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a Court of Equity.² But this clause is wholly unneces-

himself suggested them.' The Commissioners appear in their 'explanatory paper,' to adopt this view of the subject. 'It would be a simpler process, though not without its difficulties, if the plaintiff were allowed a greater latitude of putting pertinent interrogatories to the defendant, without the necessity of an allegation to found them upon, or on the mere suggestion of a reasonable suspicion.' Where deeds and other documents are sought to be disclosed, the charge in the Bill, and the interrogatories thereto, should be pointed; not only asking, whether the deeds and documents are in the defendant's possession and custody, but it should add, "whereby, if produced, the truth of the matters aforesaid, or of some of them, would appear." And in some cases it may be necessary to go farther, and charge the particular contents of the deeds or other documents, and to require a direct answer by appropriate interrogatories, so as to extort a full and clear statement of their contents. See *Gresley on Evidence*, p. 31.

¹ *Cooper Eq. Pl. 11.* In *Partridge v. Haycraft* (11 Ves. 574), Lord Eldon said; "Formerly the Bill contained very little more than the stating part. I have seen such a Bill, with a simple prayer, that the defendant may answer all the matters aforesaid, and then the prayer for relief. I believe the interrogating part had its birth before the charging part. Lord Kenyon never would put in the charging part, which does little more than unfold and enlarge the statement."

² *Mitf. Eq. Pl. by Jeremy*, 43, 44; *Cooper Eq. Pl. 10, 11*; 1 *Mont. Eq. Pl. 78*; *Barton's Suit in Eq. 27, 28.* The usual formulary is, "All which actings, doings, and pretences (of the said confederates), are contrary to equity and good conscience, and tend to the manifest [wrong] injury and oppression of your orator in the premises. In tender consideration whereof, and for as much as (or, for that) your orator is (entirely) reme-

sary, for it will not of itself give jurisdiction to the Court. If the case made by the Bill is otherwise clearly of [*32] *equitable jurisdiction, the Court will sustain it, although the clause is omitted. If, on the contrary, the case so made is not of equitable jurisdiction, the Bill will be dismissed, notwithstanding such an averment is made in it. For the Court cannot assume any jurisdiction, except upon cases and principles, which clearly justify its interposition.¹ At best, therefore, the clause is a mere superfluity.

§ 35. The seventh part of the Bill is the *Interrogatory part*. It prays, that the parties complained of may answer all the matters contained in the former parts of the Bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and to the belief they are enabled to form on the subject.² One of the principal ends of an answer upon the part of the defendant is, to supply proof of the matters necessary to support the case of the plaintiff; and it is therefore required of the defendant, either to admit, or to deny, all the facts set forth in the Bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any

diless in the premises, according to (or, by) the strict rules of the Common Law, and can only have relief (or, is relievable only) in a Court of Equity, where matters of this nature are properly cognizable (and relievable); To the end, therefore, &c.” 1 Mont. Eq. Pl. 78, note (p); Barton’s Suit in Eq. 36; Van Hey. Eq. Drafts. 6.

¹ Mitf. Eq. Pl. by Jeremy 44; Cooper Eq. Pl. 10, 11; Barton’s Suit in Eq. 36, and note; 1 Mont. Eq. Pl. 78; Bateman v. Willoe, 1 Sch. and Lefr. 204.

² Mitf. Eq. Pl. by Jeremy, 44; Cooper Eq. Pl. 10; 3 Woodes. Lect. 55, p. 368, 369.

belief concerning it. And this he ought to do fully and explicitly, even though no special interrogatories should follow in the Bill.¹ But, as experience has proved, that the substance of the matters stated and charged in a Bill may frequently be evaded by answering according *to the letter only, it has become a practice to [*33] add to the general requisition, that the defendant should answer to contents of the Bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact, an inquiry of the several circumstances, which may be attendant upon it, and the variations, to which it may be subject, with a view to prevent evasion, and compel a full answer.² Hence it is called the interrogating part of the Bill, since it questions the defendant as to the truth of the several statements and charges in the Bill.³

¹ Cooper Eq. Pl. 11, 12.

² Mitf. Eq. Pl. by Jeremy, 44, 45; Barton's Suit in Eq. 37, and note (2); Cooper Eq. Pl. 12.

³ Barton's Suit in Eq. 28-37, and note; Cooper Eq. Pl. 12. The usual formulary is, "To the end, therefore, that the said A. B. and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged (or, to all and singular the premises, or, to all and singular the charges and matters aforesaid), as fully and particularly, as if the same were hereinafter repeated, and they thereunto distinctly interrogated (or, as fully in every respect, as if the same were here again repeated, and they thereunto particularly interrogated); and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or, according to the best of their respective knowledge, information and belief); and more especially, that they may answer and set forth whether, &c. or, they may set forth and discover, whether they do not know, have heard, or are informed, and in their conscience believe that," &c. &c. Van Hey. Eq. Drafts. 7; Barton's Suit in Eq. 37; 1 Mont. Eq. Pl. 78, note (i). In the ancient forms, the Bill after the general prayer, that the defendants may upon oath make a full, true and perfect answer to all the charges and matters contained in the Bill, closed with a prayer for relief and process without putting any special in

§ 36. The interrogatory part of the Bill being originally designed and used to compel a full answer to the matters contained in the former part of the Bill, it must be founded on these matters. Therefore, if there is [*34] *nothing in the prior part of the Bill to warrant a particular interrogatory, the defendant is not compellable to answer it. This rule is indispensable for the preservation of due form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the Bill.¹ When, therefore, a question arises upon the sufficiency of the answer, we are to examine and see, whether the allegations in the Bill justify the interrogatory, and of course impose the necessity of answering it; for the interrogatory part must be construed according to the alleging part, and is not to be considered more extensive than the propositions, out of which the interrogatories arise.² But although the defendant is not bound to answer an interrogatory, which does not grow out of the antecedent matter stated or charged in the Bill, yet if he does answer it, and the answer is replied to, the matter of the interrogatory is deemed to be put in issue, and the informality is cured.³

terrogatories, as this general requisition was supposed sufficient to compel a full answer. *Barton's Suit in Eq.* 37, note (2).

¹ *Mitf. Eq. Pl. by Jeremy*, 45; *Cooper Eq. Pl.* 12; *Gilb. For. Rom.* 91, 218; *Wilkes v. Rogers*, 6 *Johns. R.* 565; *Muckleston v. Brown*, 6 *Ves.* 62.—It is also indispensable, that the interrogatory part of the Bill should coincide with the stating and charging part; for if a plea is put in, its validity will be heard with reference to the stating and charging part, and not with reference to the interrogatory part, if they differ. *Clayton v. Earl of Winchelsea*, 3 *Younge & Coll.* 683.

² *Muckleston v. Brown*, 6 *Ves.* 62; *Cooper Eq. Pl.* 62; *Attorney Gen. v. Whorwood*, 1 *Ves.* 538; *Bullock v. Richardson*, 11 *Ves.* 375, 376; *Mechanics Bank v. Levy*, 3 *Paige R.* 605; *James v. McKernon*, 6 *Johns. R.* 543; *Woodcock v. Bennett*, 11 *Cowen R.* 734; *Ante* § 28.

³ *Attorney General v. Whorwood*, 1 *Ves.* 538, 539. This proposition is fully supported by Lord Hardwicke in *Attorney General v. Whorwood*,

§ 37. But a variety of questions may be founded on a single charge in the Bill, if they are relevant to it;¹ *and, under an allegation of a fact, interrogatories [*35] may be put as to the incidental circumstances, though they may not as to any distinct subject.² Thus, for example, if there is a general charge, that money has been paid as the consideration of a contract, that general charge will entitle the plaintiff to put all questions upon it, which are material to make out, that it was paid, how, when, where, by whom, on what account, in what sums, &c. &c.; and it is not necessary to load the Bill by adding to the general charge, that it was paid, all the circumstances, in order to justify an interrogatory as to the circumstances.³ So, if a Bill is filed against an executor for an account of the personal estate of the testator, upon the single charge, that he has proved the will, may be founded every inquiry, which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required.⁴

1 Ves. 538, 539. It is immediately added: "For a matter may be put in issue by the answer, as well as by the Bill, and if replied to, either party may examine to it."—*Ibid.* The importance of having matters properly put in issue is strikingly illustrated by the rule, that even an admission of a fact in the answer, will be of no avail to the plaintiff, unless it is put in issue by the Bill. *Gresley on Evid.* p. 23.

¹ *Mitf. Eq. Pl. by Jeremy*, 45; *Cooper Eq. Pl.* 12; *Faulder v. Stuart* 11 Ves. 296–301; *Bullock v. Richardson*, 11 Ves. 375.

² *Ibid.*; ante § 28.

³ *Faulder v. Stuart*, 11 Ves. 296, 302; *Bullock v. Richardson*, 11 Ves. 375; 1 *Grant Ch. Pr.* 37.

⁴ *Mitf. Eq. Pl. by Jeremy*, 45; *Cooper Eq. Pl.* 13; 1 *Mont. Eq. Pl.* 79 and note (s). I have here used the very words of Lord Redesdale (which are elsewhere quoted as direct authority to this point); but it seems to me, that the proposition is stated too broadly; and that there

§ 38. It is clear from what has been already said, that the interrogating part of the Bill is not absolutely necessary; because, if the defendant fully answers to the matters of the Bill, with their attendant circumstances, or fully denies them in the proper manner, on oath, the object of the special interrogatories is completely accomplished. * In the old forms of bills there accordingly were no special interrogatories.¹ But from the considerations already mentioned, the practice of inserting special interrogatories is often highly useful to sift the conscience of the defendant, and is almost universal in practice, except in amicable suits.² In truth, without

should be a charge not only that the executor had proved the will, but that he had received assets, in order to found the interrogatories. See *Barton's Suit* in Eq. 32 to 36.

¹ *Partridge v. Haycroft*, 11 Ves. 574; *Barton's Suit* in Eq. 37, note; Ante § 12; *Cooper Eq. Pl.* 11.

² *Cooper Eq. Pl.* 11, 12; *Gordon v. Gordon*, 3 Swanst. 472. The late Mr. Bell (one of the most eminent counsel in Chancery), in his examination before the Chancery Commissioners, gave the results of his own experience in a very marked manner. The following questions and answers, though long, may not be without use to dispel some prejudices on the subject, as well as to forewarn young practitioners of their true duty.

"Q. 4.—Did you, in the course of your practice, ever occupy yourself in the consideration whether any alteration could be usefully made in the form of Chancery pleading?—I have turned the matter in my mind, and particularly in consequence of this commission.

"Q. 5.—What has occurred to you upon that subject?—It does not appear to me, that any alteration can be made in the form of our pleadings to much advantage. There is an objection, which has been generally raised, that a Bill is a story thrice told, which is not very correct. That the interrogating part is a repetition of the bill, thrown into the shape of interrogatories, is in some measure true, and a thing, which I do not see, how it is possible to avoid without very great inconvenience, unless it is in amicable causes. In amicable causes, where both parties only mean to state the fact fairly and candidly, the interrogating part may be omitted, and I frequently have myself omitted it, or only put a few interrogatories, applicable to those defendants, over whom I had no particular control, and to whose counsel I could not speak on the subject.

Q. 6.—From your experience, you seem to consider, that where there

such interrogatories, it would be impracticable, in many

has been a just complaint of the prolixity of Chancery pleadings, it has been rather owing to the negligence or inattention of the pleader, than to the form of pleading?—Not so much to their negligence or inattention, as to the nature of the bill; I allude particularly to the intention of the charging part not being properly understood; I have fallen into that error myself in my younger days.

“Q. 7.—Do you think it would be possible to adopt any rule with respect to amicable suits; or must not the practice in that respect be left to the discretion of the pleader?—I think it must be left in the discretion of the pleader.

“Q. 8.—In general, in the present form of bills, does not the interrogating part consist of inquiries as to every fact before alleged, with an interrogation at the end of each, to this effect; whether it be not true as stated, or in some, and what other manner?—Those are not the words commonly used. The pleader is obliged to vary the manner of the question. It is very difficult to explain, unless a man in trying his skill as a draftsman against an unwilling defendant, how difficult it is often to extract the truth. I am certain in such cases the truth could not be extracted, except by very particular interrogatories.

“Q. 9.—Do you then apprehend, that it would not answer the same effect, if a form of words could be devised, generally referring, once for all, to the several matters before stated, and calling upon the defendant to answer them, not only circumstantially, but to speak to any variance, within his knowledge or belief, from the circumstances, as stated?—I do not think it would be possible to frame any set of words, which would answer that purpose, when we have an unwilling defendant to deal with.

Q. 10.—Is it not, in your apprehension, a general and standing rule in all courts of justice, without its being so expressed, that a man, who is called upon to answer any matters stated against him, shall answer them in the way pointed out, not according to the circumstances as stated, but according to any variation of circumstances, not affecting the substance of what is so charged?—I believe, that is what every court of justice would expect of an honest man, giving his testimony in any shape whatsoever; but unfortunately, in the Court of Chancery, we have very often to deal with men, who are not men of that description. Besides that, very often the defendants are so ignorant, and sometimes so prejudiced with their views of the case, that without a wish to disguise the truth, they will look at and consider the allegation in a very different way from that in which they would, if they were indifferent persons; and therefore rather state their own view of the case, than give a direct answer, if no question is put.

“Q. 11.—If any particular question should be omitted in the interro-

cases, to extract from a reluctant defendant the facts and circumstances, so as to justify any decree.

gating part of a bill, or should not be put with sufficient precision, is it sufficient for the defendant, when challenged for not answering with sufficient particularity, to allege, that the question was no more particular than his answer?—That is a question, on which I have always had a very great doubt and difficulty; I never could bring my mind completely to any general rule upon the subject. When arguing exceptions before the master, the master has frequently said, It is your fault, that you have not gone further; your interrogatories should be much more particular.

“Q. 12.—Supposing the rule of the court to be fixed one way, that a man shall not avail himself of any want of particularity in the question, to cover any want of particularity in his answer, do not you suppose such a rule would go a great way to prevent the necessity for such particular interrogatories?—I do not think it would; and one reason for thinking so, is, I conceive, that it has been tried to a great extent; for in some of the old orders there are declarations expressly made, that no person is to answer so that his answer should be a negative pregnant, yet these rules seem not to have answered the purpose. They have always had recourse back to the old interrogatories; and no person, but one who has been in the constant habit of preparing pleadings, can be aware of the difficulties, which are met with, even in obtaining instructions from a client. I have frequently been obliged to say to my client, ‘You see the interrogatory is put in this shape, you must answer it in this shape; it is not sufficient, that you answer generally.’ I have more than once had it said to me, ‘Sir, I cannot answer differently.’ ‘Very well, Sir; then if you try another exception, the necessary consequence is, you may be in the Fleet until you have answered it.’ Then, when it has been brought to that, I have got an answer, and a very material one.

“Q. 13.—Do you apprehend, that the same warning, given in the same manner, as to consequences, that would result from a general rule of the court, would not have the same effect?—I do not think it would; unless the gentleman, who put the question, was to do the same thing, which the plaintiff’s counsel now does; that is, sit down and put it in the shape of an interrogatory, and say, ‘these are the words, in which the question is put; do you now tell me, how you answer to those particular words.’ Besides, counsel seldom see the defendants.

“Q. 14.—Do you think it would not be sufficient to inform him, that that is the way, in which the court would consider the question, and that they would require an answer, as if the question had been so put, under their general rule?—I do not think it would; I can mention a very strong instance, which occurred to myself. There was the same question put in rather a different manner, in two different parts of the bill. In the in-

§ 39. The practice of putting special interrogatories seems to have been derived from the Civil Law. By that law, when the plaintiff had put in his positions or narrative of his case, the defendant was to put in his contestations or negations of those positions; and the plaintiff had liberty to examine the defendant upon interrogatories to supersede the necessity of proof. These were called the *libellus articulatus*; which was generally put in after the first act, or proceeding, where the defendant had answered the positions.¹ In Chancery

instructions for answer to the interrogatories, in one place it was answered directly contrary, to what it was in the other. The defendant was a professional man, if I recollect right, whose answer I was preparing. When I first saw him upon his answer, he was very much surprised to find, that I had answered the question in one place different from his instructions. I sat down with him to peruse the answer, and when we came to the first question, I read to him the question, and I said, 'Now your answer, which you have written in the margin, is to this effect; I will reduce it into technical language; is that true?'—'Certainly, it is true.' We went through the answer, and then at last came to the other passage: 'Now,' said I, 'this is your language to this passage?' 'Yes, it is,' then I said, 'We will turn it into technical language,' and I went on with the answer: 'Now, if you please, we will return back, and compare the two passages' (which I had put on a separate piece of paper); 'have the goodness to read them, and let me now know, which you wish to stand.' He took them, and read them, and they were a palpable contradiction to each other. He thanked me for my attention to the situation in which he would have been, and altered the one, as the fact was. Now, that gentleman, I believe, did not wish to mislead me; but his attention being directed at one time to one view of the case, and at another period to another view of the case, he had fallen into an unintentional mistake; and I am persuaded, that, if the interrogatories are not put pointedly, there will be many mistakes of that kind. If those mistakes did not occur, it would very frequently happen, that even if a party wished to state a fact as well as he understood it, you would not get at the whole truth, unless you put the question to him in detail. In bills, which are chiefly statements of deeds, there would be very little difficulty; but, whenever a pleader comes to a complicated statement of facts, it is necessary to be very precise in the interrogatories." Report of Chancery Commissioners, 9th March, 1826. Appx. p. 1 and 2.

¹ Gilb. For. Rom. 90; Ante § 14, and note. The proceedings in the

the positions and the *libellus articulatus* are thrown into one Bill. But still they must, as in the Civil Law, relate the one to the other ; and hence the rule, that the interrogatories must arise out of the facts alleged in the Bill, may be readily traced back to its Roman source.¹

[*40] * § 40. The eighth part of the Bill is the *Prayer for relief*. This of course must vary according to the circumstances of the particular case, and the nature of the relief sought.² The usual course is for the plaintiff in this part of the Bill to make a special prayer for the particular relief, to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the Court. The latter can never be properly and safely omitted ; because if the plaintiff should mistake the relief, to which he is entitled in his special prayer, the Court may yet afford him the relief, to which he has a right, under the prayer of general relief, provided it is such relief, as is agreeable to the case made by the Bill.³ But if there is no prayer

Ecclesiastical Courts bear a close resemblance to those of the Civil Law. "In the Ecclesiastical Courts" (says Mr. Hare), "where the defendant is likewise required to make an answer or discovery upon oath, the answer is in a wholly distinct instrument from the responsive allegation, which contains the defence." Hare on Discov. 223.

¹ Gilb. For. Rom. 90, 91, Id. 21, 22, 23, 24, 26, 27, 44, 45 ; Ante § 14, and note.

² Mitf. Eq. Pl. by Jeremy, 45 ; 3 Woodes. Lect. 55, p. 369.

³ Mitf. Pl. in Eq. by Jeremy, 38, 45 ; Cooper Eq. Pl. 13, 14 ; Barton's Suit in Eq. 40, 41, and notes ; Wilkinson v. Beal, 4 Madd. R. 408 ; Beaumont v. Boultree, 5 Ves. 495 ; Hiern v. Mill, 13 Ves. 119, 120 ; English v. Foxall, 2 Peters R. 595. The usual form of the prayer is, "To the end, therefore, that the said defendant and his confederates, &c. may, upon their several and respective corporal oaths, &c. &c. (stating the interrogatory part), and that the said defendant may come to a just and fair account, &c. &c. (stating the particular relief asked), and that your orator may have such further and other relief in the premises as the nature of his case shall require, and as to your Lordship (or your Honors) shall seem meet ; (or, that your orator may be further and otherwise relieved in the

of general relief, then if the plaintiff should mistake the relief, to which he is entitled, no other relief can be granted him, and his suit must fail, at least unless an amendment of the prayer is allowed.¹

* § 41. It has been said, that a prayer of general relief without a special prayer of the particular relief, to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief, which the case requires, may at the hearing be prayed at the bar.²

premises according to equity and good conscience). See 1 Mont. Eq. Pl. 79, note (t); Van Hey. Eq. Drafts. 8; Barton's Suit in Eq. 40, 41; 3 Woodes. Lect. 55, p. 369; Cooper Eq. Pl. 14; English v. Foxall, 2 Peters R. 595.

¹ Cooper Eq. Pl. 14; Cook v. Martyn, 2 Atk. 2; Polk v. Clenton, 12 Ves. 62, 63, 64, 65; Weymouth v. Boyer; 1 Ves. jr. 426; 3 Woodes. Lect. 55, p. 372, 373. In the cases of Bills for charities, and of Bills on behalf of infants, Courts of Equity will grant relief upon any matter arising upon the state of the case, though it be not particularly mentioned and insisted on and prayed by the Bill. Stapilton v. Stapilton, 1 Atk. R. 6; Atty. Genl. v. Jeanes, 1 Atk. 355; Atty. Genl. v. Gleg, 1 Atk. R. 356; 1 Atk. 355; Atty. Genl. v. Scott, 1 Ves. 418; Atty. Genl. v. Burk, 18 Ves. 325; Atty. Genl. v. Vivian, 1 Russ. R. 235; Barton's Suit in Eq. 40, note (i). These cases, therefore, constitute exceptions to the general rule. See also Atty. General v. Jackson, 11 Ves. 371, 372; 2 Mont. Eq. Pl. note B. X. p. 120, 121; Mitf. Eq. Pl. by Jeremy, 27, 39, and note (i); Id. 55, note (m); Colton v. Ross, 2 Paige R. 390.

² Mitf. Eq. Pl. by Jeremy, 38, 39; Cooper Eq. Pl. 14; Barton's Suit in Eq. 40, note (1). Wilkinson v. Beal, 4 Madd. R. 408; Cook v. Martyn, 2 Atk. 3; Grimes v. French, 2 Atk. 141; Topham v. Constantine, Tamlyn R. 135; Manaton v. Molesworth, 1 Eden R. 26, and note (b); Mitf. Eq. Pl. by Jeremy, 46, note (x); 3 Woodes. Lect. 55, p. 372, 373.—In Cook v. Martyn, 2 Atk. 3, Lord Hardwicke is reported to have said; "Praying general relief is sufficient, though the plaintiff should not have been more explicit in the prayer of the Bill. And Mr. Robins, a very eminent counsel, used to say, general relief was the best prayer next after the Lord's Prayer. In Dormer v. Fortescue, 3 Atk. 132, Lord Hardwicke quotes the same expression, and attributes it to a Mr. Dobbins. Quere, which is the correct name? Mr. Eden, in his note to Manaton v. Molesworth, 1 Eden R. 26, note (b), says it was Mr. Robins; and Lord Northington, in the same case, quotes the saying as a common one.

This, as a general rule, may be true ; but it is not universal. Thus, for example, an injunction will not ordinarily be granted under a prayer for general relief ; but it must be expressly prayed ; because the defendant might, by his answer, make a different case under the general prayer, from what he would, if an injunction were specifically prayed.¹

[*42] *§ 42. But, even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the Bill ; for the Court will grant such relief only, as the case stated will justify ; and will not ordinarily be so indulgent, as to permit a bill framed for one purpose to answer another, especially, if the defendant may be surprised or prejudiced thereby.² Thus, if a bill is brought for an annuity, or rent charge of ten pounds per annum, left under a will, and the counsel for the plaintiff pray at the bar, that they may drop the demand of the annuity or rent charge, and insist upon the land itself, out of which the annuity or rent charge issues, the Court will not grant it, for it is not agreeable to the

¹ *Savory v. Dyer*, Ambl. 70, note ; *Wright v. Atkins*, 1 Ves. and B. 814 ; 2 Story Comm. on Eq. § 862, § 863 ; *Eden on Injunct.* ch. 3, p. 48 ; *Id.* Ch. 15, p. 321 ; 1 *Smith Ch. Pr.* 45. And it seems, that the prayer for an injunction must not only be in the prayer of relief, but in the prayer of process. *Wood v. Bradell*, 3 Sim. R. 273 ; *Hinde Ch. Pr.* 17, 18.—The usual form of praying is ; “May it please your Lordship (or your Honors), the premises considered, to grant unto your orator, not only his majesty’s most gracious writ of injunction, issuing out of and under the seal of this honorable Court to be directed to the said — (the defendant), to restrain him, &c., &c., against your orators, touching any of the matters in question ; but also his majesty’s most gracious writ of subpoena to be directed to the said — the defendant,” &c., &c., *Hinde Ch. Pr.* 17, 18.

² *Mitf. Eq. Pl.* by *Jeremy*, 38 ; *Cooper Eq. Pl.* 14 ; *Jones v. Parishes of Montgomery, &c.*, 3 *Swanst.* 208 ; *Legal v. Miller*, 2 Ves. 299 ; *Lord Walpole v. Lord Orford*, 3 Ves. 416 ; *Hiern v. Hill*, 13 Ves. 118, 119 ; 3 *Woodes. Lect.* 55, p. 372 ; *Walker v. Devereaux*, 4 *Paige R.* 229.

case made by the Bill.¹ If, therefore, the plaintiff doubts his title to the relief he wishes to pray, the Bill should be framed with a double aspect, so that, if the Court should decide against him in one view of the case, it may yet afford him assistance in another.²

§ 43. On this and many other accounts, it has been very properly remarked, that the prayer of a bill demands a good deal of consideration and attention ; and an accurate specification of the matters to be decreed in complicated cases requires great discernment and *experience.³ Where special orders and pro- [*43] visional processes are required, founded on peculiar circumstances, such as writs of injunction, writs of *ne exeat regno*, orders to transfer funds, or to preserve property pending the litigation, they are usually made the subjects of a special prayer.⁴ Indeed, the frequent applications made for amendments of the prayers of bills is a proof at once of the value of special prayers, and, also, of the intrinsic difficulty of foreseeing all the exigencies, which may arise in the progress of a suit, which may require new relief.

§ 44. The ninth part of the Bill is the *Prayer of process*, to compel the defendant to appear, and answer the Bill, and abide the determination of the Court on the subject. Care must be taken in this part of the Bill to insert the names of all persons, who are intended to be

¹ *Grimes v. French*, 2 Atk. 141 ; *Dormer v. Fortescue*, 3 Atk. 124, 132.

² *Mitf. Eq. Pl. by Jeremy*, 39 ; *Bennet v. Vade*, 2 Atk. 325 ; *Barton's Suit in Eq.* 41, note (1) ; *Cooper Eq. Pl.* 14 ; 3 *Woodes. Lect.* 55, p. 371 ; *Colton v. Ross*, 2 *Paige R.* 396 ; *Lloyd v. Brewster*, 4 *Paige R.* 537.

³ *Cooper Eq. Pl.* 13 ; 3 *Woodes. Lect.* 55, p. 372.

⁴ *Cooper Eq. Pl.* 13, 14 ; *Mitf. Eq. Pl. by Jeremy*, 46, 47 ; *Barton's Suit in Eq.* 41, note (2) ; *Moore v. Hudson*, 6 *Madd. R.* 218 ; *Hinde Ch. Pr.* 17, 18.

made parties; for it is a general rule, that none are parties, though named in the Bill, against whom process is not prayed.¹ The ordinary process prayed is a writ of subpœna, which requires the defendant to appear and [*44] * answer the bill on a certain day, named in the writ, under a certain penalty.² In the case of privilege of the peerage in England a letter missive requesting the defendant to appear and answer the bill is first prayed,

¹ Cooper Eq. Pl. 16; *Fawkes v. Pratt*, 1 P. Will. 593; *Windsor v. Windsor*, 2 Dick. 707; *Brasher v. Van Cortlandt*, 2 John. Ch. R. 245. It is said, in *Haddock v. Tomlinson*, 2 Sim. and Stu. 219, not to be necessary to pray process against persons, who are charged in the Bill to be out of the jurisdiction. It was held in *Munoz v. De Tastet*, 1 Beavan R. 109, n., and recognised by the Master of the Rolls, in *Brooks v. Burt*, 1 Beavan R. 106, 109, that there should in such case be a prayer for process against the absent party. But it is the usual practice, where any of the defendants are out of the jurisdiction, for the plaintiff to state the fact in his Bill, and to pray process against them, when they shall come within the jurisdiction. 1 Smith Ch. Pr. 45; Mitf. Eq. Pl. by Jeremy, 164, 165. If the plaintiff should not pray process against a party defendant out of the jurisdiction, and the party should come under the jurisdiction in the progress of the suit, the plaintiff would be compelled to amend his bill or to file a supplemental bill, if he was not entitled to amend, so as to bring the party before the Court. Mitf. Eq. Pl. by Jeremy, 165.

² Com. Dig. Chancery, D. 1; Gilb. For. Rom. 37. The usual form of the prayer for a subpœna is; "May it please your Lordship (or your Honors), to grant unto your orator His Majesty's most gracious writ of subpœna (or, the most gracious writ of subpœna of the State of ——— or of the U. S. of America), to be directed to the said A. B. and the rest of the confederates when discovered, thereby commanding them and every of them at a certain day and under a certain pain therein to be specified (or, therein to be inserted), personally to be and appear before your Lordship (or, your Honor or Honors), in this Honorable Court, and then and there to answer all and singular the premises, and to stand to (perform) and abide such order and decree therein, as to your Lordship (or, to your Honors, or to this Honorable Court) shall seem meet (or, shall seem agreeable to equity and good conscience); and your orator shall ever pray." Barton's Suit in Eq. 41, 42; 1 Mont. Eq. Pl. 80, note (y); Van Hey. Eq. Drafts. 9; Hinde Ch. Pr. 17, 18. When the bill is only for discovery, or to perpetuate the testimony of witnesses, the clause following the words, "to answer all and singular the premises," is omitted, as no decree is asked or is proper. Barton's Suit in Eq. 43, note (1).

and on his default the prayer of a subpœna.¹ In the case of corporations aggregate the process of subpœna is the same as in ordinary cases; but the Bill sometimes prays, that, in case of their default to appear and answer * the bill, the writ of distringas may issue to compel [*45] them to do so.² In cases, where the writ of injunction,

¹ In England, in case any defendant has privilege of peerage, or is a Lord of Parliament, a prayer for a letter missive to him, requesting him to appear and answer the Bill is put in (as is stated in the text) before the prayer of process of subpœna. And the prayer of the latter is only in default of the defendant's compliance with that request. The usual form is "May it please, &c. to grant unto your orator your Lordship's letter missive, to be directed to the said defendant, the Earl of, &c. desiring him to appear and answer your orator's Bill, or in default thereof, his Majesty's most gracious writ of subpœna," &c. Barton's Suit in Eq. 42, note; 1 Smith Ch. Pr. 75, 76, 97. In case the Attorney General, as an officer of the crown or government, is made a defendant, the Bill, instead of praying process against him, prays, that he may answer it upon being attended with a copy. Mitf. Eq. Pl. by Jeremy, 46; Cooper Eq. Pl. 16, 17; Barton's Suit in Eq. 42, note; Com. Dig. Chancery, D. 2; Gillb. For. Rom. 65, 66, 67.

² Cooper Eq. Pl. 16, 17. Mr. Cooper (Eq. Pr. 16, 17), says, that "in the case of a corporation aggregate, where the answer is under the common seal, the Bill *must* pray, that a writ, called a writ of distringas, may issue under the great seal, which is for the purpose of distraining them by their goods and chattels, rents and profits, until they obey the summons or direction of the Court." From this language it would seem indispensable, in a suit against such a corporation, to insert a prayer for such a writ. But I cannot find any sufficient authority for such a position. It seems no more necessary, than it would be in common cases to pray for an attachment and other processes, when the party does not appear and answer; and this is never done. The right to the ulterior processes results from the general authority of the Court to compel obedience to its own commands. The distringas is to compel the corporation to answer as well for the contempt as to the Bill. Harvey v. East India Company (2 Vern. R. 396; S. C. Prec. in Ch. 128), cited by Mr. Cooper, does not support his doctrine; but only the modified doctrine above stated. See 1 Harris Ch. Pr. by Newl. ch. 27, p. 149, where the form of a distringas is given. It commands the sheriff to distrain the lands and tenements (not the rents and profits), goods and chattels of the corporation, &c. &c. and that he shall answer to the Court for the said goods and chattels and the rents and profits of the land, &c. Barton's Suit in Eq. 94, 95. See also 1 Smith Ch. Pr. 45, 98, 99.

is sought, it should not only be included in the prayer for relief, but also in the prayer for process.¹

§ 45. The process of subpœna seems first to have been introduced into the Court of Chancery, to compel an appearance to a suit in Equity, by Bishop Waltham, who was chancellor in the reign of Richard the Second.* It was anciently and originally a process in the Courts of Common Law, where it was used, and still continues to be used, to compel the attendance of witnesses to [*46] *attest the truth of facts, and give testimony.³ It is supposed by some authors to have been introduced from the Courts of Common Law into the Court of Chancery, because it was the newest process, that was used in case of attestation by that law.⁴ And, perhaps, the authority to issue it was derived from the statute of West. 2, ch. 24, which gave authority to the chancellor to issue new writs in cases, where the existing writs did not afford a remedy for cases falling under the like right.⁵ It bears a close analogy, also, to the citation, or *vocatio in jus*, of the Civil and Canon Law; and, considering, that the Chancery was in those early times in the possession of the ecclesiastical dignitaries, it is by

¹ Haddock v. Tomlinson, 2 Sim. and Stu. 219; Hinde Ch. Pr. 17. Ante, § 41. Where a writ of *ne exeat regno* is sought, it is ordinarily included in the prayer of relief and of process. But it seems not to be absolutely indispensable. See Collinson v. ———, 18 Ves. 353; Moore v. Hudson, 6 Madd. R. 219; 1 Smith Ch. Pr. 51. See the form of a prayer for a *ne exeat* in Hinde Ch. Pr. 16.

² Barton's Suit in Eq. 7, 8; Id. 61 note (1); 3 Reeves Hist. of Law, 192.

³ Gilb. For. Rom. 37; 1 Story Com. on Eq. Jurisp. § 46; 3 Black. Com. 52, 53.

⁴ Gilb. For. Rom. 37.

⁵ Barton's Suit in Eq. 61, note (1); 3 Black. Com. 52, 53. See 3 Reeves Hist. of Law, 192; Treatise of Subpœna in Harg. Law Tracts, 324, 325, 332, 333; Id. 301.

no means improbable, that it was modeled upon the basis of the latter.¹

*§ 46. Such are the formal parts of an original [*47] Bill for relief, as it is usually framed ; upon which Lord Redesdale has made the following remarks:—"Some of them are not essential ; and, particularly, it is in the

¹ See Halifax Anal. of Civ. Law, ch. 9, p. 109, ch. 10, p. 122 ; Conset's Pract. 26 ; Barton's Suit in Eq. 61, note (1) ; Gilb. For. Rom. 21, 26, 27. Mr. Barton, in his Treatise on Suits in Equity (p. 61, note (1)), has made the following remarks on the writ of subpœna : " This writ answers to the *Citatio certis de causis* in the Civil Law (see Gib. Cod. T. xlv. c. 2). It was first applied to the purpose of compelling an appearance to a suit in Equity in the reign of Richard II. when Bishop Waltham, then Chancellor, appears to have adopted it in pursuance of Stat. West. ii. c. 24, which (to prevent the multiplicity of petitions to Parliament for the formation of writs adapted to such new cases as were daily arising) enacted that '*quotiescunque de cetero evenierit in Cancellaria, quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure, & simili indigente remedio, non reperitur, concordent clerici de Cancellaria in brevi faciundo.*' This writ was always vehemently opposed by the courts of Common Law ; and having sometimes, it seems, been issued upon groundless allegations, it was enacted by 15 Hen VI. c. 4, at the instigation of the Commons, that no writ of subpœna should be granted in future, till surety had been found to answer to the party aggrieved for his damages and expenses, in case the plaintiff failed to make good the charges in his Bill. This security however has long fallen into disuse (a matter there is frequently reason to lament), and is now required only in cases, where the plaintiff either resides abroad, or is likely soon to quit the kingdom.

"A custom formerly prevailed (though contrary to the more ancient practice) of issuing the subpœna before the Bill had been filed. This gave rise to the statute of 3 and 4 Ann. c. 16, by which it is provided, that 'no subpœna, or any other process for appearance, do issue out of any Court of Equity, till after the Bill be filed with the proper officer in the respective Courts of Equity (except only in cases of injunctions to stay waste or proceedings at law, in which cases, therefore, it may still be done), and a certificate thereof granted by the proper officer.' And as a still further check on this practice, it remains an order of the Court of Chancery, that 'all Bills there filed shall be dated on the day they are brought into the Six Clerks' office.' It is to be observed, however, that neither the statute nor order have entirely put a stop to this mode of proceeding, though it is always done at the risk of costs." See also the Treatise on the Writ of Subpœna, in Harg. Law Tracts, 322, 324, 332.

discretion of the person, who prepares the Bill, to allege any pretence of the defendant in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a Bill in all cases has given rise to a common reproach to practisers in this line, that every Bill contains the same story, three times told. In the hurry of business, it may be difficult to avoid giving ground for the reproach. But in a Bill, prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operation."¹

¹ Mitf. Eq. Pl. by Jeremy, 47. See also Cooper Eq. Pl. 17, 18. Mr. Bell's testimony in his examination before the Chancery Commissioners, already cited in a note to § 38, is very direct to the same purpose. The following extract of his answers to subsequent questions put, elucidate this whole subject much more fully :

" Q. 24.—Supposing a bill in Equity, according to the present form in use, to be a narrative of facts, which it may be necessary to prove, either by discovery from the defendant, or by extrinsic evidence ; does it occur to you, that any variation of the present form could be substituted to the advantage of the suitor, supposing the pleader to prepare his pleadings according to the present form, with due care and skill ?—I think not. It is very difficult to impress any person with all the difficulties of the case, except a person, who has been laboring a long time at pleading. But when one has been sitting for years at one's desk, trying to prepare bills to extract truth, and, in answers, wishing to give a fair and reasonable answer, one really is obliged, I think, to come to that conclusion : I never could bring my mind to any other conclusion.

" Q. 25.—After all the pains you have taken in framing a bill, have you not found yourself frequently disappointed, and obliged to reframe your bill, in order to obtain a full answer ?—Certainly. And in cases, where a defendant is desirous to give a full answer, where the answer is to be obtained first through the medium of a solicitor, who perhaps has not time to attend to this business himself ; next, by extracting it from a man, who, if a man of moderate intelligence, is still not used to technical language, or used to give those precise answers, which a witness ought to do ; if you do lay the positive questions before those persons, you will seldom be able (even if they wish to give you all the information they possess) to get it from them ; you will get a great deal of information, probably, that you do not want, but they will omit very material points ;

§ 47. We may conclude, what is here said on the general structure and form of a Bill, by the remark,

and it is not till instructions are sent back two or three times, pointing their attention particularly to the interrogatories, and writing down, perhaps, the interrogatory with your own hand, or the essential part, that you are able to get out the truth. I recollect one case, which occurred to myself in practice; I could not get my client to answer a particular part of a bill. The parties took exceptions more than once; they thought we were keeping back something or other. At last my client, the solicitor, said to me, 'Really, I do not know how to give you any further information.' I said, 'You must; the other parties insist upon it; and if you cannot give further information, your client must go to the Fleet, and remain till he does give further information.' At last I prevailed upon him to set seriously to the business, and he procured information, which decided the case: but it decided it in favor of my client.

"Q. 26.—As it must frequently happen, that the statements of a bill, either in the whole or in great part, are such, that beforehand the pleader perfectly well knows the defendant is incapable of giving an answer. When that case occurs, would it not be sufficient, as a general rule, that the plaintiff should confine his interrogatories to those points only, to which he knows, or suspects, or believes the defendant is able to give an answer?—The difficulty in doing that, is this: The formal parts of a bill one is obliged to leave to clerks, or to junior pupils, and it would be almost impossible to get through business with the despatch required, if we were obliged to look into it with such minuteness as to fix on those parts, if they could be distinguished.

"Q. 27.—Would it be attended with advantage, if the pleader were to pencil, for the use of his clerk, those parts, to which he wishes to confine his interrogatories?—I do not think it could be done. If the point is material to the case made against the defendant, whether he knows it or not must be matter of conjecture. The draftsman generally takes care to interrogate the defendant to whatever is material against him.

"Q. 28.—Does the person, who prepares a bill, always know how far the several parties to that bill are, or are not acquainted with the several transactions stated in it?—It is very seldom that he can know the exact information they have upon the subject.

"Q. 29.—Would not the exhibiting particular interrogatories to particular parties, instead of including all in a general interrogatory, very much increase the length of the bill?—I think it would, if you framed distinct interrogatories upon the same parts of a bill, with a view to different parties.

"Q. 30.—The drawing of the interrogative part of a bill is left to clerks or pupils?—Generally, that part is so much a formal part, that the pupils prepare it. The pleader must peruse it himself, and see that it is cor-

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that every Bill, whether original or not, must have the signature of counsel annexed to it.¹ This rule appears to have been adopted at an early period, and at [*50] least *as early as the time of Sir Thomas More.² The great object of this rule is, to secure regularity, relevancy and decency in the allegations of the Bill, and the responsibility and guaranty of counsel, 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. Hence it is, that counsel are held responsible for the contents of the Bill ; and if it contains matter, which is irrelevant, impertinent, or scandalous, such matter may be expunged ; and the counsel may be or-

rect ; and when he comes to that part, which requires particular attention, he gives that particular attention to it.

"Q. 31.—Do you consider the present interrogative part of the bill requisite to obtain a full answer, in the majority of cases, or only in cases of particular difficulty ?—In the majority of really contested cases, unless it is those cases, where the whole question depends upon the construction of certain deeds." Report of Chancery Commissioners, 1826, Appendix 4.

¹ Mitf. Eq. Pl. by Jeremy, 48, and note (a) ; 1 Prax. Alm. Cur. Can. 4 ; 1 Mont. Eq. Pl. 75 ; Cooper Eq. Pl. 18 ; French v. Dean, 5 Ves. 547 ; Hinckley v. Barton, 5 Madd. R. 378 ; Barton's Suit in Eq. 43, note (2) ; 1 Smith Ch. Pr. 64, 169.

² Mr. Cooper, in his Treatise on Equity Pleadings (p. 18), says :— "This practice is said to have commenced in the time of Sir Thomas More, in consequence of an order made by him. Before that time it seems, that the Court itself examined the Bill ; that afterwards the Chancellor delegated that power to particular counsel ; and that subsequently an order was made, that no bill should be filed, unless under the hand of a double reader, or of one of the king's counsel. But at length, on account of the increase of business, the Court referred them to the honor of the bar at large. But if the Bill is not signed by counsel, or the signature is counterfeit, or disavowed, in the first case the Bill will be dismissed on the defendant's demurrer ; and in the other, on the fact being made known to the Court, it will be ordered to be taken off the file." See also Harg. Law Tracts, 302.

dered to pay costs to the party aggrieved.¹ And this duty has been enforced by several pointed general orders of the Court of Chancery.²

§ 48. The subject of scandal and impertinence in a Bill, as well as the general rules and principles, which apply to the material allegations of a Bill, as to certainty, and accuracy, and fulness of statement, and other matters, will be more fully considered hereafter. It is sufficient, in this place, to have explained the general nature and character of this part of Equity Pleadings.³

*Our next inquiry will be, as to the persons, who [*51] may sue, and be sued by a Bill in Equity, and the manner, in which the suit is to be brought, and defended. We shall then proceed to the inquiry, what persons are proper and necessary parties to such a Bill; and when and under what circumstances parties may be dispensed with. Having disposed of these preliminaries, we shall then be prepared to resume the consideration of the mode of stating the material facts in a Bill, and the rules, by which due certainty, order, and propriety of statement in regard to these facts are ensured and attained.

¹ Mitf. Eq. Pl. by Jeremy, 48; Cooper Eq. Pl. 18, 19; Gilb. For. Rom. 210, 211; *Emerson v. Dallison*, 1 Ch. Rep. 194.

² Beames Ord. in Chanc. 25, 69, 70, 165, 166, 167.

³ As to scandal and impertinence in interrogatories to witnesses, and also in the answers of witnesses, it may be here stated, that the Court will refer the depositions to a Master to ascertain such matters, and if he reports, that there is such scandal and impertinence, the same will be ordered to be expunged from the depositions, and the costs paid by the offending party. Thus, if there has been impertinence and scandal in the interrogatories, the solicitor, who drew them, may be required to pay the costs. If scandal or impertinence in the answer of witnesses, not specifically called for by the interrogatories, as in their answers to the general interrogatory, the witnesses will be liable to pay the costs. *Guide v. Mumford*, 2 Younge & Cell. 445 to 448. Post, § 880, a.

CHAPTER III.

BILL IN EQUITY—PARTIES, WHO HAVE CAPACITY TO
SUE AND BE SUED.

§ 49. IN the first place, then, let us consider, who may sue in Equity. The King or Government may (as has been already stated) sue in a Court of Equity, not only in suits strictly on behalf of the Crown or Government, for its own peculiar rights and interests; but also on behalf of the rights and interests of those, who partake of its prerogative, or claim its peculiar protection.¹ In all such cases the suit is instituted by the proper public officer, to whom that duty is entrusted; and this ordinarily is the Attorney General.² Where the suit immediately concerns the rights and interests of the crown, the public officer sues in his own official name, without uniting that of any other person. But where the suit does not immediately concern the rights or interests of the crown, but only of those, who partake of its prerogative, or are under its peculiar protection, or the subject matter is *publici juris*, there the Attorney General sues generally (but it is not absolutely necessary), at the relation of some other person, who is named as relator in the Bill, and who becomes thereby responsible for the costs.³

¹ Ante § 8; Mitf. Eq. Pl. by Jeremy, 4, 21, 22, 23, 24; Cooper Eq. Pl. 21, 22, 101, 102; Att. General v. Vernon, 1 Vern. R. 277, 282; S. C. 370, 1 Mont. Eq. Pl. 34. Edwards on Parties in Equity 60, 61. Calvert on Parties, ch. 3, § 26, p. 301, to p. 308.

² Ibid.

³ Ante § 8; Mitf. Eq. Pl. by Jeremy, 22, 23, 24; Cooper Eq. Pl. 21, 22, 101, 102; Att. General v. Vivian, 1 Russ. R. 235, 236, 237; 1 Mont. Eq. Pl. 34. Calvert on Parties, ch. 3 § 26, p. 301. to p. 308.

§ 50. Suits on behalf of bodies politic and corporate, and of persons, who do not partake of the prerogative of the Crown or Government, and who have no claim to its particular protection, are instituted by themselves, either alone, or under the protection of others.¹ Bodies politic and corporate, and all persons of full age, not being a feme covert, idiot, or lunatic, or otherwise subject to some special disability, may by themselves alone exhibit a bill, as the like persons may sue at law;² for, with the exceptions above alluded to, it may be laid down as a general rule, that all sorts and conditions of persons, from the highest to the lowest, may sue in Courts of Equity.³ Indeed, under peculiar circumstances, Courts of Equity, which are said to delight in justice and mercy, will permit poor persons to sue *in formâ pauperis*, where they are unable to carry on such suits from want of pecuniary means; and, then, counsel will be assigned to them by the court, and they are exempted from the payment of ordinary fees.⁴

§ 51. The incapacities to sue are, as at Law, of two sorts; first, those, which are absolute; and secondly, those, which are partial. The absolute are such as, while they continue, wholly disable the party to sue. The partial are such, as disable the party to sue by himself alone without the aid of another. The absolute incapacities, in England, are outlawry, excommunication, attainder and alienage.⁵ In America the two former

¹ Mitf. Eq. Pl. by Jereiny, 24; Cooper Eq. Pl. 24.

² Mitf. Eq. Pl. by Jeremy, 24; Cooper Eq. Pl. 24; Edwards on Parties in Equity, 34, 35, 36; Calvert on Parties, ch. 3, § 18, p. 255, 260.

³ Cooper Eq. Pl. 24.

⁴ 1 Harris. Ch. Pr. by Newl. 389, 390; Wyatt Pr. Reg. 319; Beam. Ord. in Ch. 44, 50, 284; Cooper Eq. 24.

⁵ Mitf. Eq. Pl. by Jeremy, 226, 227, 228, 229; Beames Ord. in Ch. 27; — v. Davies, 19 Ves. 80; 1 Mont. Eq. Pl. 32, 33; 2 Mont. Eq. Pl. 111, 112, 113, 114, 115; Cooper Eq. Pl. 26; Calvert on Parties, ch. 3, § 28, p. 313.

are either wholly unknown; or, if known at all, are of very limited local existence. Alienage alone does not in either country constitute a general disability to sue in Courts of Law or of Equity; but only alienage combined with the character of enemy. An alien friend has a right to sue in any court; an alien enemy is incapable of suing while he remains an enemy, at least unless under very special circumstances.¹

§ 52. The ground of this distinction may be stated almost in the very language of a distinguished Judge. Alien friends come into the country, either (as was formerly the case) with a letter of safe conduct, or under a tacit permission, which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of the country, where they reside. But if the right of suing for redress of the injuries, which they receive, were not allowed them, the protection afforded would be incomplete, and merely nominal. This claim to the protection of the courts of the country does not apply to those aliens, who adhere to the public enemies of the country. They seem, upon every principle, to be incapacitated from suing either at Law or in Equity.²

§ 53. A doubt has arisen, whether this doctrine is applicable to bills of discovery, as it clearly is to bills of relief, by an alien enemy.³ Upon principle, there would not ordinarily seem to be any solid ground for any dis-

¹ Mitf. Eq. Pl. by Jeremy, 229; Cooper Eq. Pl. 27; 2 Mont. Eq. Pl. 114, 115; Daubigny v. Davallon, 2 Anst. R. 462, 467; Albretcht v. Sussman, 2 Ves. & B. 323; Edwards on Parties in Equity, 216, 217, 218; Calvert on Parties, ch. 3, § 27, p. 311, 312; Pisani v. Lawson, 6 Adolp. & Ellis, 90.

² Ch. Baron Macdonald in Daubigny v. Davallon, 2 Anst. R. 467.

³ Albretcht v. Sussman, 2 Ves. & B. 323-326.

tion. The disability to sue is personal. It takes away from the public enemies the benefit of the courts of a country, whether the suit be for the purpose of immediate relief, or to give assistance by a discovery in obtaining that relief elsewhere. Perhaps the discovery made might be available by a suit abroad ; and then the same reason would apply against the auxiliary suit, as against the principal suit.¹ An exception, might perhaps be allowed, where the alien enemy is the defendant in a suit at law in the country, where he brings the Bill for discovery ; since it may be the only effectual means on his part to establish a perfect defence to the suit at law. And, if a country will suffer an alien enemy to be sued in its courts, it is against common justice to disable him from the use of the proper means, to defend himself against a dishonest or unfounded claim.²

¹ *Daubigny v. Davallon*, 2 Anst. R. 467, 468 ; *Cooper Eq.* Pl. 25.

² The decision in *Daubigny v. Davallon*, 2 Anst. 467, is entirely in conformity with the doctrines held by the courts of Common Law and the Prize Courts on this subject. *Co. Litt.* 129 (b). It seems, however, that in a later case in the Exchequer, cited in *Albrect v. Sussman*, 2 Ves. & B. 324, 326, 327, it was held, that a Bill for a discovery would lie, notwithstanding the plaintiff was an alien enemy, thus in effect overturning the case in 2 Anst. R. 467. The Vice Chancellor, in 2 Ves. & B. 326, said : " The case in the Court of Exchequer has gone the length of deciding, that to a Bill merely for a discovery as a defence at law, this plea (alien enemy) would not hold. And the principle seems to have been, that if an alien may be sued at law, as he would be allowed process to compel the attendance of his witnesses, he should have a discovery for the same purpose. But I did not understand the court to lay down, that an alien enemy could have any relief, or any thing but a discovery merely ; and a decision to that effect would lead to the most extensive consequences." Perhaps the doctrine of these different cases may be reconciled by attending to the particular circumstances of each. In *Daubigny v. Davallon*, 2 Anst. R. 467, the Bill was brought by the plaintiff for a discovery to enable him to commence a suit at law (probably in England). The discovery was denied ; and certainly the plaintiff could not have maintained the suit at law in an English Court ; and if he meant to institute it in the enemy's country, it was open to the like objection, that he

§ 54. But, although an alien friend is not incapacitated to sue in Courts of Equity; yet this doctrine is to be understood in a limited sense, that he is thereby under

ought not to be aided there. The other case in the Exchequer, cited in 2 Ves. & B. 324, 326, seems from the remarks of the Vice Chancellor, to have been a Bill for a discovery filed by the party, who was the original defendant in a suit at law in *England*, to obtain evidence to serve as a defence in that suit. Now, if the original plaintiff could proceed in the suit at law against the original defendant, notwithstanding his being an alien enemy (which it seems difficult on principle to maintain), it seems but just and reasonable, that the defendant should be treated throughout as entitled to use all the evidence authorized by law in his defence. The original plaintiff ought not to be permitted in the suit at law to treat the original defendant as competent to be sued, and at the same time to treat him as incompetent to sue in equity; or, in other words, as incompetent to make a full defence to the suit at law. The suing of an alien enemy in an English court at law, might well be deemed on the part of the plaintiff an admission of the competency of the defendant to be sued, and a waiver of any objection to his alienage. A Bill in Equity for a discovery may be filed by an alien enemy in the courts of the country, of which he is the enemy, under circumstances, which may require, or at least may admit of very different legal considerations. He may file such a Bill in aid of a suit brought, or intended to be brought by him as plaintiff at law, in the courts of the country, where he brings his Bill; or, in the courts of the country, of which he (the plaintiff) is a subject; or, in the courts of a neutral country. In all these cases, it would seem clear, that his personal disability to sue, ought to preclude him from making use of such a Bill of discovery in aid of such a suit. On the other hand, the plaintiff, filing a Bill for a discovery, may be an alien enemy, who is sued at law as a defendant in the courts of the country, of which he is the enemy; or, in the courts of a neutral country. There may be good grounds for saying, that, in the two latter cases, he ought not to be permitted on account of his personal disability, to maintain a Bill for a discovery in aid of his defence to the suit at law in a foreign, hostile, or neutral country, which would not, or at least might not, apply with equal force to the former case. If a suit can be maintained at law against an alien enemy in the courts of a country, where he happens to be, or to whose jurisdiction he is already subjected, there is the strongest reason for saying, that he ought to be entitled to use all proper means to establish his defence upon the merits against such a suit. An alien friend, it is well known, may maintain a Bill for a discovery in aid of a suit in a foreign country. 2 Story Comm. on Eq. Jurisp. § 1495. But contra 9 Sim. 180.

no personal incapacity to sue. Still, the subject matter of the suit must be such, as will entitle him, as an alien friend, to maintain it; for if it respects land, or any demand of a mixed nature, partly real and partly personal, he may not be so entitled.¹ The disability of an alien enemy, however, is not absolute to the extent of destroying all his future right to sue, when peace has actually taken place between the countries; for, it continues only, as the old phrase is, *donec terræ fuerint communes*; and then his right is revived.² The true effect of the disability of an alien enemy is only to suspend the commencement of any suit during the war, or, if the suit is already commenced, to suspend its further progress until the return of peace.³

§ 55. In respect to alien sovereigns and alien corporations, there does not seem any difficulty in their maintaining suits in the Courts of Equity of another country. In respect to foreign sovereigns, there was formerly much forensic discussion; but the doctrine is now established in affirmance of their right, upon very satisfactory principles.⁴ It would be against all notions of general justice, to refuse to a foreign sovereign the common rights, which are granted to every private individual; and, indeed, unless he were permitted to sue, there would be rights without a remedy. If a country were to refuse to permit a foreign sovereign to sue in its courts, it might become a just cause of war.⁵ It is true, that no sovereign

¹ Co. Litt. 129 (b); Cooper Eq. Pl. 25.

² Co. Litt. 129, (b).

³ Co. Litt. 129, (6); *Hamersley v. Lambert*, 2 John. Ch. R. 508; *Ex parte Boussmaker*, 13 Ves. 71.

⁴ *Hullett v. King of Spain*, 2 Bligh R. 51, N. S.; 1 Dow R. 179, N. S.; *Colombian Gov't. v. Rothschild*, 1 Sim. R. 94; *South Carolina Bank v. Case*, 8 Barn. & Cresw. 427; *Bank of Scotland v. Ker*, 8 Sim. R. 246.

⁵ *Hullett v. King of Spain*, 2 Bligh R. 60, N. S.; *King of Spain v. EQ. PL.* 8

is so entitled to sue, unless he has been recognised by the government of the country, in which the suit is brought. But this is a mere result of the principle of the law of nations, which deems such recognition necessary, before he is entitled to be treated as a sovereign in a foreign country.¹ In respect to foreign corporations, either private, or merely municipal, there seems no just ground to deny their competency to sue in Courts of Equity; and it has accordingly been a general practice to maintain suits by them, as founded in the principles of international justice and amity.²

§ 56. Partial incapacity to sue exists in the case of infants, of married women, of idiots, and lunatics, and other persons, who are incapable, or are by law specially disabled, to sue in their own names, such, for example, as in some of the States of America, are common drunkards, who are under guardianship.

§ 57. And first in relation to infants.—An infant is incapable, by himself, of exhibiting a Bill, as well on account of his supposed want of discretion, as of his inability to bind himself, and to make himself liable to the costs of the suit.³ When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to

Machado, 4 Russ. R. 225, 560; Same v. Mendazabel, 5 Simons R. 596; Hoffman on Parties in Equity, 33, 34, 35; Calvert on Parties, ch. 3, § 27, pp. 310, 311.

¹ City of Berne v. Bank of England, 9 Ves. 347; Dolder v. Bank of England, 10 Ves. 352; Dolder v. Lord Huntingfield, 11 Ves. 283; Gelston v. Hoyt, 3 Wheat. 324; Cooper Eq. Pl. 119, 122. By the Constitution of the United States, foreign sovereigns and states are expressly authorized to sue in the Courts of the United States.

² Society for Prop. Gospel v. Wheeler, 2 Gallis. R. 105; Society for Prop. Gospel v. New Haven, 8 Wheat. R. 464; Silver Lake Bank v. North, 4 Johns. Ch. R. 370; Henriquez v. Dutch East India Co., 2 Lord Ray. 1532; South Carolina Bank v. Case, 8 Barn. & Cresw. 427; Bank of Scotland v. Ker, 8 Simons R. 246.

³ Mitf. Eq. Pl. by Jeremy, 25; Edwards on Parties in Equity, 182 to 204; Calvert on Parties, ch. 3, § 29, p. 316, 317, 318.

apply to a Court of Equity, his nearest relation is supposed to be the person, who will take him under his protection, *and institute a suit to assert his rights, or to vindicate his wrongs ; and the person, who institutes a suit in behalf of an infant, is therefore termed *his next friend*.¹ But as it frequently happens, that the nearest relation of the infant himself withholds the right, or does the injury, or, at least, neglects to give that protection to the infant, which his consanguinity or affinity calls upon him to give ; the Court, in favor of infants, will permit any person to institute suits in their behalf ; and whoever acts the part, which the nearest relation ought to take, is also styled the *next friend* of the infant, and as such is named in the Bill.²

§ 58. Occasionally, indeed, the true merits of the Bill may be founded upon the real or the imputed misconduct of the general guardian of the infant, or upon interests, which the guardian has, which are in conflict with those of the infant. In such cases, it is obvious, that the infant must sue by some other person, as his next friend ; even if he might (which seems to be matter of great doubt) sue by his guardian in ordinary cases.³

¹ Mitf. Eq. Pl. by Jeremy, 25 ; Calvert on Parties, ch. 3, § 29, 315, 316.

² Mitf. Eq. Pl. by Jeremy, 25, 26 ; Cooper Eq. Pl. 27, 29 ; 1 Harris Ch. Pr. by Newl. ch. 57, p. 361 ; Hinde Ch. Pr. 3 ; 1 Smith Ch. Pr. 54, 55.

³ At law, an infant, having a guardian, may sue by his guardian, as such, or by his next friend, though he must always defend by his guardian. 2 Inst. 261 ; 1 Black. Comm. 464. Why he should not be permitted to sue and be sued in Equity in the same manner, does not seem to be easily explicable upon principle. It is commonly said, that in Equity he must defend himself, as at Law, by his guardian ; but that he cannot sue by his guardian, but only by his next friend. It is, however, laid down in the Practical Register (Wyatt Pr. Reg. 212), that "it should seem, that an infant may sue in Equity, either by himself, by *prochein ami*, or by guardian, as the Court pleases." And it is added ; "so it should seem he may defend," &c. But the course is not to call the guardian by that name, but by the name of next friend ; yet if he is called by the name of guardian, it is no cause of demurrer." The same doctrine is laid down in the Cursus Cancell. (p. 463), where it is also expli-

§ 59. The next friend thus named is liable to the costs of the suit, and to the censure of the Court, if the suit is wantonly and improperly instituted. But if the infant attains twenty-one years, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs.¹ If the person, who thus acts as a friend of the infant, does not lay his case properly before the Court, by collusion, neglect, or mistake, a new Bill may be brought on behalf of the infant. And if a defect appears on the hearing of the cause, the Court may, and, in

citly stated, that an infant may defend by either of these ways. The Pract. Reg. cites Tothill 10, 108, 109, in support of its positions; but they are cases of the answer of an infant. And in *Wood v. Norton*, (Tothill, 109), a demurrer, because an infant sued by his *prochein ami*, and not by his guardian, was overruled. See also Co. Litt. 135 (b); Hargrave's note (1). When it is said, that he must sue and be sued by his guardian, it is not to be understood, as of course, that it is by his general guardian, but by his guardian *ad litem*, admitted by the Court for this purpose. The person, so admitted as guardian *ad litem*, is usually, unless special reasons to the contrary appear, the general guardian, if the infant have any. Where an infant sues, or defends at law by his guardian, the latter must have a warrant; though if he sues by his next friend, the *prochein ami* need not; but both the guardian and *prochein ami* must be admitted by the Court in Equity as well as at Law. *Chandler v. Villet*, 2 Saund. 117 (f); Mr. Sergeant Williams's note (1); Fitz. N. B. 27, I. [63, I.]; 1 Tidd. Pr. ch. 3, p. 70; *Turner v. Turner*, 2 Str. 709. Lord Coke has remarked, that in our books the names of guardian and *prochein ami* are sometimes taken the one for the other, because the guardian and *prochein ami* are oftentimes all one, as the guardian in socage is also *prochein ami*. 2 Inst. 261. The authority of a *prochein ami* to sue for an infant seems derived from certain statutes passed in the reign of Edw. I. Stat. of Westm. 1, ch. 48, (2 Inst. 261); and Stat. of Westm. 2, ch. 15, (2 Inst. 390); Co. Litt. 135, (b); Harg. note (1); *Turner v. Turner*, 2 Str. 709. In practice, in the Courts of Law, an infant generally sues by his *prochein ami*; but in all cases defends by his guardian. 2 Saund. R. 117 (f); Sergeant Williams's note (1); Co. Litt. 135, (b); Harg. note (1). Perhaps the rule in Equity may not be different in substance from that at Law; though the practice may be universally to sue in the name of a *prochein ami*, and not in that of a guardian. See *Offley v. Jenny*, 3 Ch. R. 92, [51].

¹ Mitf. Eq. Pl. by Jeremy, 26; Cooper Eq. Pl. 29.

favor of infants, generally does, order it to stand over, with liberty to amend the Bill.¹

§ 60. As some check upon the general license to institute a suit in behalf of an infant, if it be represented to the Court of Equity, that the suit preferred in his name is not for his benefit, an inquiry into the facts will be directed to be made 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 the proceedings.² If two suits for the same purpose are instituted in the name of an infant by different persons, acting as his next friend, the Court will direct an inquiry to be made in the same name, which suit is most for the benefit of the infant ; and, when that point is ascertained, it will stay proceedings in the other suit.³ This course is indispensable to the security of the rights of the infant, since his consent to a Bill filed in his name is not necessary.⁴

§ 61. In the next place, in relation to married women, or, as they are technically called, *femes covert*.—A *feme covert*, if her husband is banished, or has abjured the realm, or has been transported for felony, may, both at Law and in Equity, maintain a suit in her own

¹ Mitf. Eq. Pl. by Jeremy, 26, 27 ; Id. 39, note (i) ; Id. 55, note (m) ; Pritchard v. Quinchant, Amb. R. 147, 148. As a child *in ventre sa mere* is by law capable of taking property to all intents and purposes, the same as if actually born, it has been decided, that a Bill may be exhibited on behalf of such infant *in ventre sa mere* by its next friend. In a case of this sort, upon a Bill filed, the Court granted an injunction to stay waste. See Hale v. Hale, Pr. Ch. 50 ; Cooper Eq. Pl. 29.

² Mitf. Eq. Pl. by Jeremy, 27 ; Cooper Eq. Pl. 28 ; Da Costa v. Da Costa, 3 P. Will. 140.

³ Mitf. Eq. Pl. by Jeremy, 27, 28 ; Cooper Eq. Pl. 28, 29 ; Gage v. Stafford, 1 Ves. R. 544, 545.

⁴ Mitf. Eq. Pl. by Jeremy, 28 ; Cooper Eq. Pl. 27, 28 ; Turner v. Turner, 2 Eq. Abrid. 238 ; S. C. 2 Str. 708 ; Andrews v. Cradock, Prec. Ch. 376.

name, as a *feme sole*.¹ But, except in these, and some other privileged cases of a kindred nature,² a *feme covert* cannot, at Law, sue except jointly with her husband; for she is deemed to be under the protection of her husband; and a suit respecting her rights or interests must be with the assent and coöperation of her husband.³ The rule in suits in Equity is, in ordinary cases, the same as at Law; and the husband must join in the suit.⁴ But there are exceptions in Equity, which are wholly unknown at Law. Thus, if a married woman (as sometimes happens) claims some rights in opposition to the rights claimed by her husband, and it

¹ Mitf. Eq. Pl. by Jeremy, 28; Co. Litt. 132, (b); Id. 133; Cooper Eq. Pl. 24, 30; Countess of Portland v. Prodgers, 2 Vern. 104; Newsome v. Bowyer, 3 P. Will. 37, 38; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (p).

² That there are some other excepted or privileged cases, has been solemnly decided. Thus, it has been held, that if the husband is an alien enemy, his wife, domiciled in the realm, may sue as a *feme sole*. *Deerly v. Countess of Mazarine*, 1 Salk. 116; S. C. 1 Ld. Raym. 147. So, where the husband is an alien domiciled abroad, and has never been within the realm, or where he has voluntarily abandoned her here, and is under a disability to return. *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 357; *Kay v. Duchess De Pienne*, 3 Campb. 123. So, where the husband has deserted the wife in a foreign country, and she comes here and maintains herself as a *feme sole*. *Gregory v. Paul*, 15 Mass. R. 31. So, where her husband in a foreign state compels his wife to leave him, and she comes here, and maintains herself as a *feme sole*. *Abbot v. Bayley*, 6 Pick. R. 89. These last two cases, it will be seen, were decided in America; but they seem well supported by the principles established in the English cases. The cases of *Walford v. De Pienne*, 2 Esp. R. 554; *Franks v. De Pienne*, 2 Esp. R. 587, and *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 357, went much farther. But it is questionable, whether these latter cases would now be supported in England, as they were greatly modified, if not overturned, by the cases of *Kay v. De Pienne*, 3 Camp. R. 123; *Marshall v. Rutton*, 8 T. R. 545; *Bogett v. Frier*, 11 East, 301; *Farrar v. Granard*, 4 Bos. & Pull. 80; *Clancy on Marr. Women*, 57 to 62; *Calvert on Parties*, ch. 3, § 21, 265 to 274.

³ Mitf. Eq. Pl. by Jeremy, 28; *Edwards on Parties in Equity*, 144 to 153; *Calvert on Parties*, ch. 3, § 21, 265 to 274.

⁴ Mitf. Eq. Pl. by Jeremy, 28, 104; Cooper Eq. Pl. 24, 30; *Newsome v. Bowyer*, 3 P. Will. 37, 38; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k), (n), (p).

becomes proper to vindicate her rights against those of her husband, at Law she cannot maintain any suit against him. But in Equity she may maintain a suit against him, and all others, who may be proper or necessary parties.¹ In such a suit she cannot act under the advice or protection of her husband, and therefore she is allowed to seek the protection of some other person, who acts as her next friend; and the Bill is accordingly exhibited in her name by such next friend.² But in this respect she is differently placed from an infant; for no person can exhibit a Bill as her next friend, without her consent; whereas, an infant's consent to a Bill filed in his name is not necessary.³

§ 62. In like manner, the husband may sue the wife in Equity, for the purpose of enforcing his own marital rights against her property, whether such rights result from her ante-nuptial agreement, or from the general principles of Law or Equity;⁴ or whenever he seeks relief upon some claim adverse to or in opposition to his

¹ 2 Story on Eq. Jurisp. § 1368; *Cannal v. Buckle*, 2 P. Will. 243, 244; *Lady Strathmore v. Bowes*, 1 Ves. jr. 22; *Kirk v. Clark*, Prec. Ch. 275; *Lampert v. Lampert*, 1 Ves. jr. 21; *Rivet v. Lancaster*, Tothill R. 93; *Id.* 94; *Id.* 95; *Id.* 96; *Id.* 97. Cases of this sort frequently arise, where the wife has separate property, or other rights, secured by a settlement, and by agreements for a settlement, and what is called the Wife's Equity to a settlement out of property bequeathed, or otherwise coming to her, during the marriage, and not yet reduced into possession. See 2 Story on Eq. Jurisp. ch. 36, § 1402 to § 1428; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k); *Id.* note (n); *Id.* note (p).

² Mitf. Eq. Pl. by Jeremy, 28, 104, 105; Cooper Eq. Pl. 24, 30; 1 Newl. Ch. Pr. ch. 2, § 1, p. 53; *Brooks v. Brooks*, Prec. Ch. 24; *Griffith v. Hood*, 2 Ves. 452; *Elibank v. Montolieu*, 5 Ves. 737.

³ Mitf. Eq. Pl. by Jeremy, 28; Cooper Eq. Pl. 30; *Andrews v. Craddock*, Pr. Ch. 376; S. C. 1 Eq. Abridg. 239; *Pennington v. Alvin*, 1 Sim. & Stu. 264.

⁴ 2 Story on Eq. Jurisp. § 1368; *Cannal v. Buckle*, 2 P. Will. 243, 244; Calvert on Parties, ch. 3, § 21, p. 265 to 274.

wife ;¹ for (it has been well said) it is constant experience, that the husband may sue *the wife, or the wife the husband in Equity, notwithstanding, at Law, neither of them can sue the other.²

§ 63. In cases, where the wife has a separate property, it is often stated, that in respect to this property, she may sue and be sued in Equity, as a *feme sole*.³ Perhaps this is laying down the rule too broadly; for it is the ordinary course, at least for conformity's sake, to join the husband in such cases as a party. In practice, where the suit is brought by the wife for her separate property, the husband is sometimes made a co-plaintiff. But this practice is incorrect; and in all such cases she ought to sue, as sole plaintiff, by her next friend; and the husband should be made a party defendant; for he may contest, that it is her separate property and the claim may be incompatible with his marital rights.⁴

¹ *Haurott v. Cadwallader*, 2 Russ. & Mylne, 545.

² *Cannal v. Buckle*, 2 P. Will. 243, 244; *Ex parte Strangeways*, 3 Atk. 478; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); *Brooks v. Brooks*, Pr. Ch. 24; Mitf. Eq. Pl. by Jeremy, 28.

³ 2 Story on Eq. Jurisp. § 1368; *Newsome v. Bowyer*, 3 P. Will. 38, Mr. Cox's note A.

⁴ *Sigal v. Phelps*, 7 Simons R. 239; *S. P. Wake v. Parker*, 2 Keen, R. 59, 70, 73 to 75.—In this last case Lord Langdale went into a full exposition of the doctrine; and admitted, that the practice had often been different from the true rule. His language was as follows. "It has undoubtedly been very usual to file such bills, and many decrees have been made without objection in suits instituted by the husband and wife for the wife's separate estate, the Court itself taking care, that the separate estate of the wife recovered in such suits shall be protected from the husband. Thus, in *Griffith v. Hood*, (2 Ves. sen. 452.) the bill was filed by the husband and wife for the separate estate of the wife. Lord Hardwicke said; 'Where there is any thing for the separate use of the wife, a bill ought to be brought by her next friend for her; otherwise it is her husband's bill. However, there have been many cases of such bills, and the Court has taken care of the wife, and ordered payment to some person for her.' And in that case he ordered the interest of the money,

Where, indeed, the husband has an adverse interest he is a necessary and proper party defendant. Where he

which was to be invested, to be paid to the wife, or some person authorized by her for her separate use. And it is in this way, that the Court now commonly acts in such cases, and it does not appear, that any valid objection can be made to the practice. If the amount of the sum recovered be all, that the wife is entitled to, and if the sum so recovered be secured to her separate use, she has all, that she could obtain in any suit, and could make no further or renewed claim against the accounting party, who had been compelled by the suit to satisfy her demand. In the case of *Chesslyn v. Smith*, (8 Ves. 183.) where stock was settled to the separate use of a married woman, and after her death for her husband absolutely, Sir W. Grant, in a suit instituted by the husband and wife, decreed a transfer of the stock to the husband on his giving personal security for the same; and I think, that many cases have occurred of suits by husband and wife, in which the wife may have seemed to require protection from the husband, and yet decrees have been made without objection. Nevertheless, whenever the attention of the Court has been drawn to the subject, such suits have always been considered to be the suits of the husbands, and to be instituted and prosecuted by them, and under their influence. The husband, having the power to use his wife's name, may file the bill without her knowledge, and may prosecute it in a manner not favorable to her interests. If the wife's claim be not of a liquidated or specific sum, but of a sum to be ascertained by an account, though the Court might, and certainly would, protect her in the enjoyment of the sum recovered upon the account, that sum might not be the just amount of her right, because the account taken under the proceedings may not have been properly taken; and if the principle be, as I think it is in those cases, that the wife is, as to her separate estate, entitled to prosecute the suit by her own authority, independently of her husband, there seems to be no reason why a suit, instituted by her husband, should bind her,—why she may not, at any time, institute a new suit for the same matter by her next friend, or why a decree (not being a decree for a specific sum secured by the Court for her separate use, and there being no evidence that it was prosecuted with her consent and authority) should be a bar to a new suit instituted by her next friend. It is true, as was stated by Sir John Leach in *Smyth v. Myers*, (3 Mad. 474.) that the husband, by joining the wife as a co-plaintiff, admits, that the property, sought to be recovered or secured, is the separate property of the wife; but the wife appears to be further entitled to have the amount of the sum, to be recovered, or secured, ascertained by a proceeding of her own, independently of her husband, and the party sought to be charged is entitled to be protected against a subsequent independent claim of the wife. And in the subsequent cause of *Hughes v. Evans*, (1 Sim. & Stu.

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has no such interest, it is still proper to join him in the suit as the lawful protector of his wife's interest in con-

185.) Sir J. Leach, upon the authorities of *Griffith v. Hood* and *Pawlet v. Delavel*, there cited to him, stated, that where the husband and wife join in the suit as plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that it will not prejudice a future claim by the wife in respect of her separate estate; and on that opinion he acted in *Reeve v. Dalby*. (2 Sim. & Stu. 464.) It was argued, that these authorities do not apply to cases, in which there is no dispute between husband and wife; but in considering them, I think, that they do not admit of that limitation, and it is necessary to regard the interests of all parties. Not only ought the wife to be protected in the enjoyment of her separate property, but the parties also, who are sued, ought to be protected against concurrent or consecutive demands of the husband suing in the names of himself and his wife, and of the wife suing by her next friend. If such suits were allowed, it is obvious, that great oppression might be practised by the husband and wife acting in concert together. It is, I presume, for reasons of this nature, that the Vice-Chancellor has, in several instances, the notes of some of which I have seen, made orders to amend bills filed by the husband and wife for the separate estate of the wife, by making the husband a defendant, and inserting the name of a next friend for the wife as plaintiff; and in the case of *Sigel v. Phelps*, (7 Sim. 239.) he intimated his intention to dismiss the bill, if the defendants would not consent to a decree. And it is for the same reason, that I have, though I admit with reluctance come to the conclusion, that I ought to allow this demurrer. I say with reluctance, because I think, that suits thus constituted are of familiar occurrence, and I am aware, that many decrees have been made in such suits without any inconvenience arising. I think also, that in cases in which the husband and wife are not hostile, very little, if any additional security is obtained for the wife by the appointment of a next friend, the probability being, that in such cases the next friend is appointed by the wife on the recommendation of the husband. If a bill by husband and wife for the wife's separate estate were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think, that a decree ought to be made. And in many other cases I apprehend, that, with no more attention than the Court owes to the suitors, effectual means might be employed to ascertain, whether the suit was carried on with the free consent of the wife, and to secure the defendants from any further claims on her part. But confining myself to the present case, in which my attention must be exclusively directed to the statements made in the bill, in which the objection is made by the defendants at the earliest period in the cause, and in which the separate

formity to the rule of law.¹ Where the wife sues a stranger, or is sued by a stranger, in respect to such separate property, the husband is always joined as a party defendant, if he is within the country, and capable of being made a party.² Where he is not within the country, so that process cannot be served upon him, the suit may be carried on against the wife to charge her separate estate without him, with the leave and under the direction of the Court.³

estate of the wife partly consists of a sum to be ascertained by account, I think myself bound to give effect to the objection. See Calvert on Parties, ch. 3, § 21, 365 to 374.

¹ *Lillia v. Airey*, 1 Ves. jr. 278, 2 Story Eq. Jurisp. § 1368; *Smyth v. Myers*, 3 Madd. R. 474.

² Ante § 61.

³ *Dubois v. Hole*, 1 Eq. Abrid. 65; S. C. 2 Vern. 614; *Bell v. Hyde*, Pr. Ch. 328; Mitf. Pl Eq. by Jeremy, 105; *Carleton v. Menzie*, 10 Ves. 442; *Bunyan v. Mortimer*, 6 Madd. R. 278; *Garey v. Whittingham*, 1 Sim & Stu. 163.—Mr. Fonblanque, speaking on this subject (1 Fonbl. Eq. B. 1, ch. 2, § 6, note (p)), says, "There are numberless cases, in which the wife has been allowed, through the medium of her *prochein ami*, to sue her husband in respect to her separate property. But I have not been able to find any case at Law or in Equity, in which she has been allowed to sue or be sued by a stranger merely in respect to her separate property without her husband being plaintiff or defendant." Mr. Cox, in his note (A) to *Newsome v. Bowyer* (3 P. Will. 38), says generally, that "A *feme covert* having a separate estate may in a Court of Equity be sued as a *feme sole*, and proceeded against without her husband; for, in respect to her separate property she is looked upon as a *feme sole*." He cites *Dubois v. Hole*, 2 Vern. R. 614, and *Bell v. Hyde*, Prec. Ch. 328; in each of which cases the husband was made a party to the Bill; but it being shown, that he was beyond sea, the Court held, that the service on the husband might be dispensed with, and that the process was regular against the wife alone. In *Travers v. Bulkely*, 1 Ves. 386, Lord Hardwicke recognised the case in 2 Vern. R. 614; but put the decision upon another ground, that the wife had voluntarily appeared and obtained time to answer. He left the point open, whether the wife could be sued without her husband. Mr. Raithby, in his note to 2 Vern. 614, has referred to some MS. cases, proceeding on the general ground. In *Regnes v. Lewis*, 1 Ch. Cas. 35, where a *feme covert* sued without her husband, a demurrer for that cause was overruled. But the circum-

§ 64. In the next place in relation to Idiots and Lunatics. The care and commitment of the custody of the persons and estates of idiots and lunatics are in England the special prerogative of the Crown, and are always entrusted by the Crown under the royal sign-manual to the person holding the great seal.¹ By virtue of this authority, whenever any person is by an inquisition found to be an idiot or lunatic, the person, holding the great seal, commits the custody of the person and estate of such idiot or lunatic to some suitable person or persons, who is or are since called the committee or committees of the idiot or lunatic. In all such cases the idiot or lunatic must sue by the committee or committees of their estates, both of them being made parties plaintiffs.² Sometimes, indeed, informations are

stances of the case do not appear; and the husband may have been a party defendant, as his interest was concerned. See also Tothill R. 93, 94, 95, 96. See also Plomer v. Plomer, 1 Ch. Rep. 68. Ante, § 63, note.

¹ Mitf. Eq. Pl. by Jeremy, 29; 2 Story on Equity Jurisp. § 1362 to § 1365; Calvert on Parties ch. 3, § 26, p. 304.

² Mitf. Eq. Pl. by Jeremy, 29, 1 Newl. Ch. Pr. ch. 2, § 1, p. 54, Com. Dig. Chancery E. 2; Cooper Eq. Pl. 31, 32; Fuller v. Lance, 1 Ch. Cas. 19; Atty. General v. Woolrich, 1 Ch. Cas. 153; Ridler v. Ridler, 1 Eq. Abrid. 279; Atty. Genl. v. Panther, 2 Dick. 748; Atty. Genl. v. Tiler, 1 Dick. 378; Shelford on Idiots & Lunat. ch. 10, § 1, p. 415, &c. In actions at Law, idiots (it is said) must sue and defend in their own name, and appear in person, and not by guardian, or *prochein ami*, or attorney, but any one, who prays to be admitted, may sue as their next friend. But in actions at Law, lunatics, if of age, must appear by attorney; and if within age by guardian. Co. Litt. 135 (b). Beverly's Case, 4 Co. Rep. 124, (b); 2 Saund. R. 333, Sergeant William's note (4); Com. Dig. Idiot, D. 7. In *Orteges v. Messere*, 7 John. Ch. R. 139, Mr. Chancellor Kent held, that it is not necessary for a lunatic to be made a party plaintiff to a Bill by his committee to set aside an act done, while the party was under lunacy. On that occasion he used the following language: "It is not necessary for the lunatic herself to be a party plaintiff with her committee, to set aside an act done by her, while she was under mental imbecility. The same objection was made in the case of the Attorney General, on behalf of Smith, a lunatic, v. Parkhurst (1 Ch. Cas. 112), and overruled

exhibited by the Attorney General on behalf of idiots and lunatics, considering them as under the peculiar protection of the Court, and particularly, if the interests of the committee have clashed, or may clash with their interests; or if they have no committee.¹ But in such * informations it is not proper to name the luna- [* 67] tic as a relator, but as a party; and it is the common practice to require some third person to be named as relator, that he may be answerable for the costs.²

by the Lord Keeper. The suit, in that case, was for relief against an act done by the lunatic while a lunatic. In another case, *Ridler v. Ridler* (1 Eq. Cas. Abr. 279), the bill was by the lunatic *and his committee* to set aside a settlement made by him while a lunatic, and a demurrer was put in, because the lunatic was a party with his committee, and the demurrer was overruled. It would seem, therefore, to be immaterial, and but matter of form. The lunatic may be joined with the committee, or omitted, according to these cases. There was a distinction suggested in the case of the Attorney General, on behalf of *Woolrich v. Woolrich* (1 Ch. Cas. 153), between the cases of a bill to set aside an act done, while the party was, and before he was, a lunatic; but that distinction is not to be found in the two cases, which have been cited. The general practice, however, is to unite the lunatic with the committee, as was done in 2 Vern. 678. But there does not appear to be any use in it, or any necessity for it, as the committee have the exclusive custody and control of the estate and rights of the lunatic. The lunatic may be considered as a party by his committee; and, like trustees of an insolvent debtor, the committee hold the estate in trust, under the direction of this Court." See also *Brasher's Ex'ors. v. Van Cortlandt*, 2 John. Ch. R. 245, 401; *Edwards on Parties in Equity*, 294 to 316; *Calvert on Parties*, ch. 3, § 26, p. 303, 304.

¹ *Mitf. Eq. Pl. by Jeremy*, 29; *Atty. Genl. v. Woolrich*, 1 Ch. Cas. 153; *Atty. Genl. v. Parkhurst*, 1 Ch. Cas. 113; *Atty. Genl. v. Panther*, 2 Dick. 748.

² *Atty. General v. Tiler*, 1 Dick. 378; S. C. 2 Eden R. 230. In some of the cases a distinction seems to be taken between an information in behalf of an idiot, and one in behalf of a lunatic. It is said in the case of the former, the idiot need not be a party. In the case of the latter, the lunatic must. See *Atty. Genl. v. Woolrych*, 1 Ch. Cas. 153; *Atty. Genl. v. Tiler*, 1 Dick. 378; S. C. 2 Eden, 230. Perhaps this may arise from the difference, that in the case of an idiot the king has a beneficial interest in his estate; and in the case of a lunatic he has only a trust while he is insane. See 2 Story Comm. on Eq. Jurisp. § 1336, and notes. Where

§ 65. In some of the States in America, the Courts of Equity are entrusted with the like authority to appoint committees for idiots and lunatics; and in such cases the idiots and lunatics sue by their committees. In other States, idiots and lunatics are by law placed under guardians appointed by other Courts, and ordinarily by the Courts of Probate of the State. In such cases the idiots and lunatics sue and defend suits by their proper guardians, unless some other is specially appointed for that purpose.¹

§ 66. Where persons are incapable of acting for [*68] * themselves, although not strictly either idiots or lunatics, the suit may be brought in their name, and the Court will authorize some suitable person to carry it on as their next friend.² But in every such case it is in the discretion of the Court to allow the suit to proceed, or not; and it will order a stay of proceedings, or the bill to be taken off the file, if the suit is deemed improper.³

an information is filed in behalf of a lunatic, who has no committee, the Court will give directions to have a committee appointed, and in the mean time proceed to make orders for the care of the property. Mitf. Eq. Pl. by Jeremy, 29, 30 and note. Where in a suit the committee of an idiot or lunatic has an adverse interest, the suit may be instituted by another person, specially authorized by the Court. Mitf. Eq. Pl. by Jeremy, 29, 30, 104; Cooper Eq. Pl. 32.

¹ Thus, for example, in New York by statute the Court of Chancery has the care and custody of idiots and lunatics, and entire jurisdiction over the subject in all its general relations. Revised Code of New York, 1829, Vol. 2, Pt. 2, ch. 5, tit. 2, p. 51, &c. In *matter of Wendell*, 1 John. Ch. R. 600; *Brasher v. Van Courtlandt*, 2 John. Ch. R. 242, 246. On the other hand, in Massachusetts, the Courts of Probate have the exclusive authority to appoint guardians of idiots and lunatics. See Revised Statutes of Massachusetts, 1836, Pt. 2, tit. 7, ch. 79, § 8, § 9, p. 490. See *Edwards on Parties in Equity*, 180, 183. Id. 210, 211.

² Mitf. Eq. Pl. by Jeremy, 30; *Wartnaby v. Wartnaby*, Jac. R. 377; Cooper Eq. Pl. 29, 30, 31.

³ *Wartnaby v. Wartnaby*, Jac. R. 377.

§ 67. In the next place, who may be sued in a Bill in Equity.—In general it may be stated, that those persons, who may sue in Equity, may also be sued. But as there is some diversity as to the extent and manner of making defence by persons, who labor under an absolute or a partial incapacity, it will be necessary, though in a very brief manner, to state the general principles and practice applicable to defendants.

§ 68. A Bill may be exhibited against all bodies politic and corporate, against all persons, not laboring under any disability, against aliens, and against infants, married women, idiots and lunatics;¹ and also generally against persons by law disabled to institute or maintain a suit; for they cannot plead their disability in their defence.²

§ 69. In England the King and Queen, though they may sue, are not liable to be sued; and in America a similar exemption generally belongs to the Government or State. But in England, when the interest of the Crown, or of those, who are under its particular protection, is concerned in the defence of a suit in Equity, the Attorney General, or, in the vacancy of that office, the * Solicitor General, is a necessary party to make [*69] a defendant to support that interest.³ But this doctrine is to be understood with some limitations. Where the rights of the Crown are concerned, if they extend only to the superintendence of some public trust, as in the case of a charity, the Attorney General may be made a party to sustain those rights.⁴ And in other cases, where

¹ Mitf. Eq. Pl. by Jeremy, 30, 102, 103; Edwards on Parties in Equity, 151. Id. 180, 181. Id. 195. Id. 211. Id. 218.

² Cooper Eq. Pl. 27; Calvert on Parties, ch. 3, § 18, p. 255 to 260. Id. § 21, p. 266 to 273. Id. § 26, p. 303, 304. Id. § 29, p. 316, 317.

³ Mitf. Eq. Pl. by Jeremy, 30, 102; Calvert on Parties, ch. 3, § 26, p. 301 to 308.

⁴ Mitf. Eq. Pl. by Jeremy, 30.

the Crown is not in possession, and a title vested in it is not impeached, and its rights are only incidentally concerned, it has been generally considered, that the Attorney General may be made a party in respect of those rights; and the practice has been accordingly.¹ But where the Crown is in possession, or any title is vested in it, which the Bill seeks to divest or affect, or its rights are the immediate and sole object of the suit, the proper mode of redress is not by a Bill, but by a petition of right.² Upon such petition the Crown ordinarily directs, that right be done to the party; and the petition is then referred to the Chancellor to be executed according to law, and directions are given, that the Attorney General should be made a party to the suit.³ In some cases, indeed, a suit may be instituted in the Court of Exchequer, as a Court of Revenue and general auditor of [* 70] the King, and relief there obtained by * the plaintiff against the Crown, the Attorney General being made a party.⁴

§ 70. Bodies politic and corporate, and persons of full age, not laboring under any disability, defend a suit by themselves. But infants, idiots and lunatics are incapable, by themselves, of defending a suit, as they are

¹ Mitf. Eq. Pl. by Jeremy, 30; Cooper Eq. Pl. 22; Balch v. Wastell, 1 P. Will. 445; Dolder v. Bank of England, 10 Ves. 352.

² Cooper Eq. Pl. 22, 23; Mitf. Eq. Pl. by Jeremy, 31; Reeve v. Atty. Genl. 2 Atk. 223; Hovenden v. Lord Annesley, 2 Sch. and Lefr. 617, 618.

³ Ibid. In America no such general remedy by a petition of right exists against the Government; or, if it exists at all, it is a privilege created by statute in a few States only. In cases, where the Government has an interest in the subject as a matter of public trust, it is presumed, that the Attorney General may be made a defendant, as he may be in England.

⁴ Mitf. Eq. Pl. by Jeremy, 31; Pawlet v. Atty. Genl., Hardres R. 465; Pool v. Atty. Genl., Parker R. 272; Reeve v. Atty. Genl., 2 Atk. 223.

of instituting a suit. Infants (as we have seen) institute a suit in Equity by their next friend; but they must defend a suit by a guardian, who is appointed by the Court, and is usually their nearest relation, not concerned in interest in the matter in question.¹ Idiots and lunatics defend a suit by their committees, who are by an order of Court appointed guardians *ad litem* for that purpose, as a matter of course, in ordinary circumstances.² But if an idiot or lunatic has no committee,

¹ Mitf. Eq. Pl. by Jeremy, 103; Cooper Eq. Pl. 29, 109; *Jongsma v. Pfiel*, 9 Ves. 357; *Williams v. Wynn*, 10 Ves. 159; *Tappan v. Naman*, 11 Ves. 563; *Hill v. Smith*, 1 Madd. R. 290; *Edwards on Parties in Equity*, 193, 211; *Calvert on Parties*, ch. 3, § 29, p. 316, 317.

² Mitf. Eq. Pl. 103, 104; *Westcombe v. Westcombe*, 1 Dick. R. 233; Cooper Eq. Pl. 31, 32; Shelf. on Idiots and Lunatics, ch. 10, § 2, p. 425, &c. In *Brasher's Ex'ors. v. Van Cortlandt* (2 John. Ch. R. 242, 245), Mr. Chancellor Kent held it not necessary, in New York, to make the lunatic himself a party defendant to a Bill for payment of his debts, but his committee only, where he had a committee. His language on that occasion was; "The Bill is against the committee, and seeks payment of a debt due from the lunatic; and the question arises, whether the lunatic ought to have been joined with his committee as a party defendant. If he had been joined, it would seem to be a mere matter of form, and the committee would have been directed, as of course, to put in his answer, as his guardians. It would have been their answer, though in his name. If he be made a defendant, he is to answer by his committee. (*Dickens R.* 233, 460). When the committee are made defendants, there can be no use in joining the lunatic also, for the custody of the estate is no longer in him, but in this Court, under the administration of the committee. Though the books speak of the lunatic as a proper party (*Lloyd's case*, *Dickens*, 460), yet I do not perceive its necessity. The payment of the debts due from the lunatic is now usually sought by a petition to the Court, as the funds are supposed to be under its entire control." He added, "The custody of the lunatic is committed, in England, not to the Court of Chancery but to an individual selected by the Crown, who is generally, though not always, the person, who has the custody of the great seal. (3 Atk. 635; *Dickens*, 563). But, here, the charge of the person and estate of the lunatic, and his maintenance, is expressly committed to the Chancellor (*N. R. Laws*, vol. i. 147), and the duty of providing for the payment of the debts is specially enjoined. For this pur-

or the committee has an interest opposite to that of the person, whose property is entrusted to his care, an order may be obtained for appointing another person as guardian *ad litem* for the purpose of defending the suit.¹ In like manner, if a person is in the condition of an idiot, or lunatic, although not so found by an inquisition, or, if by reason of age or infirmities, he is reduced to a second [* 72] infancy, the Court will, upon *information, direct a guardian *ad litem* to be appointed for him, to defend a suit against him.²

pose, the committee is to exhibit, under oath, within six months from his appointment, an inventory of the estate, debts, and credits of the lunatic; and when the personal estate shall be insufficient for the discharge of the debts, he is to present a petition to the Chancellor, setting forth the particulars and amount of the estate and debts. If the personal estate shall appear to be insufficient, it is made the duty of the Chancellor to cause so much of the real estate to be sold as shall be necessary for the discharge of the debts. These provisions render the payment of the debts out of the lunatic's estate no longer a matter of discretion, but of indispensable duty; and they contemplate the committee as being charged (though, undoubtedly, under the control and direction of this Court), with a trust to be performed for the benefit of creditors, and an agency in the payment of the debts, and the administration of the estate. To what extent these new duties of the committee may necessarily lead, I need not now examine, nor am I altogether prepared to say. The view of the subject under our statute is, certainly, greatly varied from that under the English law; and I entertain no doubt, that the committee may be called upon in this Court by the creditors for the payment of their debts, without making the lunatic a party. This question of necessary parties is always more or less a matter of discretion, depending on convenience. In this case, it would be quite absurd to bring in a party, who has no capacity or power of action, except by the very persons already before the Court as his trustees, and when the Court is only to look to the certainty of the debt, and to the state of the assets, in order to provide for its payment." See Edwards on Parties in Equity, 211 to 216.

¹ Mitf. Eq. Pl. by Jeremy, 103, 104; Snell v. Hyatt, 1 Dick. R. 287; Howlett v. Wilbraham, 5 Madd. R. 423; Lloyd v. —, 2 Dick. 460.

² Mitf. Eq. Pl. by Jeremy, 103, 104; Cooper Eq. Pl. 32, 33, 109; Brassington v. Brassington, 2 Anst. R. 369; Leving v. Caverly, Prec. Ch. 229; Wilson v. Grace, 14 Ves. 172; Mr. Cox's note B to 3 P. Will. 111; Gason v. Garnier, 1 Dick. 286.

§ 71. In regard to married women, ordinarily, their husbands must be joined with them as defendants in the suit, and their answer must also be joint.¹ There are exceptions, however, to the rule, in both of its requirements. A married woman may be made a defendant, and answer as a *feme sole* (even, it is said, in some cases, without any order of Court), as, for example, whenever her husband is plaintiff in the suit, and sues her as defendant; for in such a case he elects to treat her as a *feme sole* for the purposes of the suit.² So, where her husband is an exile, or has abjured the realm, or has been transported under a criminal sentence, or is an alien enemy, she may be sued, and answer, as a *feme sole*.³ But, generally, a married woman cannot answer separately, when her husband is joined, or ought to be joined, as a defendant, in the suit, without an order of Court for that purpose, founded upon special circumstances.⁴ Thus, where a *married woman claims as a defendant, in oppo- [*73] sition to her husband, or lives separate from him, or disapproves of the defence, which he wishes her to make, she may obtain an order of the Court for liberty

¹ Mitf. Eq. Pl. by Jeremy, 104, 105; Cooper Eq. Pl. 30, 31, 36; Garey v. Whittingham, 1 Sim. & Stu. 163; Lillia v. Airey, 1 Ves. jr. 278; Le Neve v. Le Neve, 3 Atk. 648, 649; Clancy on Marr. Women, ch. 4, p. 54 to 63; Id. 69, 71; Edwards on Parties in Equity, 151 to 158; Calvert on Parties, ch. 3, § 21, p. 266 to 273.

² Mitf. Eq. Pl. by Jeremy, 104, 105; Cooper Eq. Pl. 30, 31; Brooks v. Brooks, Pr. Ch. 24; *Ex parte* Strangeways, 3 Atk. 478; Ainslee v. Medicott, 13 Ves. 266. In such a case, the wife does not put in her answer by a guardian; but in her own name, as a *feme sole*. *Ex parte* Strangeways, 3 Atk. 478.

³ Mitf. Eq. Pl. by Jeremy, 104, 105; Cooper Eq. Pl. 30, 31; Portland v. Prodgers, 2 Vern. 105; Co. Litt. 132 (b), 133 (a).

⁴ Garey v. Whittingham, 1 Sim. & Stu. 163; Duke of Chandos v. Talbot, 2 P. Will. 371.

to answer and defend the suit separately ; and in such case her answer may be read against her.¹ So, if a married woman obstinately refuses to join in a defence with her husband, the latter may obtain an order to compel her to make a separate defence.² So, if the husband be abroad, and not answerable to the jurisdiction, the plaintiff in the suit may obtain an order, that she shall answer separately.³ But, except under circumstances of this and a similar nature, a married woman can only defend a suit jointly with her husband.⁴

¹ Mitf. Eq. Pl. by Jeremy, 104, 105 ; Cooper Eq. Pl. 30, 31 ; *Ex parte Halsam*, 2 Atk. 50 ; Anon. 2 Eq. Abrid. 66 : *Wybourn v. Blount*, 1 Dick. R. 155 ; *Duke of Chandos v. Talbot*, 2 P. Will. 371 ; *Travers v. Bulkeley*, 1 Ves. 383 ; S. C. 1 Dick. R. 138 ; *Jackson v. Haworth*, 1 Sim. & Stu. 161.

² Mitf. Eq. Pl. by Jeremy, 105 ; Cooper Eq. Pl. 30, 31 ; *Pain v. —*, 1 Ch. Cas. 296 ; *Garey v. Whittingham*, 1 Sim. & Stu. 163 ; *Barry v. Cane*, 3 Madd. R. 472.

³ Mitf. Eq. Pl. by Jeremy, 104, 105 ; Cooper Eq. Pl. 30, 31 ; *Portman v. Popham*, Tothill R. 75, [96] ; *Garey v. Whittingham*, 1 Sim. & Stu. 163 ; *Bell v. Hyde*, Pr. Ch. 328, 329 ; *Plomer v. Plomer*, 1 Ch. Rep. 68 ; *Travers v. Bulkeley*, 1 Ves. 383 ; S. C. 1 Dick. R. 138 ; *Carleton v. Menzie*, 10 Ves. 442 ; *Banyan v. Mortimer*, 6 Madd. R. 278 ; *Bushell v. Bushell*, 1 Sim. & Stu. 165 ; *Dubois v. Hole*, 2 Vern. 613 ; *Chambers v. Bull*, 1 Anst. 269 ; *Leithley v. Taylor*, 1 Dick. R. 373.

⁴ Mitf. Eq. Pl. by Jeremy, 105 ; Cooper Eq. Pl. 31 ; *Edwards on Parties in Equity*, 151 to 158 ; *Calvert on Parties*, ch. 3, § 21, p. 266 to p. 273.

CHAPTER IV.

PROPER PARTIES TO BILLS.

§ 72. LET us, in the next place, proceed to the consideration of the inquiry, who are the proper and necessary parties to a Bill. This is a subject of great practical importance, and of no inconsiderable difficulty in a great variety of cases.¹ It has been remarked, that Courts of Equity adopt two leading principles for determining the proper parties to a suit. One of them is a principle, admitted in all Courts upon questions, affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be finally decided in a Court of justice, unless he himself be present, or at least unless he has had a full opportunity to appear and vindicate his rights. The other, is, that when a decision is made upon any particular subject-

¹ Cooper Eq. Pl. 33, 34. As far as I know, there are but two works which treat fully of the subject of parties. The first and earliest (published in New York, in 1832,) is, "A practical Treatise on parties to Bills and other Pleadings in Chancery with precedents, by Charles Edwards, Esq." The second is "A Treatise upon the Law respecting Parties in suits in Equity, by Frederic Calvert, Esq., published in London, in 1837. Each of these works has high merits and will be found exceedingly useful in practice. But the work of Mr. Calvert contains the fullest and most systematic review of the principles, which regulate the subject, as well as the most complete collection of the Authorities. I recommend them both to the learned reader, who is desirous of making a thorough examination of the whole subject; and in this second edition I have freely used such of the materials furnished by each, as had escaped my former researches. Mr. Daniell, also, in his recent and excellent work on the Practice of Chancery has devoted a good deal of attention and a large space to the subject. See 1 Daniell, Ch. Pract. ch. 5, p. 284 to p. 392.

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 be. In this last respect there is an essential distinction (as we shall presently see) between the practice of the Courts of Common Law and that of Courts of Equity, both in England and America, founded upon the different nature and objects of their particular organization.¹ It is the constant aim of Courts of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those, who are compelled to obey it, and also, that future litigation may be prevented.² Hence, the common expression, that Courts of Equity delight to do justice, and not by halves.³ And hence, also, it is a general rule in Equity (subject to certain exceptions, which will hereafter be noticed), that all persons materially interested, either legally, or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs, or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all.⁴ By this

¹ Calvert on Parties, ch. 1, § 1, p. 1, 2.

² Mitf. Eq. Pl. by Jeremy, 163, 164; Id. 39; Cooper Eq. Pl. 33; Caldwell v. Taggart, 4 Peters R. 190; West v. Randall, 2 Mason R. 190 to 196; Joy v. Wirtz, 1 Wash. Cir. R. 517; Holland v. Prior, 1 Mylne & Keen, 240.

³ Knight v. Knight, 3 P. Will. 333. Post, § 174.

⁴ Mitf. Eq. Pl. by Jeremy, 164; Cooper Eq. Pl. 33, 34; Id. 125; Palk v. Clinton, 12 Ves. 53, 54; Hickock v. Scribner, 3 John. Cas. 311, 315, 317, 318, 319; Joy v. Wirtz, 1 Wash. C. R. 517; Caldwell v. Taggart, 4 Peters R. 190; Wendell v. Van Rensselaer, 1 Johns. Ch. R. 349; Calvert on Parties, ch. 1, § 1, p. 1, 2, Hoxie v. Carr, 1 Sumner's R. 172; Whiting v. Bank of U. States, 13 Peters R. 6-14; Hopkirk v. Page, 2 Brock. R. 20.

means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain, that no injustice is done, either to the parties before it, or to others, who are interested in the subject-matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.¹ We shall hereafter have occasion to consider at large, who in the true sense of the rule are proper parties to the suit; for it has been well observed, that it is not all persons, who have an interest in the *subject* matter of the suit, but, in general those only, who have an interest in the *object* of the suit, who are ordinarily required to be made parties.²

§ 73. Lord Chief Baron Gilbert,³ after stating the rule, has illustrated its propriety and policy in the following manner: "Where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings, that the defendant is only a tenant for life, and consequently, the tenant in tail cannot be bound by the decree; and, where one legatee brings a Bill against an executor, and there are many other legatees (none of which will be bound, either by the decree, or by the account to be taken of the testator's assets), and each of these legatees may draw the account in question over again at their leisure; or, where

¹ *West v. Randall*, 2 Mason R. 190, 191.

² See *Calvert on Parties*, 5, 6, 10, 11; *Post*, § 136 to § 152.

³ *Gilb. For. Rom.* 157, 158.

several persons are entitled, as next of kin under the statute of distributions, and only one of them is brought on to a hearing ; or, where a man is entitled to the sur- [*76] plus *of an estate, under a will, after payment of debts, and is not brought on ; or, where the real estate is to be sold under a will, and the heir at law is not brought on ; in these, and all other cases, where the decree cannot be made uniform, for, as on the one hand, the Court will do the plaintiff right, so, on the other hand, they will take care, that the defendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties at first, and whose fault it was, that it was not so done."

§ 74. Another illustration of the rule may be found in the case, where the ancestor has entered into a covenant to do certain acts, and bound himself and his heirs to the performance thereof. If he should die, and a Bill in Equity should be brought against the heir alone, to compel a performance of the covenant, the Court would require the executor or administrator of the ancestor to be made a party ; because, if the latter had assets, the heir would be entitled, upon another Bill against him, to reimburse himself out of the personal assets. But, by uniting both in the same Bill, the Court would be enabled at once to do complete justice between all the parties, by decreeing the executor or administrator to perform the covenant, so far as the personal assets will extend, and the rest to be made good out of the real assets, descended to the heir.¹ But, at Law, the heir alone might be sued.²

¹ Knight v. Knight, 3 P. Will. 331, 333 ; Calvert on Parties, 1, 2, 3.

² Ibid.

§ 74. *a.* Another illustration may be derived from the case of a mortgage in fee to secure a debt by bond. There, if the mortgagee dies, the heir is the sole party entitled at law to sue the mortgagor for possession of the land; and the executor or administrator, the sole party entitled at law to sue for the debt upon the attendant bond. And the heir and executor or administrator cannot at law unite in one suit their respective claims, although arising out of the same transaction. But in a Court of Equity, both may be united, if the object is to compel payment of the debt or a foreclosure of the mortgage; nay, although the executor or administrator is deemed in Equity the sole party entitled to the debt, and therefore entitled also to sue upon the mortgage for a foreclosure; yet he may not sue alone; but he will be compelled to join the heir either as a co-plaintiff or as a co-defendant, because the mortgagor is entitled upon payment of the debt to have a re-conveyance of the estate, and this can be made only by the heir in whom the estate is then vested. In short, the heir is treated as a trustee of the executor or administrator, until the debt is paid, and when it is paid, he is treated as a trustee of the mortgagor; and therefore to avoid circuitry of action and multiplicity of suits, Equity requires, both to be joined in the same suit, in order that complete justice may be done *uno flatu*.¹ But we are not to understand from this, that the nonjoinder or misjoinder of proper parties can be made an objection in all stages of the cause with equal effect. The mere nonjoinder of a party, who might be a proper party, but whose absence produces no prejudice to the rights of the parties before

¹ See *Scott v. Nicoll*, 3 Russ. R. 476; *Calvert on Parties*, 2, 3; *Id.* 166; *Id.* 187; *Post*, § 200, § 201.

the Court, will constitute no fatal objection at the hearing or re-hearing, or upon bill of review.¹ The same rule would in general apply to the misjoinder of a party, either as plaintiff or as defendant ; for at the hearing, if a decree can be made without prejudice to the rights of the parties before the Court, the objection will not avail.²

§ 75. If the proper parties are not made, the defendant may either demur to the Bill ; or take the objection by way of plea or answer ; or, (subject to the considerations above suggested), when the cause comes on to a hearing, he may object, that the [*77] *proper parties are wanting ; or the Court itself may state the objection, and refuse to proceed to make a decree ; or, if a decree is made, it may, for this very defect, be reversed on a re-hearing, or an appeal ; or if it be not reversed, yet it will bind none but the parties to the suit, and those claiming under them.³ So, that all the evils of fruitless or inadequate litigation may sometimes be visited upon the successful party in the original suit, by leaving his title still open to future question and controversy.

§ 76. This doctrine, as to parties, constitutes one of the most striking differences between the proceedings in Courts of Law, and the proceedings in Courts of Equity. In general, Courts of Law require no more than, that the persons directly and immediately interested in the subject-matter of the suit, and whose interests

¹ *Whiting v. Bank of U. States*, 13 Peters, 6, 14.

² *Post*, § 236, § 541, § 544.

³ *Cooper Eq. Pl.* 33 ; *Gilb. For. Rom.* 54, 55, 157, 158 ; *Wyatt Pr. Reg.* 299 ; *Cockburn v. Thompson*, 16 Ves. 325, 326 ; *Mitf. Eq. Pl. by Jeremy*, 180 ; *Darwent v. Walton*, 2 Atk. 510 ; *Hickock v. Scribner*, 3 John. Cas. 311, 316, 317 ; *Calvert on Parties*, ch. 2, § 4, p. 113 to 116 ; 1 *Daniell Ch. Prac.* ch. 5, § 3, p. 384 to 388 ; 2 *Daniell Ch. Prac.* ch. 12, § 2, p. 37, 38.

are of a strictly legal nature, should be parties to it.¹ All other persons, who have merely an equitable, or remote interest, are not only not required to be parties, but are excluded from being made parties; and, if any are improperly joined, the fault may be fatal to the suit.² Thus, for example, at Law, the executor and the heir cannot join, or be joined, in an action, although each may have an interest in the controversy. But in Equity, they may both join and be joined, and, indeed, both are often necessary and proper parties.³

§ 76. *a.* The general rule, in Courts of Equity, as to parties, is, (as has been already stated⁴), that all persons materially interested in the subject-matter, ought to be made parties to the suit, either as plaintiffs or as defendants, however numerous they may be, in order, not only that complete justice may be done, and that multiplicity of suits may be prevented;⁵ or, as the rule was once stated by Lord Hardwicke, that all persons ought to be made parties before the Court, who are necessary to make the determination complete, and to quiet the question.⁶ It has been objected, that this, although the common language made use of in the authorities, is not entirely accurate, or free from vagueness;⁷ for there are cases, in which persons are materi-

¹ Com. Dig. Abatement, E. 8 to E. 14. Id. F. 4 to F. 10. *Rice v. Shute*, 5 Burr. 2611; Chitty on Plead. 1 to 10, 3d edit.

² Com. Dig. Abatement. E. 15; Chitty on Plead. 7, 8, 13, 14, 3d edit.

³ *Plunket v. Parson*, 2 Atk. 51; *Knight v. Knight*, 3 P. Will. 333, and Mr. Cox's note (A); Calvert on Parties, 1, 2.

⁴ Ante § 72.

⁵ Mitf. Eq. Pl. by Jeremy, 4th edit. p. 164; Calvert on Parties, ch. 1, § 1, p. 3; *Palk v. Clinton*, 12 Ves. 58; *Cockburn v. Thompson*, 16 Ves. 325.

⁶ *Poor v. Clarke*, 2 Atk. R. 515.

⁷ Calvert on Parties, ch. 1, § 1, p. 3 to p. 11.

ally interested in the suit, in which, nevertheless, they are not always required to be parties ; as, for example, a remainder-man, after an estate tail.¹ On the other hand (it may be added) there are cases, where persons are required to be made, or at least may be made, parties, who do not seem to have any material interest in the suit ; as, for example, a naked trustee, a husband who claims no interest in a suit respecting his wife's separate estate, a mortgagor in a suit brought by a second mortgagee to redeem the first mortgagee, and yet not seeking a foreclosure or other decree against the mortgagor ; and an obligee of a bond, who has made an absolute assignment thereof, and claims no interest therein, in a suit brought by the assignee against the obligor.²

§ 76. *b.* It has also been suggested, that it would be a more just exposition of the general rule to declare, that all persons interested in the object of the suit ought to be made parties.³ Undoubtedly this does furnish a safe and satisfactory guide in many cases of ordinary practice ; but it may admit of doubt, whether it is universally true, or whether it is not equally as open to criticism as the common formulary, in which the rule is expressed. In a just sense, a remainder-man, after a tenancy in tail, has an interest in the object of a suit brought by a tenant in tail affecting the entire fee ; and yet he is not required to be made a party.⁴ So, residuary legatees are interested in the object of a suit by a creditor against the executor, to establish his debt or

¹ Post, § 142, § 144, § 146.

² Post, § 63, § 153, § 186, § 229, § 231.

³ Calvert on Parties, ch. 1, § 1, 11.

⁴ Calvert on Parties, ch. 1, § 1, p. 4. Id. ch. 3, § 7, p. 189 to 197. Post, § 141, § 144, § 145, § 146.

claim against the estate ; for the establishment of such debt or claim goes *pro tanto* in direct diminution of their interest in the residue. Yet they are never required to be made parties.¹ So trustees for the payment of debts and legacies may sustain a suit, either as plaintiffs or as defendants, touching the trust estate, without bringing the creditors or legatees before the Court as parties.² On the other hand, persons, who seem to have no interest either in the subject or in the object of a suit, are sometimes required, as has been already suggested, to be made parties, or at least may be made parties. Thus, if the heir is sued upon a bond of his ancestor by the obligee, it is said, that the executor or administrator of the ancestor ought to be made a party, because the personal assets are primarily liable for the debt, although the object of the Bill is purely to obtain payment from the heir.³ Yet this principle is not applied throughout ; for, as we shall presently see, a mortgagee may proceed against the heir of a mortgagor for a foreclosure, without making the executor or administrator a party, although the personal assets are, in such a case, primarily liable for the debt.⁴

§ 76. *c.* The truth is, that the general rule in rela-

¹ Calvert on Parties, ch. 1, § 1, p. 5. Post, § 148, § 150.

² Post, § 150.

³ Post, § 173. Calvert on Parties, ch. 1, § 1, p. 2, 3. In *March v. Cockerill*, 8 Simons R. 219, the suit was brought by A for one moiety of a trust fund, the other belonging to B, and the allegation of the Bill was, that the whole fund was improperly dealt with. The Vice Chancellor held, that as it did not appear, that B had been satisfied as to his share, he ought to be made a party to the suit, that the whole matter might be settled in one suit. Here, we see, that though the object of the Bill as to one moiety might be obtained, the Court acted upon the ground, that other considerations might require other parties. Ante, § 159. Post, § 213, § 214.

⁴ Post, § 175, § 193 and notes. Post, § 186, § 196.

tion to parties, does not seem to be founded on any positive and uniform principle ; and therefore it does not admit of being expounded by the application of any universal theorem, as a test. It is a rule, founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of Courts of Equity to suppress multifarious litigation, and partly in the dictate of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them. Whether, therefore, the common formulary be adopted, that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable, indeed, as a practical guide, but is still open to exceptions, and qualifications, and limitations, the nature and extent and application of which are not and cannot, independently of judicial decision, be always clearly defined.⁵ On this account it is

¹ Mr. Calvert, in his learned work on Parties (p. 1 to p. 11), has examined this subject with great care and ability. The following extracts, although long, will amply reward the attention of every professional reader :—

“The combination of the two principles which have been mentioned, has given rise to the general rule upon the proper parties to a suit in Equity. This rule has been laid down by different writers and judges in very different expressions. Lord Redesdale says, in the continuation of the passage just quoted, ‘For this purpose all persons materially interested in the subject, ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented.’ Ld. Hardwicke (*Poore v. Clarke*, 2 Atk. 515, 1742), says ; ‘The general rule is, that if you draw the jurisdiction out of a court of law, you must have all persons parties before this court, who will be necessary to make the determination complete, and to quiet the question.’

of great importance to ascertain, what are the admitted exceptions to the general rule, and to ascertain, what are

Ld. Thurlow says (Anon. 1 Ves. jr. 29. 1789); 'All parties, having an apparent right, must be brought into court before the court will do any thing which may affect their right.' Sir William Grant says, 'As far as it is possible, the Court endeavors to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate,' (Palk v. Clinton, 12 Ves. 58. 1806). Lord Eldon says (Cockburn v. Thompson, 16 Ves. 325. 1809), 'The strict rule is, that all persons materially interested in the subject of the suit, however numerous, ought to be parties; that there may be a complete decree between all parties having material interests.' Sir William Grant again says (Wilkins v. Fry, 1 Mer. 262. 1816), 'In Equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or of defendants.'

"The object of quoting so many authorities for the general rule, is not merely to show how universally it has been acknowledged, but still more to call attention to the vague language in which it has been expressed by very logical reasoners. Lord Redesdale has qualified the rule, which he laid down, in these words (Red. Pl. 170): 'In many cases the expression, that all persons interested in the subject must be parties to a suit, is not to be understood as extending to all persons who may be *consequently* interested.' Yet if Lord Redesdale's rule, even in company with this qualification, were to be adopted as a guide for practice, it would frequently lead to inferences, which are at variance with decisions acknowledged to be correct. For instance, a remainder-man in fee after an estate tail, is (Cockburn v. Thompson, sup.) not to be made a party to a suit, in which the title to the estate is determined, though one who claims an interest only for life, antecedent to the estate tail, must be made a party. A person who possesses either of these two characters is 'a person interested,' and 'materially interested;' nor is there any meaning in the term 'consequently,' which applies to the former, and not to the latter. If a creditor (Lawson v. Barker, 1 Bro. C. C. 302. 1783) sues for payment of his debt, it is clear that the residuary legatees are interested in resisting the claim; for if the resistance to the debt is successful, their shares of the residue will be increased. Yet it is not necessary to join them as parties with the executors. A residuary legatee, or, in case no residuary legatee is appointed, a next of kin, appears to have precisely the same degree of interest in opposing a suit to establish a legacy, as an heir at law has in opposing a suit to establish a devise; the interest of the one is in no respect more 'consequential' than the interest of the other: yet the heir at law is a necessary party in one suit; and the next of kin, or residuary legatee, is not a necessary party in the other. Such being the indefinite character of the rule according to the terms in which it has

the grounds, on which they are founded,—for when these exceptions, and the grounds thereof, are fully seen and

been laid down by high authority, it might be at first inferred that the nature of the subject would not admit of any more precise expression; and the same inference might follow from a merely cursory observation of the decided cases. It must, however, be observed, that the object at which judges have aimed in giving their judgments, has been to lay down the rule with sufficient accuracy for the case immediately before them, and that they have not attempted to pronounce a general rule applicable to all cases. They might have had in their minds a precise idea of the general principle, although they did not express it precisely. An attempt will now be made to ascertain the precise nature of that principle, and to express the rule in such language as may be sufficiently definite to serve as a guide upon all occasions. Lords Eldon and Thurlow, and Sir William Grant, mention as necessary parties all persons interested in the subject of suit. The expression, 'subject of suit,' may mean one of two things; either the fund or estate, respecting which the question at issue has arisen, or else that question itself. For instance, in a foreclosure suit, it may mean, either, in the first sense, the mortgage-debt or mortgaged premises, or else, in the second sense, the question whether a foreclosure ought or ought not to take place. In the passage which has been quoted from the case of *Palk v. Clinton*, it is clear that Sir W. Grant used it in the first sense. Lord Eldon, in the case of *Cockburn v. Thompson* (16 V. 326. 1808), appears to have used the words in the same sense; for in further explanation of the general rule, he says, 'Accordingly, there are several well-known cases of exception; and, without going through them all, I will mention one instance of not applying it to persons having valuable interests in real estate; namely, where it has been held sufficient to bring before the Court the first person having an estate of inheritance; though it cannot be denied, that persons having present immediate valuable interests in the same real estate, may become most deeply affected by what is done here in their absence.' The sense in which Lord Thurlow used the term, cannot be ascertained from Mr. Vesey's very brief (*Anon. 1 Ves. jr. 29. 1789*) report of the anonymous case, which has been quoted. If the words, 'subject of suit,' were taken in that very extensive meaning in which Lord Eldon and Sir W. Grant used it, the general rule, as laid down by them, would be inconsistent with several distinctions which are firmly established. For instance, if there is a contract to sell an estate, which the vendor claims under a will, the purchaser filing his bill for specific performance of the contract, need not make the heir a party, if he does not pray proof of the will; but if he does, he must make him a party. Yet the interest of the heir in the estate, that is, according to Lord Eldon's and Sir W. Grant's use of the term, in the subject of the suit, cannot be at all varied by the inser-

explained, they will furnish strong lights to guide us in our endeavors to apply the rule and the exceptions to

tion of such a prayer. The executor of a mortgagor has neither greater nor less interest in the estate mortgaged, whether the prayer of the mortgagee's bill is for a sale or for a foreclosure; yet if it is only for a foreclosure, he is not necessarily a party; but he is, if the prayer is for a sale. When a lessee of tithes institutes a suit respecting them, the lessor is not a requisite party, unless the prayer is in part for the establishment of the right to tithes; though he is of course equally interested in the tithes themselves, whether such a prayer is or is not introduced into the bill. Many cases may be mentioned, which show, that according to general practice, a mere interest in the subject of suit, as the term was used by Lord Eldon and Sir W. Grant in the passages quoted above, is not sufficient to render a person a necessary party. The cases of *Saville v. Tancred*, and *Franco v. Franco*, are inserted here as examples of such cases. *Saville*, (*Saville v. Tancred*, 1 Ves. 101. 1748), pawnee of a strong box, containing jewels which belonged to the Duke of Devonshire, filed a bill against Tancred, in whose custody it was, to compel him to deliver it up, and to give an account. An objection was made, that the Duke's representative should have been made a party; but Lord Hardwicke 'overruled the objection: for pawnee of a pledge, as Saville was, may bring trover or detinue at law for it, without troubling himself with the pawner; for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another; that person has nothing to do with the Duke. Therefore, let these jewels come into his hands which way they will, he may give the custody of them to any one, and have them back without hurting the Duke or his representative.' In *Franco v. Franco* (3 Ves. jr. 75. 1796), the plaintiff, a trustee, had, at the request of his co-trustee, the defendant, transferred the trust fund into his name. The bill prayed, amongst other things, that the defendant might be decreed to replace the fund, and it was contended, on demurrer, that the cestuisque trust ought to have been parties; but Lord Loughborough said, 'This is no bill for execution of a trust. Whatever demand the cestuisque trust would have, they could never found themselves upon the case the present plaintiff makes against the defendant,' and overruled the demurrer. It need hardly be remarked, that in *Saville v. Tancred*, the Duke of Devonshire was interested in the jewels, and that in *Franco v. Franco*, the cestuisque trust were interested in the stock. In cases concerning trust property, it is particularly necessary to pay attention to the correct rule; for the cestuisque trust are always the persons interested in the subject of the suit, and yet they are very frequently not to be introduced among the parties: Where, for instance, there are

new cases, as they arise in judgment. And here it may be proper to state the remark of a learned chancellor,

trustees to sell an estate, receive the purchase-money, and pay it to particular individuals. If the mere object of the suit is to get into the hands of the trustee the property which is to be enjoyed by the cestuique trust, the latter need not be made parties; and the reason seems to be, that their equitable rights remain in precisely the same situation, whether the trustees are successful or unsuccessful in their suit. Yet it is quite clear that they would be necessary parties, if all were so considered who are interested in the subject of the suit, according to the meaning of the term 'subject,' which has been referred to. The rule, then, which has been stated in these cases with reference to the subject of the suit, meaning thereby the estate or fund, on which the question at issue has arisen, does not appear to be adapted to general application. It must be taken in connection with other authorities, which will now be quoted. In *King v. Martin* (2 Ves. jr. 643. 1795), *Ld. Loughborough* says, 'There is no pretence for the demurrer. This is a bill stating a case for relief, a case of confederacy between the defendants; and the material party, and against whom a decree might be made, not perhaps for the specific relief prayed by this bill, is the bankrupt, who has demurred. The case of making a witness to a will a defendant, to know what he will say when he comes to support the will, is perfectly different; but if it was a case in which the will was impeached, as obtained by fraudulent practices, the witnesses are proper parties.' Lord Eldon says, in *Fenton v. Hughes* (7 Ves. 288. 1802), 'It is admitted, that it is impossible to file a bill against a person, who is a mere witness, if the object of the bill is to have relief in Equity. That is established by a great variety of authorities.' The general effect of this decision is said by Sir T. Plumer, in *Whitworth v. Davis* (1 Ves. & B. 550. 1813), to be, 'that a person, who has no interest and is a mere witness, against whom there can be no relief, ought not to be made a party.' Sir John Leach says, in *Smith v. Snow* (3 Mad. 10. 1818), 'Persons not interested in the suit cannot be made parties, and it is sufficient to say, that it is not alleged that these defendants have any interest in this suit.' And again, in *Lloyd v. Lander* (5 Mad. 289. 1821), speaking of a bankrupt, he says, 'Having thus neither interest nor power in the subject of the suit, which requires to be bound by the decree of the Court, it is difficult to conceive any principle upon which he can be considered as a necessary party.' The dicta which have been last quoted, coincide with the opinion of Lord Harkwicke in *Poore v. Clarke* (2 Atk. 515. 1742), when he made the criterion to be 'what persons are necessary to make the determination complete, and to quiet the question.' So Lord Lyndhurst says, in his judgment upon the case of *Small v. Atwood*

speaking upon this very subject of parties, as containing a salutary admonition and instructive lesson, that it is

(Younge, 458. 1832), 'The general rule is, that all persons who are interested in the question, must be parties to a suit instituted in a Court of Equity.' A similar principle is expressed in Comyn's Digest (Com. Dig. tit. 'Chancery,' E. 2. Mr. Starkie says, that the interest which disqualifies a witness, is an interest in the result of the cause. Vol. i. p. 102), namely, that 'all concerned in the demand ought to be made partners in Equity.' Not all concerned in the subject-matter respecting which a thing is demanded; but all concerned in the very thing, which is demanded, the matter petitioned for in the prayer of the bill, in other words, the object of suit. The same remark applies to all the authorities, which have been just quoted. They make the propriety of a person being made a party, depend upon his interest, not in the subject-matter, but in the object of the suit. If this distinction between the meaning of 'the subject of a suit,' and that of 'the object of a suit' is borne in mind, it may appear superfluous to show by other authorities, that the word 'interest,' when used as a criterion of the proper parties to a suit, means interest in its object, and not interest in its subject-matter. Still, as the word seems to have been loosely employed in the opinions, which were quoted in the first instance, and as the correct interpretation of it may be the key to many of the difficulties, which arise respecting parties, no apology will be required for mentioning the interpretation of the word, which has appeared in a work recently published by Mr. Wigram. In the following passages he is ascertaining, what are the documents, which a plaintiff may compel a defendant to produce. 'The plaintiff (Points on the Law of Discovery, by James Wigram, K. C. p. 199) must show, that he has an interest in the documents, the production of which he seeks. There can be no objection to this mode of expressing the rule, provided the sense, in which the word *interest* is used, be accurately defined. But without such definition it is obvious, that this mode of expressing the rule is unprofitable for instruction. The word *interest* must here be understood with reference to the subject-matter to which it is applied.' 'The word *interest* must, therefore, in these cases be understood to mean—an interest in the production of a document for that specific purpose.' 'Unless the meaning of the word *interest* be limited in the way pointed out, it is obvious, that the effect of a simple claim (perhaps without a shadow of interest) would be to open every muniment-room in the kingdom, and every merchant's accounts, and every man's private papers, to the inspection of the merely curious.' In perfect keeping with these remarks is Mr. Wigram's explanation of the word *material*, when it is said, that the plaintiff has a right to the discovery of all matters which are material to his case. 'The word *material*, (Points on the

the duty of every Court of Equity to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases, which, from the progress daily making in the affairs of men, must continually arise; and not, from too strict an adherence to forms and rules established under very different circumstances, to decline to administer justice, and to enforce rights, for which there is no other remedy.¹

§ 77. Let us, therefore, before entering upon the more particular considerations applicable to this subject, ex-
[* 78] amine into and consider *the general nature of the exceptions, which have been admitted to the gene-

Law of Discovery, p. 65) is relative—material with reference to the purpose, for which discovery is given, that is, material with reference to the plaintiff's case. Now the plaintiff's case—in the sense in which the words are here used—is that case, upon which the parties are about to go to trial.' Mr. Wigram afterwards quotes a passage from Lord Redesdale, in which, stating the general right of a plaintiff to a discovery of the matters alleged in the bill, he says; 'Provided they are necessary to ascertain certain facts material to the merits of his case, and to enable him to obtain a decree.' These passages are the more important in confirming the rule upon parties, which will be proposed, as there is a strict analogy between the purpose for which parties are made, and that for which discovery is given. 'The purpose,' (Points on the Law of Discovery, p. 200), says Mr. Wigram, 'for which discovery is given, is, simply and exclusively, to aid the plaintiff on the trial of an issue between himself and the defendant.' So the purpose, for which parties are made, is to enable the plaintiff to bring that issue to trial. Therefore the rule upon discoveries to be made, and upon parties to be brought into court, ought to be founded on the same principle. Upon the combination of all these authorities, it is proposed to state the general rule in the following words: 'All persons having an interest in the object of the suit, ought to be made parties.'" Calvert on Parties, ch. 1, § 1, p. 3 to p. 11.—The subject is also learnedly discussed in a very able article in the London Law Magazine for May, 1839, pp. 238 to 242. See also Calvert on Parties, ch. 1, § 2, p. 19.

¹ Lord Cottenham, in *Mare v. Malachy*, 1 Mylne & Craig R. 559; and *Taylor v. Salmon*, 4 Mylne & Craig R. 141. Post § 94, § 132, § 113, note, § 135 a.

ral rule in Equity, that all persons legally or beneficially interested in the subject-matter of a suit should be made parties; or, if the expression be deemed more exact and satisfactory, that all persons, who are interested in the object of the Bill, are necessary and proper parties. All these exceptions will be found to be governed by one and the same principle, which is, that, as the object of the general rule is to accomplish the purposes of justice between all the parties in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, Courts of Equity 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 of the case render the application of the rule wholly impracticable.¹ On the other hand, if complete justice between the parties before the Court cannot be done without other parties being made, whose rights or interests will be prejudiced by a decree; then the Court will altogether stay its proceedings, even though those other parties cannot be brought before the Court; for in such cases the Court will not, by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties, not before it, whose claims are or may be equally meritorious.² We shall presently

¹ *Cockburn v. Thompson*, 16 Ves. 321, 326; *Adair v. New River Company*, 11 Ves. 429; *Wendell v. Van Rensselaer*, 1 John. Ch. R. 349, 350; *Wiser v. Blackley*, 1 John. Ch. R. 437; *Brasher v. Van Cortlandt*, 2 John. Ch. R. 245, 247; *West v. Randall*, 2 Mason R. 190 to 196; *Hallett v. Hallett*, 2 Paige R. 15; *Joy v. Wirtz*, 1 Wash. C. R. 517; *Hallett v. Hallett*, 2 Paige R. 18, 19; *Elmendorf v. Taylor*, 10 Wheat. R. 152.

² *Hallett v. Hallett*, 2 Paige R. 15; *West v. Randall*, 2 Mason, 190 to 196; *Fell v. Brown*, 2 Bro. Ch. R. 575; *Joy v. Wirtz*, 1 Wash. C. R. 517; *Marshall v. Beverley*, 5 Wheat. 313; *Ward v. Arredondo*, 1 Paine Cir. R. 410; S. C. 1 Hopk. R. 213.

have occasion to notice some illustrations of the principle of the exceptions, and of the qualifications of it, to which we have alluded.

§ 78. The first exception to the rule, which we shall notice, is founded upon the utter impracticability of making the new proper or necessary parties. This occurs, of course, when such new parties are without the jurisdiction of the Court, and when consequently they cannot be reached by the process of the Court. In such a case, to require such persons to be made parties, would be equivalent to a dismissal of the suit, and amount to a denial of justice. Hence, it is a common rule of the Court, that when a person, who ought to be a party is out of the jurisdiction of the Court, if the fact is stated in the Bill, and admitted by the answer, or proved (if denied) at the hearing, that of itself constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him.¹ Thus, for example, the general rule is, that to a Bill against a partnership, all the partners must be made parties. But if one of the partners be

¹ Mitf. Eq. Pl. by Jeremy, 164; Cooper, Eq. Pl. 39, 186, 187; *Smith v. Hibernian Mine Company*, 1 Sch. & Lefr. 240; *Quintine v. Yard*, 1 Eq. Abrid. 74. In *Cockburn v. Thompson* (16 Ves. 326), Lord Eldon, speaking on the subject of dispensing with parties and of the exceptions to the general rule, said: "The same principle, in a great variety of cases, has obliged the court to dispense with the general rule as to persons out of the jurisdiction. And there are many instances of justice administered in this Court in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered, as it obviously cannot be so completely, as if all persons interested were parties. But the Court does what it can." See also *Adair v. New River Company*, 11 Ves. 443, 444. Where the party is out of the jurisdiction, that fact should be positively averred in the Bill, and not left to mere inference; as, for example, by averring that the party absconded a year before the bill was filed. *Perfold v. Nunn*, 5 Sim. 498.

resident in a foreign country, so that he cannot be brought before the Court, and the fact is so charged in the Bill, the Court will ordinarily proceed to make a decree against the partners, who are within the jurisdiction; with this qualification, however, that it can be done without manifest injustice to the absent partner.¹

§ 79. This ground of exception is peculiarly applicable to suits in Equity in the courts of the United States, which suits can be maintained in general only by and against citizens of different States. If, therefore, the rule as to parties were of universal operation, many suits in those courts would be incapable of being sustained therein, because all the proper or necessary parties might not be citizens of different States; so that the jurisdiction of the Court would be ousted by any attempt to join them. On this account it is a general rule in the courts of the United States to dispense, if consistently with the merits of a case it can possibly be done, with all parties, over whom the Court would not possess jurisdiction.²

§ 80. It is usual (as has been already stated)³ to add in the Bill the name of the person out of the jurisdiction of the Court, so far as may be necessary to connect his case with that of the other parties. But in such a case, the Bill should not only allege, that the person is out of the jurisdiction, but it should go on to pray process against

¹ Cooper Eq. Pl. 35; Mitf. Eq. Pl. by Jeremy, 31, 164; *Couslad v. Cely*, Prec. Ch. 83; *Darwent v. Walton*, 2 Atk. 510; *Whalley v. Whalley*, 1 Vern. 487; *Milligan v. Milledge*, 3 Cranch, 220.

² *West v. Randall*, 2 Mason R. 196; *Russell v. Clarke*, 7 Cranch, 69, 98; *Milligan v. Milledge*, 3 Cranch, 220; *Simms v. Guthrie*, 9 Cranch, 19, 25; *Elmendorf v. Tayler*, 10 Wheat. R. 152; *Mallow v. Hinde*, 12 Wheat. R. 193; *Harding v. Handy*, 11 Wheat. R. 103; *Ward v. Arredondo*, 1 Paine C. R. 413, 414.

³ Ante, § 78.

him, so that he may be made amenable to the process of the Court, if he should come within the jurisdiction.¹ One reason for this is, that the absent person may have an opportunity of appearing to the suit, and taking such a course in it, as he may deem to be for his advantage.² And if in fact he should become so amenable, pending [*81] the suit, he ought to be *brought before the court either by process issuing against him, if process shall have been prayed against him ; and if not, by amending the Bill for that purpose, if the state of the proceedings will admit of such an amendment ; or by a supplemental Bill, if the state of the proceedings will not so admit.³

§ 81. It is an important qualification engrafted on this particular exception (which has been already incidentally alluded to), that persons, who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with, only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the Court.⁴ The doctrine ordinarily laid down on this point is, that where the persons, who are

¹ *Munoz v. De Tastet*, 1 Beavan R. 109, and note ; *Brookes v. Burt*, 1 Beavan R. 109. But see *Haddock v. Tomlinson*, 6 Sim. R. 219.

² *Munoz v. De Tastet*, 1 Beavan R. 109, note ; *Id.* 111, the Reporter's note.—But in *Haddock v. Tomlinson*, 2 Sim. & Stu. 219, it seems to have been thought by the Court, that it was not absolutely necessary to pray process against a person out of the jurisdiction of the Court, although it might be done. The objection, however, if well founded should be taken by demurrer ; and if an absent person should afterwards come within the jurisdiction, he might be made a party by the plaintiff, by a supplemental Bill. *Post*, § 335 ; *Mitford Eq. Plead. by Jeremy*, 164, 165 ; *Id.* 189, 181.

³ *Mitf. Eq. Pl. by Jeremy*, 164, 165 ; 1 *Smith Ch. Pr.* 45 ; *Haddock v. Tomlinson*, 2 Sim. & Stu. 219.

⁴ *West v. Randall*, 2 *Mason*, 190 to 198 ; *Mallow v. Hinde*, 12 *Wheat. R.* 193 ; *Russell v. Clarke's Exors.* 7 *Cranch*, 72.

out of the jurisdiction are merely passive objects of the judgment of the Court, or their rights are merely incidental to those of the parties before the Court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with.¹ But if such absent persons are to be active in the performance or execution of the decree;² or if they have rights wholly distinct *from those of the other parties; or if the [*82] 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 any decree against them or their rights or interests; but the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective.³ In many instances the objec-

¹ Mitf. Eq. Pl. by Jeremy, 31, 32; Id. 164, 165; *Meux v. Maltby*, 2 Swanst. 278.

² Sir Thomas Plumer (Master of the Rolls), in *Meux v. Maltby*, 2 Swanst. R. 278, went largely into the general rule and the exceptions. In that case a joint stock company, authorized by act of Parliament to bring suits in the name of their treasurer, purchased an estate, pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of a part. On a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined not to disturb their possession. But the Court refused to decree an execution of the lease; as the rest of the proprietors were not parties, being very numerous; and the Court would not compel them as absentees to do any act. On that occasion the learned Judge said: "The only novelty is, that the bill requires an act to be done by the absentees. Not having them before the Court, though their rights may be bound, there is a difficulty in making them act. The plaintiff requires special performance of the agreement; and it would hardly be sufficient, supposing it proper, for a few to execute a lease on behalf of the rest. In a conveyance of the interest, all must join. But that difficulty presents no objection to binding the rights of the parties not before the Court. That is authorized by every one of the cases referred to. If the Court cannot proceed to compel the defendants to do the act required, it must go as far as it can."

³ Mitf. Eq. Pl. by Jeremy, 31, 165; *Fell v. Browne*, 2 Bro. Ch. R.

tion will be fatal to the whole suit. In others, it will not prevent the court from proceeding to the decision of other questions between the parties actually before it, even though such a decision may incidentally touch upon, or question the rights of the absent parties.¹

275; *Att. General v. Baliol College*, 9 Mod. R. 409; *Inchiquin v. French*, Ambler R. 33; *Browne v. Blunt*, 2 Russ. & Mylne, 83; *Roveray v. Grayson*, 3 Swanst. R. 145, note; *Smith v. Hibernian Mine Company*, 1 Sch. & Lefr. 240; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Russell v. Clarke's Ex'ors.* 7 Cranch, 72. In *Whalley v. Whalley*, 1 Vern. R. 484, the court went very far in sustaining the suit, and in dispensing with parties. The Bill, in that case, charged, that the testator was, among other things, possessed of a lease for forty years, of which thirty-five years were unexpired at his death; that he bequeathed the residue of property (which included the lease) to the plaintiff, and made the plaintiff's father executor in trust for the plaintiff. It further charged, that the executor surrendered the lease, and took a new one in his own name for the unexpired term, and mortgaged it to one W., which mortgage, by intermediate assignments, came to one of the defendants, and he afterwards assigned the equity to another of the defendants, to be sold to pay his debts; and that the executor then went abroad; and the object of the Bill was to procure an assignment of the mortgage and equity of redemption, upon the ground, that they belonged to the plaintiff, and the defendants had notice. The court decreed the lease to be assigned to the plaintiff, and that the defendants should account for the profits, and also an account to be taken of the testator's estate, &c. &c. without the executor being made a party. From this statement it would seem indispensable, that the executor should have been made a party; for the decree directed, that the sums should be allowed him, which he had paid, beyond the other personal estate received by him. How could an account be properly taken without him? It is true, that it is said, that the Court ordered the suit to proceed against the defendants without prejudice for not bringing the father to a hearing. But the whole Equity of the case depended upon the state of the accounts of the executor, and whether the executor had paid debts and legacies, to the full amount of all the property, which had come to his hands, and, at all events, whether he had paid to an amount beyond the other personal estate. It is remarkable that in the Register's Book no such order of the court appears. Ibid. note (7). The case of *Heath v. Percival* (1 P. Will. 684) turned upon very different considerations as to the question of parties. See *Roveray v. Grayson*, 3 Swanst. 145, note. See *West v. Randall*, 2 Mason R. 181, 190 to 197.

¹ *Inchiquin v. French*, Ambler R. 34; *Attorney General v. Baliol Col-*

§ 82. A few cases will serve to illustrate this doctrine with its accompanying qualifications. Thus, where a * suit is brought to recover a debt against partners, [*84] and one is out of the jurisdiction, a decree may (as we have seen) be had against the other. The reason seems to be, that in such a case as each partner is liable for the whole debt, and each in fact represents the whole interest of the partnership, no injustice is done by making the one before the Court solely liable, and dispensing with the other partner; as, indeed, might be done at law in a similar case.¹ But if the Bill were brought by one partner against several other copartners, one of whom was out of the jurisdiction, praying for an account and dissolution of the partnership; there the case might be very different; for the absent partner would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and indeed would pervade the entire operations of the partnership.²

lege, 9 Mod. 409; *Fell v. Brown*, 2 Bro. Ch. R. 275; *Browne v. Blount*, 2 Russ. & M. 83; *Mallow v. Hinde*, 12 Wheaton R. 193. In *Attorney General v. Baliol College*, 9 Mod. R. 409, Lord Hardwicke is reported to have said, in answer to an objection, that the University of Glasgow was not a party to the original decree, and so not bound by it; "Glasgow indeed was no party, nor indeed were the plaintiffs obliged to make that University party, for it is a corporation, and out of the kingdom and reach of process of this Court, which is always an excuse for not making them parties; therefore, this is no objection to make this a void decree as to them." With reference to the case before the Court, this might be entirely correct. But the language is far too broad and unqualified, if it was meant to be used generally; for there are many cases, where a decree against a party out of the jurisdiction would be void, so far as it touched his interests. See *Fell v. Brown*, 2 Bro. Ch. R. 275, 276; *Browne v. Blount*, 2 Russ. & M. 83. Post, § 83, § 84, § 85.

¹ *Darwent v. Waltern*, 2 Atk. 510; *Cowslad v. Cely*, Prec. Ch. 83.

² See *Beaumont v. Meredith*, 3 Ves. & B. 180; *Evans v. Stokes*, 1 Keen R. 32; *Sandau v. Moore*, 1 Russ. R. 441.

§ 83. Another case may be stated, where the objection was held fatal to the entire objects of the suit. A judgment creditor sued out an *elegit*, and filed a bill for the purpose of an equitable execution against certain real estates, vested in trustees upon certain trusts, under which the debtor was now entitled to the rents and profits during his life. The trustees were defendants in the Bill; but the debtor was abroad, and had been so for several years, and, therefore, could not be made a party to the suit. The Court held the objection fatal, notwithstanding the impossibility of the debtor being made a party, because he was the very person, whose interests were sought to be affected by the decree.¹ [*85] * The sound reason, which dictated this decision, is obvious; and any attempt to sustain the jurisdiction in such a case would subvert the very foundation, on which the rule in Equity, requiring the joinder of the interested parties, rests; for the decree would either have concluded, without a hearing, the interests of the only person really interested to contest it; or have delivered over the whole matter to new and independent litigation.

§ 84. Upon the like ground, where a second mortgagee brought a Bill against the first, to redeem his mortgage, without making the heir of the deceased mortgagor a party, and the Bill alleged, that he was abroad in America; it was held by the court, that the heir was an indispensable party; for the natural and common decree in such a case is, that the second mortgagee shall redeem the first mortgage, and that the mortgagor shall redeem him, or stand foreclosed. Under such circumstances, the foreclosure would conclude the interests of

¹ Browne v. Blount, 2 Russ. & M. 83.

the heir in a suit, to which he was no party. But it was at the same time held, that, in that case, the personal representative of the mortgagor was not an indispensable party.¹

➤ § 85. Another case, standing upon analogous reasoning, is, where the bail of a judgment debtor brought a * Bill to stay the proceedings against them by the [*86] creditor, and alleged fraudulent conduct on the part of the creditor, and that he had charged the debtor with sums never paid, and had collusively sold the debtor's property remitted for sale, and prayed an account of all the mercantile transactions between the creditor and debtor, and the Bill charged the debtor to be out of the jurisdiction of the Court; it was held, that the Bill could not be sustained without the principal being brought actually before the Court; for he was an indispensable party to the account. And the case was likened to a suit brought by sureties, who could not be relieved as against the obligee, without bringing the obligor before the Court.²

➤ § 86. The same doctrine may be illustrated by putting the case of fraud, where several persons, having distinct interests, claim under independent titles the whole fund. In such a case, all the persons, who claim by the different titles, ought to be made parties; for a

¹ *Fell v. Brown*, 2 Bro. Ch. R. 276-279; *Polk v. Clinton*, 12 Ves. 58, 59. If the Bill in this case had sought only a redemption of the first mortgage, without any foreclosure, there does not seem any sound reason, why the Court might not have allowed the second mortgagee to maintain the Bill without making the heir a party, if the second mortgagee was willing to take a decree without any account, which would bind the heir of the mortgagor. The only effect of the decree then would be, to put the second mortgagee in the place of the first; leaving the amount due on the first mortgage open to examination, in the same way, as if there had been an assignment of the first mortgage to the second mortgagee.

² *Roveray v. Grayson*, 3 Swanst. R. 145, note.

Court of Equity would not, at least, unless upon very special circumstances, change the hands, in which the funds are already placed, especially when the title of the plaintiff is equally open to controversy on behalf of all the claimants. And in such a case, it would ordinarily constitute no sufficient ground for proceeding in the suit, that one or more of the claimants was out of the jurisdiction.¹

§ 87. It has been already stated, that in some cases the court will proceed to a decree against the parties before it, even though other proper parties may be out of the jurisdiction. In such cases, the absent party cannot be compelled to do any act. But if the disposition *of the property in controversy is in the power of the other parties, the Court may act upon them and through them upon that property.² Thus, where the heir at law of a testator, who had devised his real estate on certain trusts, was out of the jurisdiction of the court, and that fact was charged in a Bill seeking to enforce the trusts, and proved at the hearing, the Court directed an execution of the trusts, upon full proof of the execution of the will and the sanity of the testator;³ although, ordinarily upon such a Bill, the heir at law is deemed a necessary party.⁴ But in such a case, it is

¹ *Russell v. Clarke's Ex'ors.* 7 Cranch, 98.

² 2 Madd. Ch. Pr. 144; *Smith v. Hibernian Mine Company*, 1 Sch. & Lefr. 238-240.

³ Mitf. Eq. Pl. by Jeremy, 171, 172, 173; *Smith v. Hibernian Mine Company*, 1 Sch. & Lefr. 238-240; *Williams v. Whinyates*, 2 Bro. Ch. R. 399; *Harris v. Ingledew*, 3 P. Will. 92, 94; *French v. Baron*, 2 Atk. 120; *Thompson v. Topham*, 1 Y. & Jerv. 556; *Cooper Eq. Pl.* 38.

⁴ Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 171, 172), has made the following remarks on this subject. They show a nice distinction between the case of devisees and heirs. "To a bill" (says he) "to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir at law of the testator is deemed a necessary party,

clear, that the heir at law would not be bound by the decree, but he might file a bill to set aside the decree as erroneous, or otherwise assert his title at law. And the evidence taken in the case could not be read against him, if he *should afterwards dispute the will.¹ So [*88] that the Court could not, on such a Bill, establish the will against him, or in any manner ensure the title under its decree against his claim.² In this case, it is obvious, that the Court was placed in a predicament, in which one of two alternatives must be adopted; either wholly to dismiss the Bill, which would necessarily delay, to an indefinite period, the settlement of the trusts of the estate; or to act upon the parties to the trust before the Court, and leave the ultimate validity of the title open to contest by the heir. As the latter course would be without prejudice to the heir, and the former was satisfactory to those interested in the objects of the Bill, the

that the title may be quieted against his demand; for which purpose the bill usually prays, that the will may be established against him by the decree of the court. But if the testator has made a prior will containing a different disposition of the same property, and which remains uncanceled, and has not been revoked except by the subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties; though if the subsequent will be not valid, those persons may disturb the title under it, as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument, notwithstanding the subsequent will, the persons claiming under it may be brought before the court to quiet the title, and protect those who may act under the orders of the Court in executing the latter instrument." He adds—"If no heir at law can be found, the king's Attorney General is usually made a party to a bill for carrying the trusts of a devise of real estate into execution, supposing the escheat to be to the crown, if the will set up by the bill should be subject to impeachment. But if any person should claim the escheat against the crown, that person may be a necessary party."

¹ Cooper Eq. Pl. 38; Mitf. Eq. Pl. by Jeremy, 172, 173.

² Mitf. Eq. Pl. by Jeremy, 172, 173; *Smith v. Hibernian Mine Co.* 1 Sch. & Lefr. 240, 241; *Thompson v. Topham*, 1 Y. & Jerv. 556.

Court might, upon its own principles, proceed to execute the trusts.¹

§ 88. The same course for the same reason was adopted by the Court on a Bill brought by a residuary legatee for the sale of a real estate, pursuant to a will, for the payment of debts, the legatee being entitled to the surplus, and the heir at law being out of the jurisdiction, or rather no heir at law being known or found. The sale was ordered; but the Court refused to make any decree establishing the will.²

§ 89. The same doctrine may be illustrated by the case of a Bill brought by one of several residuary legatees, *or by one of several of the next of kin, for a final settlement and distribution of the estate of a deceased testator or intestate. In general, in such a case all the other residuary legatees or distributees ought to be made parties, so that the rights and claims of all may be conveniently established at the same time and in the same suit.³ But if any of such residuary legatees or

¹ See *Cockburn v. Thompson*, 16 Ves. 328, 329.

² *French v. Baron*, 2 Atk. 120. See *Atty. Genl. v. Baliol College*, 9 Mod. R. 409; *Cooper Eq. Pl.* 38; *Gilb. For. Rom.* 157, 158.

³ *Dunstall v. Babett*, Rep. T. Finch, 243; *Atwood v. Hawkins*, 1 Rep. Temp. Finch, 113; *Parsons v. Neville*, 3 Bro. Ch. R. 365; *Sherrit v. Birch*, 3 Bro. Ch. R. 229; *West v. Randall*, 2 Mason, R. 191, 192; *Cockburn v. Thompson*, 16 Ves. 321, 328; *Gilb. For. Rom.* 158; *Haycock v. Haycock*, 2 Ch. Cas. 124; *Cooper Eq. Pl.* 39, 40; *Davoue v. Fanning*, 4 John. Ch. R. 199; *Brown v. Ricketts*, 3 John. Ch. R. 555; *Pritchard v. Hicks*, 1 Paige R. 273. But see *Ross v. Crary*, 1 Paige R. 419, note; and *Hallett v. Hallett*, 2 Paige R. 20, 21; *Mitf. Eq. Pl. by Jeremy*, 168, note (o); *Cooper Eq. Pl.* 39, 40; *Gilb. For. Rom.* 158. This seems the general rule as to residuary legatees. But a question has been made, whether, in such a case, it is indispensable to make all the residuary legatees, when known, technical parties by name, or whether it is sufficient for a residuary legatee to sue on behalf of himself and all other residuary legatees, in which case they are, in a sense, deemed parties. (*Leigh v. Thomas*, 2 Ves. 312). In *Brown v.*

distributees are out of the jurisdiction of the Court, and cannot be made parties, either as plaintiffs or as defendants, the Court will dispense with them, and proceed to decree the shares of the parties before it. Such a decree is of course not conclusive upon the absentees or other persons not made parties. But the general rule is dispensed with, because otherwise persons having *clear rights would without their own default be [*90] precluded from asserting them, even when the rights of others would not necessarily be prejudiced thereby.¹

Ricketts (3 John. Ch. R. 555), Mr. Chancellor Kent seems to have thought, that all the residuary legatees should be technically parties by name; and he relied on *Parsons v. Neville*, 3 Bro. Ch. R. 365, and *Cockburn v. Thompson*, 16 Ves. 327, 328. He held the same doctrine in *Davoue v. Fanning*, 4 John. Ch. R. 199. The case in 3 Bro. Ch. R. 365, was the case of residuary devisees, not of residuary legatees. But in 16 Ves. 328, where Lord Eldon refers to Lord Thurlow's opinion, he considers it applicable to residuary legatees; but still admitting of exceptions, where it is not necessary or convenient to bring all before the Court; as, for example, where a residue is left to the individual members of a society, which is very numerous. (See *Cooper Eq. Pl.* 39, 40). In *Kettle v. Crary* (1 Paige R. 417, 419, 420, note), Mr. Chancellor Jones held, that in all cases a residuary legatee might sue in behalf of himself and all others, without making them technically parties. Referring to the case in 16 Ves. 328, he said; "I deduce from that and other cases the principle, that in the case of the residuary legatees, in common with all the other cases, where it is impracticable to make parties, or when the inconvenience and expense would greatly overbalance the utility of the proceeding, and all the rights and interests of the whole class of persons, to be affected by the decree, may be protected and preserved by their subsequent accession to the suit or the reference before the master, this Court will dispense with them as parties on the record, and give the opportunity of introducing them into the suit by subsequent proceedings before the master." See *Ross v. Crary* (1 Paige, 412), where Mr. Chancellor Walworth seems to have approved the same doctrine; and *Hallet v. Hallet*, 2 Paige R. 19, 20, where he directly affirmed it. See also *West v. Randall*, 2 Mason R. 190, 191, 192.

¹ *West v. Randall*, 2 Mason R. 181, 190 to 199; *Cockburn v. Thompson*, 16 Ves. 321, 328; *Brown v. Ricketts*, 3 John. Ch. R. 555, 556; *Bradwin v. Harper*, Ambl. R. 375; 2 Madd. Ch. Pr. 146. Mr. Cooper, in his *Equity Pleadings*, after stating, that all the residuary legatees ought to be

§ 90. Upon a similar ground one of several of the next of kin of an intestate, entitled to distribution, may sue for his distributive share without making the other distributees parties, if the latter are unknown, or cannot [*91] *be found, and that fact is charged in the Bill.¹ In such a case the Bill may properly be filed on behalf of the plaintiff and also of all the other persons, who may be entitled as distributees. But if the Bill should be differently framed, and yet sustained, the master, to

parties, and referring to 3 Bro. Ch. R. 229 and 365, in support of the proposition, has added ; " But one of the next kin of an intestate may sue for his distributive share, and the master will be directed by the decree to inquire and state to the Court, who are all the next of kin of the intestate, and they may come in under the decree. But if the plaintiff knows and states in his Bill, who are the other next of kin, it seems, that he must make them parties to the suit." Lord Ch. Baron Gilbert (For. Rom. 158) says, that where several persons are entitled as next of kin under the statute of distributions, and one only of them is brought on to a hearing, the Court will not proceed to a decree. This apparent contrariety may be explained by the suggestion, that in the case supposed by Mr. Cooper the Bill alleges, that the other distributees are unknown ; and in that supposed by Lord Ch. B. Gilbert, that the other distributees are known, and the Bill has no averment to the contrary. Probably, if the distributees are very numerous, even if known, a Bill might be maintained by one or more on behalf of all, as was done in the case of appointees under a will in *Manning v. Thesiger* (1 Sim. and Stu. 106). In *Waite v. Temple* (1 Sim. and Stu. 319) the Bill was brought for the administration of a testator's estate, who had given one fifth share of the residue of his estate to one T. P. or his heirs, executors and administrators. T. P. died in the testator's lifetime. The executors of T. P. were made parties but not his next of kin. The Vice Chancellor said, that the next of kin ought to be made parties, upon a claim as *personæ designatæ*, and the master should inquire, who were the next of kin, and with liberty to file a supplemental Bill. He added, that if one of the next of kin had in that character been made a party to the suit, and the claim of the next of kin had been raised upon the record, then any other persons found by the master to be next of kin might have been heard by counsel, though not parties. But where no one of the next of kin is in that character a party, nor the claim raised upon the record, there must be a supplemental Bill.

¹ Cooper Eq. Pl. 39, 40. See *Fenn v. Craig*, 3 Younge & Coll. 222, 223.

whom the cause is referred, will be directed to inquire and state to the Court, who are all the next of kin of the intestate, entitled as distributees, and they may come in under the decree, and take the benefit thereof.¹

§ 91. Another exception, flowing from the same general principle of the impracticability of making parties, is, where a personal representative of a deceased person is a necessary party; but it is charged in the Bill, that no such representative is in existence; as, for example, if it is charged in the Bill, that the representation is in litigation in the Ecclesiastical Court, or some other appropriate *tribunal.² In such a case, the Court will [*92] retain the Bill, notwithstanding the want of parties, and will proceed to a decree, if it can be done without prejudice; and if not, then it will postpone the cause, until the proper parties can be made.³ Thus, for example, a Bill may be brought for a discovery of real assets against an heir, in order to preserve a debt, without making the personal representative of the deceased a party, if it is

¹ Cooper Eq. Pl. 39, 40; West v. Randall, 2 Mason R. 192 to 194; Mitf. Eq. Pl. by Jeremy, 167, 168, 169; 2 Madd. Ch. Pr. 146; Bennett v. Honeywood, Ambler R. 710; Montague v. Nucella, 1 Russ. R. 166, 173; Waite v. Temple, 1 Sim. & Stu. 219; Hallet v. Hallet, 2 Paige R. 15. In Bradwin v. Harper (Ambler R. 374, 375), where the plaintiff sued as residuary legatee of one moiety of one sixth of the personal estate of the testatrix, and there was a mistake in the description of the legatees, and one only of the next of kin was a party on the record as executor, the Master of the Rolls at first doubted, whether he could act for the want of other parties, who were the next of kin. But it appearing, that the next of kin were numerous and living in distant places, and the matter in dispute being very small, and the plaintiff a pauper, he finally decreed the money to be paid. See Waite v. Temple, 1 Sim. & Stu. 319.

² Mitf. Eq. Pl. by Jeremy, 180; Cooper Eq. Pl. 35. See Atkinson v. Henshaw, 2 Ves. & B. 85; Jones v. Frost, 3 Madd. R. 1. See Cleland v. Cleland, Prec. Ch. 64.

³ See Humphreys v. Humphreys, 3 P. Will. 349, 350, 351; Mitf. Eq. Pl. by Jeremy, 178.

suggested in the Bill, that the representation is in litigation in the Ecclesiastical Court.¹

§ 92. So, if the persons, who are proper parties, are unknown to the plaintiff, and the fact is so charged in the Bill, and the Bill seeks a discovery of those parties, for the purpose of bringing them before the Court, the objection of want of parties will not be allowed to prevail, for the reason already assigned, and for the additional reason, that it is one of the very objects of the Bill, to obtain the information, which will enable the plaintiff to cure the defect ; and in no other way can it be cured.²

§ 93. There is an illustration of the rule, and also of [*93] *the exception to it, which may be mentioned in this place, as having a peculiar point and applicability. In general, where a Bill is brought for equitable relief upon a rent charge, chargeable upon divers estates, the rule is, that the owners of terre-tenants of all the estates, which are liable to the rent charge, shall be made parties ; not only, that all the persons in interest may be represented, and may, if they please, contest the title ; but also, that they may contribute among themselves in the proper proportions, if the rent charge is established, and complete justice be done between them.³ But there

¹ Mitf. Eq. Pl. by Jeremy, 180 ; Cooper, Eq. Pl. 35 ; Plunket v. Pen-son, 2 Atk. 51 ; D'Aranda v. Whittingham, Mosel. R. 84.

² Mitf. Eq. Pl. by Jeremy, 180 ; Bowyer v. Covert, 1 Vern. 95 ; Heath v. Perceval, 1 P. Will. 682-684 ; Mr. Baron Alderson in Fenn v. Craig, 3 Younge and Coll. 216, 224, said, that where the Bill alleged, that the other proper parties were unknown, so that there was an impossibility in bringing them before the court, it would be a gross absurdity to require them to be made parties, or to allow an objection for want of them.

³ Attorney General v. Wyburgh, 1 P. Will. 599 ; Attorney General v. Shelly, 1 Salk. 163 ; Attorney General v. Jackson, 11 Ves. 367 ; Adair v. New River Co. 11 Ves. 444.

are certain well known exceptions to this rule. Thus, for example, if, in a Bill brought against the owners or terre-tenants of one of the estates charged, it should appear upon the pleadings, that the other owners or terre-tenants are unknown ; or that it is uncertain, what the other estates, which are chargeable, are ; or whether the title or charge against them is not lost, or become incapable of being distinguished by lapse of time or otherwise ; the Court would dispense with the other parties ; and, at least in the case of a charity, proceed to decree between the parties before the Court.¹

*§ 94. Another exception to the general rule, as [*94] to parties, is, where they are exceedingly numerous, and it would be impracticable to join them without almost interminable delays and other inconveniences, which would obstruct, and probably defeat the purposes of justice.² In such cases, the Court will not insist upon their being made parties ; but will dispense with them,

¹ Attorney General v. Wyburgh, 1 P. Will. 599 ; Attorney General v. Shelly, 1 Salk. 163 ; Attorney General v. Jackson, 11 Ves. 367 ; Adair v. New River Co. 11 Ves. 444 ; Anon. Cary R. 33. Although the reasoning would seem to justify the laying down of the proposition in all cases of rent charge, where the exception exists, I have not ventured to state it as applicable except to cases of charity, for it is in those cases, that the exception has been allowed and acted on. But even in cases of charities, the Court will take care of the rights and interests of the terre-tenants before the Court, as well as of other terre-tenants not made parties, by directing inquiries before the master, whether there are any such, and how far they are chargeable. See on this subject the elaborate judgment of Lord Eldon, in Attorney General v. Jackson, 11 Ves. 366 to 373 ; and Benson v. Baldwin, 1 Atk. 596.

² Mitf. Eq. Pl. by Jeremy, 165, 166, 167 ; Cooper Eq. Pl. 39, 40, 41 ; West v. Randall, 2 Mason R. 192 to 196 ; Adair v. The New River Co. 11 Ves. 429 ; Cockburn v. Thompson, 16 Ves. 321 ; Wendell v. Van Rensselaer, 1 John. Ch. R. 349 ; 1 Mont. Eq. Pl. p. 57-63 ; Taylor v. Salmon, 4 Mylne & Craig, R. 134 ; Male v. Malachy, 1 Mylne & Craig, 559. In the Reporters' note (a) to Fenn v. Craig, 3 Younge & Coll. 224, there is a collection of some of the leading authorities on this subject.

and proceed to a decree, if it can be done without injury to the persons not actually before the Court. This last is an important qualification of the exception; for there are still cases (as we have seen, and shall hereafter see), in which Courts of Equity will not proceed to a decree without all the persons in interest being made parties, where the decree must directly and essentially affect their interests.¹ We say, where the decree must directly affect their interests; for in every case, in which a decree is made, where the parties being numerous, are on that account dispensed with, and all of them are not before the Court, their interests may be incidentally and indirectly affected; as, for example, if in a Bill of this sort an account is taken, and there is a decree, giving a certain portion of a fund to the parties before the Court, the parties not before the Court will be bound by that account and decree, and the Court will protect the defendant acting under the decree, and obeying it, from future litigation on the points so decided; for otherwise, the defendant would really be deprived of all protection.² This will appear more fully in our subsequent remarks.

[*95] *§ 95. Thus, we see, that by the general rule the parties, though numerous, are still ordinarily required to be brought before the Court; that there is an exception allowed, founded on the mere fact of numerousness, when it may amount to a great practical inconvenience or positive obstruction of justice; and again, that quali-

¹ Ante § 81. *Evans v. Stokes*, 1 Keen R. 32; *Beaumont v. Meredith*, 3 Ves. & B. 184; *Sandare v. Moore*, 1 Russ. R. 441; *Leigh v. Thomas*, 2 Ves. 312; *West v. Randall*, 2 Mason R. 193 to 196.

² *Mitford Eq. Pl. by Jeremy*, 167-171; *Farrell v. Smith*, 2 Ball & Beatt. 337, 341, 342; *Kenyon v. Worthington*, 2 Dick. R. 668; *Hallett v. Hallett*, 2 Paige R. 18, 19, 20.

fications are introduced, which limit the effect of the exception to cases within the general mischiefs, which it was intended to remedy. In all cases governed by the exception, it seems proper to allege in the Bill, unless it is otherwise apparent upon its face, that the parties are too numerous to make it practicable, even if known, to prosecute the suit, if all are made parties.¹

§ 96. In truth, the same general principle pervades the whole course of Equity proceedings, in all these apparently irreconcilable or anomalous cases. It has been well observed, that the general rule, being established for the convenient administration of justice, ought not to be adhered to in cases, in which, consistently with practical convenience, it is incapable of application ; for then it would destroy the very purpose, for which it was established.² The exceptions, therefore, turn upon the same principle, upon which the rule is founded. They are resolvable into this, either that the Court must wholly deny the plaintiff the equitable relief, to which he is entitled, or that the relief must be granted without making other persons parties. The latter is deemed the least * evil, whenever the Court can proceed to do jus- [*96] tice between the parties before it, without disturbing the rights or injuring the interests of the absent parties, who are equally entitled to its protection.³ And even in the

¹ *Weld v. Bonham*, 2 Sim. & Stu. 91.

² *Cockburn v. Thompson*, 16 Ves. 326 ; *Adair v. New River Co.* 11 Ves. 444 ; *Good v. Blewit*, 13 Ves. 397 ; *Wendell v. Van Rensselaer*, 1 John. Ch. R. 349, 350 ; *West v. Randall*, 2 Mason R. 193, 194 ; *Dummer v. Wood*, 3 Mason R. 317, 318. *Taylor v. Salmon*, 4 Mylne & Craig, 141 ; *Male v. Malachy*, 1 Mylne & Craig, 559.

³ *West v. Randall*, 2 Mason R. 195 ; *Cockburn v. Thompson*, 16 Ves. 326 to 330. In *Cockburn v. Thompson* (16 Ves. 329), Lord Eldon, referring to the general rule, and this class of exceptions to it, said ; "The principle (of the general rule) being founded in convenience, a departure from it has been said to be justifiable when necessary. And in all these

cases, in which the Court will thus administer relief, so solicitous is it to attain the purposes of substantial justice, that it will generally require the Bill to be filed not only in behalf of the plaintiff, but also in behalf of all other persons interested, who are not directly made parties (although in a sense they are thus made so), so that they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing.¹ The Court will go further, and in such cases, it will entertain a Bill or Petition, which shall

cases the Court has not hesitated to depart from it with the view by original and subsequent arrangement, to do all, that can be done for the purposes of justice, rather than hold, that no justice shall subsist among persons, who may have entered into these contracts." In *Wood v. Dummer* (3 Mason R. 317), the general rule and the exceptions to it, were summed up in the following language:—"The general rule is, that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions, just as old and as well founded, as the rule itself. Where the parties are beyond the jurisdiction, there are so numerous, that it is impossible to join them all, a Court of Chancery will make such a decree, as it can, without them. Its object is to administer justice; and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the Court, who are entitled to relief. What is practicable, to bring all interests before it, will be done. What is impossible or impracticable, it has not the rashness to attempt; but it contents itself with disposing of the equities before it, leaving, as far as it may, the rights of other persons unprejudiced."

¹ *West v. Randall*, 2 Mason R. 193; *Adair v. New River Company*, 11 Ves. 444; *Cockburn v. Thompson*, 16 Ves. 326, 327, 328; *Good v. Blewit*, 19 Ves. 336. The case of *Good v. Blewit*, 13 Ves. 397; S. C. 19 Ves. 336, shews with what solicitude the Court will watch over and protect the interests of the absent persons, not parties, in all cases of this sort. See also *Angell v. Madden*, 1 Madd. R. 429; *Durch v. Kent*, 2 Vern. 260. Lord Redesdale, with reference to this subject, used the following language (Mitf. Eq. Pl. by Jeremy, 178):—"In some cases, when it has appeared at the hearing of a cause, that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative on the hearing, the Court has made a decree directing proceedings before one of the masters of the Court, without requiring

bring the rights and interests of the absent parties more distinctly before the Court, if there is any certainty, or even any danger of injury or injustice to them.¹ We shall presently see this doctrine fully borne out, when we advert to the cases, which illustrate the nature, and character and extent of this class of exceptions.

§ 97. The most usual cases arranging themselves under this head of exceptions are ; (1.) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole ;² (2.) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole ;³ (3.) where the parties are

the representative to be made a party by amendment or otherwise ; and has given leave to the parties in the suit to bring a representative before the master, on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative. And a representative thus brought before the master, is considered as a party to the cause in the subsequent proceedings."

¹ Ibid. See also *Weld v. Bonham*, 2 Sim. & Stu. 91.

² 1 Mont. Eq. Pl. 61 ; *Cooper Eq. Pl.* 40 ; *Id.* 186 ; *Mitf. Eq. Pl.* by Jeremy, 166, 167.

³ 1 Mont. Eq. Pl. 58, 59, 60 ; *Cooper Eq. Pl.* 40 ; *Id.* 186, 187. We are carefully to distinguish cases of this sort, from cases where there are numerous parties in a joint stock company, and a few sue to recover back deposits paid by them from the Directors, upon the ground of an original fraud practised by the Directors in the original scheme, where they allege, that the names of the other shareholders are unknown to them ; for in such a case, they do not touch the rights of any parties not before the Court, but seek for redress only for a common fraud committed against themselves. *Blair v. Agar*, 2 Sim. 239. But for such an allegation, or for an allegation of numerousness (if not apparent) each shareholder would be compellable to sue severally for his own deposit ; *Id.* ; *Jones v. Garcia de Rio*, 1 Turn. & Russ. 297 ; *Colt v. Woolaston*, 2 P. Will. 154 ; *Hitchens v. Congreve*, 4 Russ. R. 562, 576 ; *Walburn v. Ingilby*, 1 Mylne & K. 77.

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very numerous, and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the Court.¹

§ 98. In the first of this class of cases, may be included suits brought by a part of a crew of a privateer against prize agents for an account, and their proportion of the prize money. In a case of this nature, if the Bill be brought by a few of the crew, on behalf of themselves only, it will not be sustained.² But if it be brought on behalf of themselves, and all the rest of the crew, who had signed the articles, and had not received their shares of the prize money, it will be sustained, from the manifest inconvenience of adopting any other course.³ And it has been well observed, that no case can call more strongly for indulgence, than where a number of seamen have interests in the same subject matter; for their situation at any period, how many were living at any one given time, [*99] *how many are dead, and who are entitled to representation, cannot ordinarily be ascertained.⁴

¹ *West v. Randall*, 2 Mason R. 192 to 196; 1 Mont. Eq. Pl. 61; *Cooper Eq. Pl.* 41; *Id.* 186, 187; *Mitf. Eq. Pl. by Jeremy*, 170, 182.

² *Leigh v. Thomas*, 2 Ves. 312; *Good v. Blewit*, 13 Ves. 397; S. C. 19 Ves. 336; *West v. Randall*, 2 Mason R. 193, 194; 1 Mont. Eq. Pl. 61.

³ *Ibid*; *Chancey v. May*, Prec. Ch. 592; *Leigh v. Thomas*, 2 Ves. 312. *Pearson v. Belchier*, 4 Ves. 627. The case of *Moffat v. Farquharson* (2 Bro. Ch. R. 338), contains a contrary doctrine; but the doctrine in that case has been overruled. See 2 Bro. Ch. R. 338, Mr. Belt's note (1). See also *Cullen v. Duke of Queensbury*, 1 Bro. Ch. R. 101, and Mr. Belt's note (1); *Lloyd v. Loaring*, 6 Ves. 777.

⁴ *Good v. Blewit*, 13 Ves. 397; *Leigh v. Thomas*, 2 Ves. 712; *West v. Randall*, 2 Mason R. 193, 194; *Hendrick v. Robinson*, 2 John. Ch. R. 296, 297. In the case of *Good v. Blewit* (13 Ves. 397), which was the case of a foreign crew suing for the benefit of all the crew; the Master of Rolls (Sir Wm. Grant) took notice of the fact, that it was a case, in which the defendants sued for the whole. He said; "It is not a case, where a great number of persons, who ought to be defendants, are

§ 99. Similar reasons have induced the Court to depart from the general rule in another class of cases, where the suit is brought on behalf of many persons in the same interest, and all the persons answering that description cannot easily be discovered or ascertained. Thus, a few creditors may maintain a suit on behalf of themselves and all the other creditors of a deceased debtor, against his proper representatives for an account and application of his assets, real as well as personal, in payment of their demands.¹ In such a case, the whole administration and settlement of the estate is assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. The other creditors may come in under the decree, and prove their debts before the Master, to whom the cause is referred, and obtain satisfaction of their demands, equally with the plaintiffs in the suit; and under such circumstances they are treated as parties to the *suit. If, however, they decline so to come in [*100] before the Master, they will be excluded from the benefit of the decree; and yet they will from necessity be considered as bound by the acts done under the authority of the Court.² But a few creditors will not be permitted

brought before the Court, but are to be bound by a decree against a few." This latter circumstance, however, would not be decisive in all cases of defendants; though it might be in some. See *Meux v. Maltby*, 2 Swanst. R. 296 to 299, and the cases there cited; *Mayor of York v. Pilkington*, 1 Atk. 284; *Calvert on Parties in Equity*, 46.

¹ 1 Mont. Eq. Pl. 62; Mitf. Eq. Pl. by Jeremy, 166. In *Burney v. Morgan* (1 Sim. & Stu. 358), it was held, that a mortgagee cannot sue in behalf of himself, and all other creditors, because he has no common interest with them; and when a creditor sues in behalf of all, it is permitted upon the ground of there being a common interest in all. Post § 102.

² Mitf. Eq. Pl. by Jeremy, 165, 166; *Leigh v. Thomas*, 2 Ves. 212, 213; *Neve v. Weston*, 3 Atk. R. 557; *Cooper Eq. Pl.* 39, 106; *West v. Randall*, 2 Mason R. 194; *Law v. Rigby*, 4 Bro. Ch. R. 60; *Good v. Blewit*, 19 Ves. 336; *Hendricks v. Robinson*, 2 John. Ch. R. 283, 296; *Hallett v.*

to bring a Bill of this sort, for an account and administration of the assets, without saying in the Bill, that it is [*101] brought *on behalf of themselves, and all the rest of the creditors ; for otherwise, the executor or administrators might be compellable to account *de novo* with all the other creditors in other Bills.¹ But when the Bill is

Hallett, 2 Paige R. 18, 19 ; Ross v. Crary, 1 Paige R. 417, note. Mr. Chancellor Walworth, in Hallett v. Hallett (2 Paige R. 19), has expounded this whole doctrine with great clearness. "If" says he, "there are many parties standing in the same situation, as to their rights or claims upon a particular fund, and, where the shares of a part cannot be determined, until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate or residuary legatees, all the parties interested in the fund must in general be brought before the Court, so that there may be but one account, and one decree, settling the rights of all. And if it appears on the face of the complainant's Bill, that an account of the whole fund must be taken, and, that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object, that all, who have a common interest with the complainants, are not before the Court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate, who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute on behalf of themselves, and all others standing in the same situation, who may afterwards elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation. If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims, which they might have had upon the same. But if the rights of such absent parties are known and ascertained by the proceedings in the suit, provision will be made for them in the decree. (Anonymous, 9 Price's Rep. 210). In either case the Court will protect the defendants against any further litigation in respect to the fund." In the case of creditors coming in before the Master, they have been held entitled to re-hear the cause, though not technically parties, because the decree affected their interest. Giffard v. Hort, 1 Sch. & Lefr. 409.

¹ Leigh v. Thomas, 2 Ves. 313 ; Brown v. Ricketts, 3 John. Ch. R. 553, 555, 556. But see Brinckerhorff v. Brown, 6 John. Ch. R. 151. In the ordinary proceedings before the Master, all other creditors, except those coming in before the Master, and proving their debts, are generally excluded from the benefit of the decree. But still they may file a Bill,

brought on behalf of themselves, and all others, all creditors are, in a sense, deemed to be before the Court.¹

subsequently, to establish their own rights, not disturbing what has been done under the decree. But, sometimes, the Court gives directions, in cases of this sort, to the Master, to ascertain the claims of all persons interested. In such a case, if the Master reports any claims due to particular creditors, and others, who do not come in under the decree, the Court will sometimes retain the Bill for their benefit, and direct the Master to advertise anew for them to come in, and take the benefit of it; as, for example, if it should appear upon the Master's report, that they were beyond sea, or out of the jurisdiction at the time. Lord Eldon, in *Good v. Blewit* (19 Ves. 336, 339), explained this subject very fully. Referring to the decree in that case, which directed, that the Master should report as to all the persons entitled to a share of the proceeds of a prize, he said; "Taking this decree to be right, under the special circumstances of the case, it seems to require some addition. Upon the Master's report, in a creditor's suit, the Court knows nothing of any demand except of those persons, who have established their debts. But the special circumstances of this case are, that the original decree directs the Master to state, who are entitled: and he has stated, that, not only those, who have come in, but that others also, who have not come in, are entitled to certain shares. Upon that fact, therefore, the Court is to decide, whether, notwithstanding their title to a proportionable sum upon an account, it would exclude them from the benefit of the decree, or would leave them to do, what they would be entitled to do, to institute a new suit, if they think proper; as it is clear by analogy to the case of creditors, that, if they do not come in, and are excluded from the benefit of this decree, that does not prevent another Bill, having due regard to costs, &c. Generally, however, the Court does not take notice of other creditors; as the report does not bring before it that fact, to which, if in a special case it does appear, the Court does give attention. Where, for instance, there are circumstances accounting for the non-claim, as that some of the parties had gone to sea, the Court would take care, that what the report stated them to be entitled to should not be lost. The question now is, whether the opportunity of making out that case ought to be given; and it seems to me, that further advertisements ought to be directed as to the claimants not coming in; not taking the account as to them; but taking it as to the others. That direction, therefore, may be inserted in the decree for the purpose of bringing before the Master these individuals, whom he has stated to be entitled; and, that with regard to those, who shall come in upon farther advertisements, he shall execute the decree, and not as to the others." See also *Angell v. Haddon*, 1 Madd. R. 529; *Anon.* 9 Price R. 210, and *Hallett v. Hallett*, 2 Paige, 19, 20, *supra*, note (1); *Cockburn v. Thompson*, 16 Ves. 327.

¹ *Adair v. New River Company*, 11 Ves. 444.

§ 100. Lord Redesdale has remarked upon this class of cases, that "As a single creditor may sue for his demand out of the personal assets, it is rather matter of convenience, than of indulgence, to permit such a suit by a few on behalf of all the creditors. And it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome on the fund to be administered. For, if a Bill be brought by a single creditor for his own debt, he may, as at Law, obtain a preference by judgment in his favor over other creditors in the same degree, who may not have used equal diligence."¹ There is great truth in this remark; for Courts of Equity are thus enabled to act fully upon their own favorite maxim, that equality is equity. But it does [*103] *not disclose the whole ground of the doctrine. It is, on the other hand, the real danger of doing injustice to parties not before the Court, where interests might be jeopardized without being represented; and the utter impracticability of making all the interested persons actually and technically parties, from their being unknown, or being so exceedingly numerous, that any obligation to join them all, would amount to a positive

¹ Mitf. Eq. Pl. by Jeremy, 166, 167. But a single creditor is not permitted in this way to acquire any preference over creditors of a higher degree, nor necessarily in all cases over those of an equal degree; for wherever a single creditor brings a Bill, though no general account of the debts is directed; but the course is, to direct an account of the personal estate, and of that particular debt; yet the common decree is, that that debt shall be paid in the course of administration. All debts, therefore, of a higher nature, or even of an equal nature, may be paid by the executor, and must be allowed to him in his discharge. *Atty. Genl. v. Cornthwaite*, 2 Cox R. 44; *Bedford v. Leigh*, 2 Dick. R. 708; *Newland v. Champion*, 1 Ves. 104; *Peacock v. Monk*, 1 Ves. 131; *Pritchard v. Hicks*, 1 Paige R. 270; *Anon.* 3 Atk. 572.

denial of justice, which constitutes the main ground of the doctrine.¹

¹ *Chancey v. May*, Prec. Ch. 592; *Hendricks v. Robinson*, 2 John. Ch. R. 296. When a single creditor sues for his own debt (as we have seen that he may), he need not make any person but the personal representative of the deceased a party. We have also seen, that in such a suit, the usual decree is, not to direct a general account of the whole estate, but only a decree for an account of the personal assets, and the payment of the debt in the course of administration. But although this is the usual decree, it is not therefore to be considered as absolutely incompetent for the Court, upon such a Bill, to make a more general decree for a general account, as is done in case of a common Bill for all the creditors. On the contrary, a case may be made out, upon the answer and proofs, which may render it, if not indispensable, at least highly expedient for the Court, for the purposes of justice, to adopt this latter course. 1 Story Comm. on Eq. § 547, note (2), and the authorities there cited. See also *Wiser v. Blackley*, 1 John. Ch. R. 438; *McKay v. Green*, 3 John. R. 58, 59; *Thompson v. Brown*, 4 John. Ch. R. 610, 630, 643, 546; *Ross v. Crary*, 1 Paige R. 417, 419, note; *Hallett v. Hallett*, 2 Paige R. 18, 19. In this last case, Mr. Chancellor Walworth used the following language: "I apprehend the reason, why one creditor, or one legatee, who has a specific claim against the estate, may sue in his own name only, and yet, that a decree may be made on such Bill for a general distribution of the fund to be this: It does not appear upon the Bill, that there are not sufficient assets to pay all the creditors or legatees; and therefore no general account and distribution of the fund may be necessary. I understand the rule in that case to be, if the executor admits a sufficiency of assets, there is to be a decree for the payment of the particular debt or legacy, without any general decree for an account. Hence, the ordinary prayer in the Bill, that the defendant may admit assets, or set out an account in his answer; and if he admits assets he is not obliged to set out the account. (Per Sir Thomas Plumer, V. C., Cooper's Rep. 215). But if, by the answer of the defendant, it appears, there will be a deficiency of assets, so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the Court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity. If several suits are depending in favor of different creditors or legatees, the Court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary." In the case of *Egberts v. Wood* (3 Paige R. 520) the same learned judge said: "Where it appears upon the face of the Bill, that there will be a deficiency in the fund, and that

§ 101. But although one creditor may thus be permitted to file a Bill on behalf of himself and all the other creditors; yet this is to be understood with this limitation, that the Bill is not filed for any peculiar interest of the plaintiff; but it is one, where all the creditors have a common interest with him in all the objects of the Bill. A mortgagee, therefore, cannot sue on behalf of all the creditors in regard to his mortgage debt; for he has no common interest with the creditors at large in enforcing it.¹ Upon the same ground, if the plaintiff seeks to establish a priority of right or charge, he cannot file a Bill on behalf of all the creditors; but the latter must be actual parties; for the suit is not homogeneous, or for objects equally beneficial to all the parties; and therefore each creditor has a distinct right and interest to contest the plaintiff's claim.²

§ 102. Upon similar grounds, where there are a number of creditors, who are parties to a deed of trust for the payment of debts, a few have been permitted to sue, on behalf of themselves and the other creditors named [*105] *in the deed, to enforce the execution of the trust. It is obvious, that in many such cases, unless all the creditors were brought before the Court, or were allowed to come before the Court, the due execution of the trust might be impracticable, or be enforced injuriously to the interests of the creditors not parties.³ It has

there are other creditors or legatees, who are entitled to a ratable proportion with the complainants, such creditors or legatees should be made parties to the Bill, or the suit should be brought by the complainants on behalf of themselves and all others standing in a similar situation, and it should be so stated in the Bill."

¹ *Burney v. Morgan*, 1 Sim. & Stu. 358, 362; *Jones v. Garcia del Rio*, 1 Turn. & Russ. 297; *White v. Hillacre*, 3 Younge & Coll. 597. See *Palmer v. Dutcher*, 7 Paige R. 437.

² *Newton v. Earl of Egmont*, 5 Sim. R. 137; S. C. 4 Sim. R. 574, 585.

³ *Mitf. Eq. Pl. by Jeremy*, 167; *Id.* 175, 176; *Routh v. Kinder*, 3

been remarked by Lord Redesdale, that "This seems to have been permitted purely to save expense and delay. If a great number of creditors thus specially provided for by a deed of trust were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements by the death of creditors; and if many were made defendants the same inconvenience might happen, and additional expense would unavoidably be incurred."¹

§ 103. The mischief would not in many cases stop here; for where the debts due to any of the creditors were unascertained, and depended upon the future adjustment of accounts, and the funds under the trust deed were inadequate to a full discharge of all the debts; or where any of the creditors had a preference, and their debts were unliquidated; or where any of the preferred creditors were out of the country;—in these and many other instances, the difficulty of administering substantial justice between the creditors, if the Court were compelled to wait, until all of them were technically parties before the Court, would be almost insuperable. A single creditor, in cases of this sort, would not be permitted by a Court of Equity to sue for his own single *demand without bringing the other creditors in [*106] some form or manner before the Court, from the obvious inconvenience and apparent injustice in deciding upon the extent of their rights and interests in their absence.²

Swanst. R. 145, note; Boddy v. Kent, 1 Meriv. R. 361; Weld v. Bonham, 2 Sim. & Stu. 91; Handford v. Storie, 2 Sim. & Stu. 196; Peacock v. Monk, 1 Ves. 131; 1 Mont. Eq. Pl. 62; Newton v. Earl of Egmont, 4 Sim. R. 574; S. C. 5 Sim. 130; Atherton v. Worth, 1 Dick. R. 375.

¹ Mitf. Eq. Pl. by Jeremy, 167.

² Mitf. Eq. Pl. by Jeremy, 167. In Joy v. Wirtz (1 Wash. Cir. R. 417), which was a suit in Equity, brought by two creditors, for the purpose of setting aside a release made by all the creditors to a debtor upon

The substitution, therefore, of a few to sue for the benefit of the whole, at the same time, that it subserves the interests of all the creditors, by enabling them to make themselves active in the final apportionment and distribution of the trust funds, gives to the watchful and diligent an opportunity of having prompt justice done to them, without any wanton sacrifice of the rights of others, or any sacrifice, not caused by the laches or indifference of the latter.¹

an assignment of his estate for their benefit, Mr. Justice Washington thought, that all the creditors should have been made parties, or the Bill should have been brought on behalf of all; for all of them might be affected by the decree, setting aside the release, as it would not be set aside as to a part of the creditors, and left to operate on others. On that occasion he said: "Where the creditors are to be paid out of a particular fund, or are united in the same transaction so as to produce a privity between them, all are to join;" "either by name, or by being represented by a part suing in the names of all."

¹ The remarks of Lord Eldon on this subject in *Cockburn v. Thompson* (16 Ves. 327) deserve to be cited here. "In the familiar case" (says he) "of creditors suing on behalf of themselves and all others, what an infinite number of valuable interests may be bound, in a sense, not absolutely. As, where the Court for convenience dispenses with the presence of parties, the principle leads it, by future arrangement, to find out the means of giving them an opportunity in some shape of coming in. Upon questions of marshalling, whether real estate is charged with debts, &c. the case may be sustained originally perhaps by persons, having interests of the least value. But certainly any person, afterwards becoming interested, would have his interest as much attended to, as if he had been originally a party. The Court must always be open to questions upon the carriage of the cause, applications for re-hearing, &c.; and I should upon principle find the means, if not supplied by precedent, of giving a creditor, coming in after the institution of a suit, the opportunity of supporting his interest better than the plaintiff could. A bond creditor having been in partnership with the debtor, may, if there are assets, go in before the master; but the Court must find the means of ascertaining, whether such creditor was not a debtor on the partnership account; and the account must be taken; or perhaps the Court may find itself obliged to direct a Bill to be filed; reserving a proportion of the assets for the result of the inquiry in an actual suit. Lord Thurlow determined, that the general principle requires a residuary legatee to bring before the Court all persons

§ 103. *a.* The foregoing are cases of a creditor's Bill brought against the common debtors to all of them or their representatives. And ordinarily in such cases, all the debtors or their representatives must be made parties defendants. But cases may occur, where the Court will dispense with some of the debtors. Thus, for example where one of several judgment debtors is insolvent and wholly destitute of property, and the fact is distinctly stated in the Bill, it is not necessary to make him a defendant to a creditor's bill to obtain satisfaction out of equitable interests or choses in action of the other defendants.¹

* § 104. By analogy to the case of creditors, [*107] a legatee, at least if he is not a residuary legatee, is permitted to sue the personal representative of the testator on behalf of himself and all other legatees, in order to procure a settlement of the accounts of his administration and a payment of all the legatees.² In a case of

interested in the residue. But that admits of exception, where it is not necessary, or convenient, that all should be before the Court; as in *Chaney v. May* and the case of *The Water Works Company*. If a residue had been left equally among all the individual members of those Societies, upon the same ground of impracticability and inconvenience, it would be competent to some of them to file a Bill on behalf of themselves and the others; though suing as residuary legatees." See also *Anon.* 9 Price R. 210, where a distinction is taken between the case of creditors and that of legatees, as to their being excluded from the benefit of the decree, if they do not appear.

¹ *Van Cleef v. Sickles*, 5 Paige R. 505.

² We have had occasion in a preceding note (*Ante* § 89, note) to state, that there is some diversity of judicial opinion on the point, whether one residuary legatee can maintain a Bill for himself and all the other residuary legatees, who are interested; or whether he must make them technical parties to the bill. If a legatee be the sole residuary legatee, there does not seem to be any real difficulty in his maintaining a Bill, either for himself alone, or for himself and all the other legatees and parties in interest; for in either case a general account of the assets must be taken; and the master will, by the decree, be directed to inquire and state, who are the

this nature such a legatee might sue for his own legacy only.¹ But a suit on behalf of all the other legatees has the same tendency to prevent inconvenience and expense, as a suit by one creditor on behalf of all the creditors of the same fund.² But in a suit brought by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets

other legatees and other persons interested in the assets; and the final decree, after the account taken, will be for such assets as belong to the residuary legatee after all other claims are paid. Of course, under the interlocutory decree all other legatees and persons interested will have a right to appear before the master, and assert their claims, whether the residuary legatee sue alone, or in behalf of all other persons interested. See *Cooper Eq. Pl.* 39, 40; *Bennett v. Honeywood*, *Ambler R.* 709, 710; *Montagu v. Nucella*, 1 *Russ. R.* 173; *Kettle v. Crary*, 1 *Paige R.* 417, note; *Hallett v. Hallett*, 2 *Paige R.* 20, 21.

¹ *Mitf. Eq. Pl. by Jeremy*, 167; *Brown v. Ricketts*, 3 *John. Ch. R.* 553; *Haycock v. Haycock*, 2 *Ch. Cas.* 124; *Atty. Genl. v. Ryder*, 2 *Ch. Cas.* 93. See *Pritchard v. Hicks*, 1 *Paige R.* 273; *Fisk v. Howland*, 1 *Paige R.* 23; 1 *Mont. Eq. Pl.* 62, 63.

² *Mitf. Eq. Pl. by Jeremy*, 167; *Haycock v. Haycock*, 2 *Ch. Cas.* 124; *Lloyd v. Loaring*, 6 *Ves.* 779; *Good v. Blewit*, 13 *Ves.* 339; *Cockburn v. Thompson*, 16 *Ves.* 327; *Atty. Genl. v. Ryder*, 2 *Ch. Cas.* 178; *Brown v. Ricketts*, 3 *John. Ch. R.* 553; *Fisk v. Howland*, 1 *Paige R.* 20, 23; *Kettle v. Crary*, 1 *Paige R.* 417, note; *Hallett v. Hallett*, 2 *Paige R.* 20, 21. In *Morse v. Sadler* (1 *Cox R.* 352), the Master of the Rolls took a distinction between the case of a legacy payable out of personal estate and that of a legacy chargeable on real estate. The Bill in that case was filed by one legatee on behalf of himself and all the other legatees, without making the others parties. On that occasion he said: "That it was an established rule, that legatees out of personal estate only need not be parties; but every person claiming an interest out of real estate must be before the Court." And he directed the cause to stand over to add the other legatees, as parties. It is not very clear, upon what precise ground this distinction proceeds. It may perhaps be for the reason suggested by Lord Hardwicke in *Peacock v. Monk*, 1 *Ves.* 131, that the executor, in all cases sustaining the person of the testator, is to defend the estate for himself, for all creditors, and for all legatees. See *Wiser v. Blackley*, 1 *John. Ch. R.* 433. In a Bill against an executor, by creditors or legatees, it is not ordinarily necessary to make the residuary legatee a party for the same reason. *Lawson v. Barker*, 1 *Bro. Ch. R.* 303; *Anon.* 1 *Vern. R.* 261; *Wainwright v. Waterman*, 1 *Ves. jr.* 310; *Brown v. Dowthwaite*, 1 *Madd.*

for the payment of the legacy, warrants an immediate personal decree against himself (by which he alone will be bound), the Court will direct a general account of all the legacies of the same testator; and if there is a deficiency of assets, it will direct payment of the legacy sued for ratably only with the other legacies, as no preference is allowed in equity among legatees, standing in *pari jure*, in the administration of assets.¹ Indeed, if it appears from the face of the Bill, that there will be a deficiency in the fund, and that there are other persons, who are interested in it, as creditors, or legatees, or otherwise, it seems proper, that all the persons in interest should either be made direct parties, or the Bill

R. 446. In cases of interests in the realty, there is no person authorized by law to represent the interests of all legatees in the realty. In *Brown v. Ricketts* (3 John. Ch. R. 553), Mr. Chancellor Kent seems to have acted against the distinction under peculiar circumstances. See also *Fisk v. Howland*, 1 Paige R. 23; *Pritchard v. Hicks*, 1 Paige R. 270. In *Hallett v. Hallett*, 2 Paige R. 22, Mr. Chancellor Walworth affirmed the doctrine in *Morse v. Sadler* (1 Cox R. 352); and thought the case of *Brown v. Ricketts* (3 John. Ch. R. 553) properly decided upon its own circumstances.

¹ Mitf. Eq. Pl. by Jeremy, 168; Cooper Eq. Pl. 39, 40. See *Haycock v. Haycock*, 2 Ch. Cas. 124; *Montagu v. Nucella*, 1 Russ. R. 173; *Anon*, 9 Price R. 210. In this respect there seems to be a distinction between the case of creditors and that of legatees. In *Anon*, 9 Price R. 210, Lord Ch. Baron Richards took notice of it. "The reason" (he observed) "why creditors are excluded, unless they should come in within a limited time, is, because they could not be known to the Court, or ascertained, unless they should appear, and parties interested were not to be delayed by the laches of creditors. But that does not apply to legatees, who are entitled to have a proportional part of the fund set apart for the satisfaction of their legacies." See *Farrell v. Smith*, 2 Ball & Beatt. 347. Where the Court has made a decree in a case to ascertain the rights of legatees, and distribute the funds; and the funds have been distributed among the legatees accordingly, the Court will not permit a legatee afterwards to file a Bill against the executor for payment of his legacy. His proper remedy, if any, is to file a Bill to reverse the original decree as erroneous. *Farrell v. Smith*, 2 Ball & Beatt. 341.

be filed on behalf of all of them. And, at all events, the Court will take care of their interests by permitting them to come in and assert their claims before the Master by its interlocutory decree.¹

§ 105. Upon similar grounds, where a distribution or application of the personal estate of a deceased person [*110] *is to be made among his next of kin, or among persons claiming under a general description, as, for example, among the relations of a testator or other person, where it may be uncertain, who are all the persons answering that description, or the circumstances will make it extremely inconvenient, a Bill will be allowed to be filed by one claimant on behalf of himself and all the other persons equally entitled.² Such a Bill is maintainable, not only upon the ground of the supposed uncertainty of the persons, answering the description; but also, where they may be known, and yet they are exceedingly numerous.³

§ 106. But although the Court will, in cases of this sort, entertain jurisdiction by creditors, legatees and distributees on behalf of themselves and all others, and will exonerate the executor or administrator, or other trustee, for payment of the assets pursuant to its decree; yet it is not to be understood, that such a decree absolutely binds the absent creditors, legatees, or distributees, who have

¹ Ante, § 100, note; *Hallett v. Hallet*, 2 Paige R. 19, 20; *Egberts v. Wood*, 3 Paige R. 519, 520; *Mitf. Eq. Pl.* by Jeremy, 178.

² *Mitf. Eq. Pl.* 169; *Id.* 167, 168; *Bennett v. Honeywood*, *Ambler*, R. 709, 710; *Montagu v. Nucella*, 1 Russ. R. 173; 1 *Mont. Eq. Pl.* 62, 63.

³ *Hallett v. Hallett*, 2 Paige R. 19, 20, 21; Ante § 89, note; *Cockburn v. Thompson*, 16 Ves. 328, 329; *Manning v. Thesiger*, 1 Sim. & Stu. 106; *Cranbourne v. Crispe*, *Cas. Temp. Finch* 105. In *Manning v. Thesiger* (1 Sim. & Stu. 106) where the plaintiffs sued on behalf of themselves and the other legatees and appointees under a will to have the fund transferred to the Court of Chancery, an objection was taken, that all the

had no opportunity of proving and presenting their claims, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor, or administrator, or trustee; yet they have a right to assert their claim to a share in the property, against the creditors, legatees, or distributees, who have received it.¹

appointees, who were *cestuis que trust* under the will ought to be made technical parties. But it being stated, that they were very numerous, (more than fifty in number) the Vice Chancellor said, that they ought regularly to be all made parties to the suit. But as they were very numerous, and as the Bill was filed on behalf of themselves and the other appointees, the rule might, in this case, be dispensed with. So that numerousness, as well as absence out of the jurisdiction, or being unknown, may constitute a good ground for dispensing with all the residuary legatees being made parties. The same principle would apply, where the individual members of a society, very numerous, were made residuary legatees. *Cockburn v. Thompson*, 16 Ves. 328.

¹ *David v. Frowd*, 1 Mylne & K. 200; *Gillespie v. Alexander*, 3 Russ. R. 130. The judgment of the Master of the Rolls, in *David v. Frowd*, 1 Mylne & K. 200, is so important on this point, that the following extract is given: "The personal property," said he, "of an intestate is first to be applied in payment of his debts, and then distributed amongst his next of kin. The person, who takes out administration to his estate, in most cases, cannot know, who are his creditors, and may not know, who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A Court of Equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator. Upon the application of any person claiming to be interested, the Court refers it to the Master to inquire, who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters, where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master, within a reasonable time stated; and when that time is expired, it is considered, that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those, who have, before the Master, established an apparent title. Such proceedings having been taken, the Court will protect the administrator against any future claim. But it is obvious, that the notice given by advertisements may, and must, in

§ 107. The second class of cases, constituting an exception to the general rule, and already alluded to,

many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice, that the proceedings of the Court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one, who has no right to it. It is for this reason, that if a party, who has not gone in before the Master, applies to the Court after the Master has reported the claimants, who have established before him an apparent title, and makes out, that he has not been guilty of wilful default in not claiming before the Master, the Court will refer it to the Master, to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the Master. This is every day's practice with respect to creditors. For the same reason, if a creditor does not happen to discover the proceedings in the Court, until after the distribution has been actually made by the order of the Court amongst the parties, having, by the Master's report, an apparent title, although the Court will protect the administrator, who has acted under the orders of the Court; yet, upon a Bill filed by this creditor, against the parties, to whom the property has been distributed, the Court will, upon proof of no wilful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor, that which of right belongs to him. For this principle, I need only refer to the case of *Gillespie v. Alexander*, before Lord Eldon, which has been introduced in the argument. There, the estate had been apportioned, under the order of the Court, amongst the legatees, and actually paid to them; except that, one legatee, being an infant, his proportion could not be paid to him, but was carried to his account in the suit. After this distribution by the order of the Court, a creditor, who had not claimed before the Master, established his title; and Lord Lyndhurst, then Master of the Rolls, acting upon the principle, which I have stated, directed payment of the creditor's demand out of the fund in Court, which had been carried to the account of the infant. Lord Eldon considered, most justly, that the share carried to the account of the infant was as much the property of the infant, as if it had been actually paid to him, and that the infant's share was liable to the creditor's demand only in the proportion, that the other legatees were liable in respect of the sums, which they had received, and to that extent reversed Lord Lyndhurst's order; thus establishing the principle, that legatees, who had received payment under the order of the Court, were bound to refund to a creditor, who had never

is, where the parties form a voluntary association for public or private purposes, and those, who sue or defend, may fairly be presumed to represent the rights and interests of the whole.¹ In cases of this sort, the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements, and other impediments, arising from intermediate deaths or other accidents, or changes of interest. Under such circumstances, as there is a privity of interest, the Court will allow a Bill to be brought by some of the parties on behalf of themselves and all the others, taking care, that there shall be a due representation of all substantial interests before the Court.² And such a

claimed before the Master. It is argued, that there is a distinction between a creditor, and a person claiming as next of kin, because a creditor, it is said, has a legal title; the right being equal, there is no distinction in a Court of Equity between a legal and equitable title. It is not, however, accurate to say, that a creditor continues to have a legal title, after the fund has been administered in this Court; he has, under such circumstances, lost that title by the administration of the Court, and his only remedy is in a Court of Equity. It is argued, also, that the case is extremely hard upon the party, who is to refund, for that he has full right to consider the money as his own, and may have spent it, and, that it would be against the policy of the law to recall money, which a party has obtained by the effect of a judgment upon a litigated title. There is here no judgment upon a litigated title; the party, who now claims by a paramount title, was absent from the Court, and all that is adjudged is, that upon an inquiry, in its nature imperfect, parties are found to have a *prima facie* claim, subject to be defeated upon better information. The apparent title under the Master's report is in its nature defeasible. A party, claiming under such circumstances, has no great reason to complain, that he is called upon to replace, what he has received against his right: complaints of hardship come with little force from the party, who seeks to support a wrong."

¹ Mont. Eq. Pl. 58 to 60; *Mandeville v. Riggs*, 2 Peters R. 487.

² Cooper Eq. Pl. 40; *Chancey v. May*, Prec. Ch. 502; *Lloyd v. Loaring*, 6 Ves. 773; *West v. Randall*, 2 Mason R. 194, 195, 196; *Baldwin v.*

Bill must be brought on behalf of all the parties in interest; for if it be brought for the plaintiffs alone, it will not be sustained by the Court for the want of proper parties.¹

§ 108. This doctrine may be illustrated by advert-
ing to a case, which has occurred in judgment. A Bill
was brought by the treasurer and managers of certain
[*114] *works, called the Temple Mills Brass Works,
on behalf of themselves, and all other proprietors and
parties in the first undertaking, except the defendants,
who were the late treasurers and managers (about thir-
teen in number), for an account for several mismanage-
ments, misapplications, and embezzlements of the part-
nership funds. The partnership consisted originally of
eighteen shares, and these were afterwards divided
into eight hundred. The defendants demurred, because
the rest of the proprietors were not made parties; and
the demurrer was overruled upon the ground, first, that
the Bill was on behalf of all other proprietors, except
the defendants, and so all of them were, in effect,
parties; and secondly, that it would be impracticable
to make them all parties by name, and there would be
continual abatements by death, or otherwise, and so no
coming at justice, if all were to be made parties.²

§ 109. The like doctrine has been applied to a case,
where a Bill was brought by some shareholders in a
joint stock company (the stock of which was divided
into six thousand shares), on behalf of all the sharehold-
ers, to compel the directors of the company to refund
moneys improperly withdrawn by them from the stock

Lawrence, 2 Sim. & Stu. R. 18; *Hickens v. Congreve*, 4 Russ. R. 562,
576, 577.

¹ *Baldwin v. Lawrence*, 2 Sim. & Stu. 18.

² *Chancey v. May*, Prec. Ch. 592.

of the company, and applied to their own use. Upon the objection being taken of the want of proper parties, the Court overruled it, upon the ground, that justice would be 'unattainable, if all the shareholders were required to be made parties to the suit; and that a separate Bill by each shareholder, to recover his proportion of the money, would produce enormous inconvenience, and multiplied litigation; and that all the *shareholders had one common right and one [*115] common interest to be subserved by the suit.¹

§ 110. The like doctrine has been applied to a case, where there was an Association of Widows, contributing to a fund to pay them annuities. The fund having proved insufficient, application was made to the Court by Bill, by some of the widows, on behalf of themselves and all others, against the directors, to compel a specific performance of the original articles of subscription, they having reduced the annuities. One of the difficulties was, that all the persons interested were not before the Court by name; for every subscriber, who had not been a member long enough to become an annuitant, and the representatives of those, who were dead, had an interest to state their title in, or to recover, the money. The Court sustained the Bill, upon the ground, that it virtually brought the parties before the Court, as far as was practicable and convenient; and, that it was better to go as far as possible towards justice, than to deny it altogether.²

§ 111. The like doctrine has been applied to cases of voluntary associations, though not corporations, yet

¹ *Hickens v. Congreve*, 4 Russ. R. 562, 576.

² *Buckley v. Cater*, cited 17 Ves. 11, 15; and in *Cockburn v. Thompson*, 16 Ves. 328, 329. *Pearce v. Piper*, 17 Ves. 1, embraced the same principle.

recognised by law; as for example, that of Mutual Assurance Companies in England, where any number of persons are permitted to associate for the insurance of each other, all in effect participating as in a partnership. In such a case, it is evident, that if an occasion should arise to resort to Equity for an account, as it would be, if not impossible, almost impracticable, to bring all persons interested as parties before the Court, [*116] *the suit must be against some, being proprietors and accountable parties, and instituted by others on behalf of all.¹

§ 112. Upon similar grounds, where an act of Parliament authorized a rate, to be assessed by commissioners of a fund upon the inhabitants of a town, in aid of the fund for charitable purposes, some of the inhabitants of the town were allowed to file a Bill, on behalf of themselves and all the other inhabitants, against the commissioners of the fund, alleging a misapplication, and that the rate assessed by them was unnecessary, and asking, that the collection of it might be restrained; for they all possessed a common interest, and it was impracticable to join them all in the suit.²

§ 113. So, some of the shareholders of a canal have been permitted to bring a Bill on behalf of themselves and all other shareholders, against the commissioners of a canal, to set aside an agreement made by the commissioners contrary to the act of Parliament, authorizing the canal; for under such circumstances, all the shareholders must be deemed to have a common interest,

¹ Cooper Eq.Pl. 40; *Cockburn v. Thompson*, 16 Ves. 328, 329; *Lloyd v. Loaring*, 6 Ves. 773.

² *Att. General v. Heelis*, 2 Sim. & Stu. 67.

to compel obedience to the act of Parliament. On that occasion the Court said: "In order to enable a plaintiff to sue on behalf of himself and all others, who stand in the same relation with him to the subject of the suit, it must appear, that the relief sought by him is in its nature beneficial to all those, whom he undertakes to represent. The several persons, who advanced moneys upon the credit of these tolls, must be taken to have advanced such moneys in the confidence, that *the powers of management of the tolls, which [*117] were vested in the commissioners, would be only exercised according to the directions of the act, and a Bill, which has for its object the due exercise of those powers, and to avoid a breach of trust, must be intended in its nature beneficial to every shareholder."¹ We shall presently see, how essential an ingredient this is in cases of numerousness of parties.

§ 114. Upon the like grounds, a few of a large number of persons (as, for example, parishioners,) have been permitted to institute a suit on behalf of themselves, and the rest, for relief against acts done by commissioners appointed under an act of parliament, which are injurious to their common right, although a majority of the parishioners approve of those acts, and disapprove of the suit. For, where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong, nor deprive all other parties of their remedy by suit.²

¹ *Gray v. Chaplin*, 2 Sim. and Stu. 267. See *Mandeville v. Riggs*, 2 Peters R. 487.

² *Bromley v. Smith*, 1 Sim. R. 8. In *Jones v. Garcia del Rio* (1 Turn. & Russ. 300), Lord Eldon said, "The cases, where one party files a Bill in behalf of himself and others, are cases, where others have a choice between that and nothing. But how can it be managed, where some

§ 114. *a.* So pewholders and members of the congregation, for whose use a chapel was held in trust for religious service according to the doctrines and discipline of the Church of Scotland, have been permitted to maintain a suit on behalf of themselves and all others of the congregation, except the trustees, who were members, and were guilty of a breach of trust, to compel obedience to the trust, because the object of the suit was for the common benefit of all the members of the congregation, except the offending trustees; and in no other way could redress for the injury complained of be obtained.¹

§ 115. So, where some of the partners in a very numerous company (500 and more) filed a Bill on behalf of themselves, and all the other partners, to rescind a contract, entered into in behalf of the partnership, where it was manifest from the circumstances of the case, that it would be for the benefit of all the partners, that the contract should be rescinded, it was held by the Court, upon an objection for want of parties, that the Bill was maintainable. *Upon that occasion it was said to be a rule of Courts of Equity, that where the parties are so numerous, as to render it inconvenient or impracticable, that they should be parties to the record; if they all have one common interest, a few may sue on behalf of themselves and all the other members of the company; and that the case then in judgment fell within this predicament.²

parties are not dissatisfied, and are disposed to abide by the contract?" These remarks seem to require qualification.

¹ *Milligan v. Mitchill*, 3 Mylne & Craig, 72, 84. Post § 143.

² *Small v. Atwood*, 1 Younge R. 407, 458. The objection and the answer to it, with a review of the principal cases, were very elaborately considered by the Bar and the Court on this occasion. Lord Lyndhurst's judgment is very pointed and full on the subject. See also Lord

§ 115. *a.* So where a Bill was filed by the trustees of a voluntary Assurance Company, the members of which were constantly fluctuating, for the purpose of procuring a policy underwritten by the trustees for the Company to be cancelled on account of fraud, and the Bill alleged, that the members of the company were very numerous, and their names and places of abode unknown, and could not be ascertained by the plaintiffs; it was held, that the members need not be made parties, but the trustees alone might maintain the Bill, as the cancellation of the policy was for the common benefit of all.¹

§ 116. Thus far we have been considering cases, where the bill is brought by some proprietors, as plaintiffs on behalf of all. But the like doctrine applies to cases, where there are many persons, defendants, belonging to a voluntary association, against whom the suit is brought. In such cases, it is sufficient, that such a number of the proprietors are brought before the Court, as may fairly represent the interests of all, where those interests are of a common character and responsibility.² Thus, for example, where a committee of a voluntary club or association entered into agreements and incurred expenses on account of the club, it was held, on a Bill brought by a creditor against the committee, that it was not necessary to make the other members of the club parties to the suit, on account of the members being numerous, as well as unknown.³ In such a case, it seems

Brougham's judgment in *Walburn v. Ingleby*, 1 Mylne & K. 76, 77; and the judgment of Lord Cottenham in *Mare v. Malachay*, 1 Mylne & Craig, 559, and in *Taylor v. Salmon*, 4 Mylne & Craig, 141.

¹ *Fenn v. Craig*, 3 Younge & Coll. 216. See Post § 147 to § 150, § 216.

² *Cooper Eq. Pl.* 40; *Adair v. New River Company*, 11 Ves. 444.

³ *Cullen v. Duke of Queensbury*, 1 Bro. Ch. R. 101; *Cooper Eq. Pl.* 40; *Cousins v. Smith*, 13 Ves. 544.

proper, if indeed it be not indispensable, to charge in the Bill, that the members are numerous, and many unknown.¹

[*119] *§ 117. Upon similar grounds, where a joint stock company, created under an act of Parliament, were sued for a specific performance of an agreement for a lease, entered into by the vendors of certain real estate, which was sold to them *pendente lite*, and the treasurer and directors only were made parties, the Court overruled the objection, that all the proprietors were not made parties. On that occasion the Court, after examining the leading authorities, added the following expressive language: "There is a current of authority adopting more or less a general principle of exception, by which the rule, that all persons interested must be parties, yields, when justice requires it in the instance, either of plaintiffs, or of defendants. The rigid enforcement of the rule would lead to perpetual abatements. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear, that the present suit has sufficient parties, and that the defendants may be considered as representing the company."²

¹ In *Cullen v. Duke of Queensbury*, 1 Bro. Ch. R. 101 (note 2), the Bill charged, that the plaintiff "could not discover the several members of the club, and procure a remedy against them, as they were numerous, and many of them totally unknown to him." See also *Adair v. New River Company*, 11 Ves. 428. In *Cousins v. Smith*, 13 Ves. 544, Lord Chancellor Eldon said; that "where a legal body acts by committees, it is enough to consider the contract made with those, who think proper to undertake, looking to the body, for which they undertake, for indemnity; and the plaintiffs at law could not be nonsuited, nor could they defend an action against them on that ground."

² *Meux v. Maltby*, 2 Swanst. R. 284. The Master of the Rolls cited and commented upon all the leading authorities on this occasion, as did Lord Eldon in *Cockburn v. Thompson*, 16 Ves. 328, 329. It was said by the Vice Chancellor in *Lanchester v. Thompson* (5 Madd. R. 12, 13), that where it is attempted to proceed against two or three individuals, as

§ 118. So, where the city of London had leased certain water pipes and privileges to a lessee for a specified *rent; and the lessee had afterwards assigned it; [*120] and the assignees had subdivided the interest into nine hundred shares; and a Bill was brought to enforce the payment of the rent in arrear against the assignees and some of the shareholders; it was held, that all the shareholders need not be made parties, since it was obviously impracticable to bring them all before the Court.¹ So, where upon the creation of a water company, the Crown had received a moiety of the interest, and afterwards that moiety was subdivided into a large number of shares (over one hundred); on a suit brought by an annuitant against the company, it was insisted, that all the shareholders ought to have been made parties. But the Court overruled the objection, saying, that it was not necessary, that all the proprietors of the King's share, as well as of the company's share, (whose share had also been subdivided) should be made parties; for those parties were represented before the Court; and no objection could arise on this account; for it was impracticable to comply with the general rule.²

§ 119. Upon similar grounds, where the stockholders of an incorporated bank, on its dissolution, had divided the capital stock among themselves, leaving a deficiency to pay their outstanding bank bills, it was held, that a bill-holder might maintain a suit against some of the

representing a numerous class, it must be alleged in the Bill, that the suit is brought against them in that character.

¹ *City of London v. Richmond*, 2 Vern. 421; S. C. Prec. Ch. 156; S. C. 1 Bro. Parl. R. by Tomlins, 516. See also *Vernon v. Blackerly*, 2 Atk. 144, 145.

² *Adair v. New River Company*, 11 Ves. 443, 444.

stockholders to subject the funds in their hands to contribution *pro rata* to pay the bills in his hands without making all the stockholders parties.¹

§ 120. The third class of cases already alluded to, as [*121] * constituting an exception to the general rule as to parties, is, where the parties are very numerous, and though they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the Court, and, on this account, they are dispensed with.² In this class of cases, there is usually a privity of interest between the parties ; but such a privity is not the foundation of the exception. On the contrary, it is sustained in some cases, where no such privity exists.³ However, in all of them there always exists a common interest or a common right, which the Bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away. It is obvious, that, under such circumstances, the interests of persons, not actual parties to the suit, may be in some measure affected by the decree ; but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice.⁴ Indeed, in most, if not in all, cases of this sort, the decree obtained upon such a Bill will ordinarily be held binding upon all other persons standing in the same predicament, the Court, taking care that sufficient persons are before it, honestly,

¹ Wood v. Dummer, 3 Mason R. 315 to 319, and cases there cited.

² 1 Mont. Eq. Pl. 57, 58. Post § 285.

³ Mayor of York v. Pilkington, 1 Atk. 289 ; City of London v. Perkins, 4 Bro. Parl. Cas. 158 ; S. C. 3 Bro. Parl by Tomlins, 602.

⁴ Mitf. Eq Pl. by Jeremy, 170 ; Cooper Eq. Pl. 40, 41 ; West v. Randall, 2 Mason R. 193, 194, 195 ; Cockburn v. Thompson, 16 Ves. 328 ; Long v. Younge, 2 Sim. R. 369 ; Mayor of York v. Pilkington, 1 Atk. 282 ; Post § 285.

fairly, and fully to ascertain and try the general right in contest.¹

§ 121. Thus, for example, Bills have been permitted to be brought by the lord of a manor against some of the * tenants, or, *vice versâ*, by some of the tenants [*122] on behalf of themselves and all the other tenants, against the lord, to establish some right ; such, for instance, as a Bill with regard to suit to a mill, or a right of common,² or a right to cut turf.³ In like manner, a Bill has been permitted to be brought by the parson of a parish against some of the parishioners, to establish a general right to tithes, and the others have been bound by the decree made in the suit ;⁴ and, conversely, a Bill has been permitted to be brought by some of the parishioners, on behalf of all, against the parson to establish a parochial modus.⁵ So, where all the inhabitants of a parish had a right of common under a trust, a suit has been permitted to be brought by one, on behalf of himself and

¹ *Adair v. New River Company*, 11 Ves. 429, 444 ; *Meux v. Maltby*, 2 Swanst. 283, 284 ; *Weale v. West Midd. Water Works Comp.* 1 Jac. & Walk. 369 ; *Duke of Norfolk v. Myers*, 4 Madd. 113, 114 ; *Baker v. Rogers*, Sel. Cas. in Ch. 74.

² *Mitf. Eq. Pl. by Jeremy*, 170 ; *Cooper Eq. Pl.* 41 ; *Conyers v. Lord Abergarvenny*, 1 Atk. 285 ; *Brown v. Vermuden*, 1 Ch. Cas. 272 ; *Cockburn v. Thompson*, 16 Ves. 328 ; *West v. Randall*, 2 Mason R. 195 ; *Meux v. Maltby*, 1 Jac. & Walk. 283.

³ In such cases the Bill should be on behalf of all the tenants ; for, if it be a common right claimed by all, and interrupted, or denied to all, a Bill by a single tenant would not be proper. *Baker v. Rogers*, Sel. Cas. Ch. 74. See to the same point, *Lanchester v. Thompson*, 5 Madd. R. 13.

⁴ *Brown v. Vermuden*, 1 Ch. Cas. 272 ; *Mayor of York v. Pilkington*, 1 Atk. 282.

⁵ *Mitf. Eq. Pl. by Jeremy*, 170 ; *Rudge v. Hopkins*, 2 Eq. Abridg. 170 ; *Poor v. Clarke*, 2 Atk. 515 ; *Cooper Eq. Pl.* 41 ; *Cockburn v. Thompson*, 16 Ves. 328 ; *West v. Randall*, 2 Mason R. 195 ; *Mayor of York v. Pilkington*, 1 Atk. 282-284 ; *Meux v. Maltby*, 2 Swanst. R. 284 ; *Chaytor v. Trinity College*, 3 Anst. 841 ; *Hardcastle v. Smithson*, 3 Atk. 247.

all the other inhabitants.¹ In all these cases, although there were, or might be, distinct interests in the different tenants or parishioners; yet there was a general right and privity between them, as to the claim asserted in the Bill; and, therefore, the suit was held to be well instituted.²

[*123] * § 122. Upon similar grounds, although, by the general rule, all the persons, whose estates are affected with a rent charge, should be made parties to a suit brought to enforce it; yet, if some of them are unknown, or if they are very numerous, so that the rule becomes impracticable, or exceedingly inconvenient, the Court will dispense with it;³ and the parties before the Court will be left to seek contribution from the other persons

¹ Anon. 1 Ch. Cas. 269; Mitf. Eq. Pl. by Jeremy, 168, 169.

² *Mayor of York v. Pilkington*, 1 Atk. 282-284. The true distinction is between the cases, where the parties have a common right or general interest in the subject in controversy, and cases, where they have distinct and several interests only, and no common right or claim. See *Jones v. Garcia del Rio*, 1 Turn. & Russ. 299-301. In *Long v. Younge*, 2 Sim. R. 369, the Vice Chancellor used the following language:—"Now the rules with respect to parties are exceedingly plain and intelligible to those, who will consider the principle, on which they are founded. The general rule is, that all parties interested in the subject of the suit, shall be parties to the record. Then there are certain exceptions. And those exceptions, as far as this particular point is concerned, may be divided into two parts. One exception is, where several persons, having distinct rights against a common fund, or against one individual, are allowed, a few of them, on behalf of themselves and the rest, to file a bill for the purpose of prosecuting their mutual rights against the common fund, or the individual liable to their demand. The other exception is, where a person may have a right against several individuals, who are liable to common obligations. In that case, a Bill is allowed to be filed by a single plaintiff against some, but not all, of those persons, who are bound to make good the plaintiff's demand. This is the general division of the exceptions to the general rule." See also *Hichens v. Congreve*, 4 Russ. R. 562, 576, 577.

³ *Attorney General v. Wyburgh*, 1 P. Will. 599; S. C. 2 Eq. Abridg. 167; *Attorney General v. Jackson*, 11 Ves. 367; *Attorney General v. Shelly*, 1 Salk. R. 162; *Cooper Eq. Pl.* 41.

in a new Bill for contribution.¹ Here, also, there is a privity between all the terre-tenants as to the rent charge, although their estates are, or may be, otherwise several and distinct.

§ 123. So, where there is one general right to demand service from the individuals of a large district, as for example, a right to demand, that all the individuals of a large district should grind all the corn for their subsistence at a particular mill; in such a case, the mill-owner * may sue a few in Equity, to establish his right [*124] against all. But so many must be joined, as will fairly and honestly try the legal right.²

§ 124. But Bills have also been allowed to be brought, (Bills of peace) where there has been a general right claimed by the plaintiff, and yet no privity existed between the plaintiff and the defendants, and no general right on the part of the defendants, and where many more were, or

¹ Attorney General v. New River Company, 11 Ves. 444, 445.

² Lord Eldon alluded to this class of cases in *Adair v. The New River Company* (11 Ves. 444), and used the following language:—"There is one class of cases, very important upon this subject, viz. where a person, having at law a general right to demand service from the individuals of a large district, to his mill, for instance, may sue thus in Equity. His demand is upon every individual, not to grind corn for their own subsistence, except at his mill. To bring actions against every individual for subtracting that service, is regarded as perfectly impracticable. Therefore a bill is filed to establish that right; and it is not necessary to bring all the individuals. Why? Not that it is inexpedient, but, that it is impracticable, to bring them all. The Court, therefore, has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and, when the legal right is so established at law, the remedy in Equity is very simple; merely a bill, stating, that the right has been established in such a proceeding; and upon that ground a Court of Equity will give the plaintiff relief against the defendants in the second suit, only represented by those in the first." See also *Weale v. Middlesex Water Works Company*, 1 Jac. & Walk. 369.

might be concerned, than those brought before the Court.¹ In such cases, however, the right claimed by the plaintiff, affected the defendants and all others in the same way, and they had, or might have, a common interest to resist it. Thus, for example, the City of London brought a Bill to establish its right to a certain duty, and the Bill was against a few persons only, who dealt in those things, of which the duty was claimed; and the Bill was maintained by the Court, notwithstanding the objection, that all the [*125] * subjects of the realm might be concerned in the right. In such a case, a great number of actions might otherwise be brought, and almost interminable litigation would ensue; and, therefore, the Court suffered the Bill to proceed, although the defendants might make distinct defences, and although there was no privity between them and the city.²

§ 125. So, where a Bill was brought to quiet the plaintiff's right of fishery in the river Ouse, of which the plaintiffs claimed the sole fishery for a large tract against the defendants, who (as the Bill suggested) claimed several rights, either as lords of manors, or as occupiers of the adjacent lands, and also for a discovery and account of the fish, which they had taken; an objection was taken, that there was no privity between the defendants, but that the Bill treated them as distinct trespassers, and that there was no general right to be established against them. The Court, however, sustained the Bill; for there was a general right of a sole fishery asserted by the plaintiffs against all the defendants; and the defendants were not precluded from setting up distinct

¹ Mitf. Eq. Pl. by Jeremy, 145, 146; *Tenham v. Herbert*, 2 Atk. 484; *West v. Randall*, 2 Mason R. 194, 195.

² *City of London v. Perkins*, 4 Bro. Parl. Cas. 158 (Tomlin's Edit. 3 Brown P. C. 602); *Mayor of York v. Pilkington*, 1 Atk. 283, 284.

exemptions and distinct rights in their defence.¹ The benefit to be obtained by such a Bill, under such circumstances, is, that it may furnish a ground to quiet the general right, not only as to the persons before the Court, but as to all others in the same predicament.²

¹ *The Mayor of York v. Pilkington*, 1 Atk. 282, 284; *Tenham v. Herbert*, 2 Atk. 484; Mitf. Eq. Pl. by Jeremy, 145, 146.

² Lord Hardwicke (in 1 Atk. R. 284), on that occasion said; "Here are two causes of demurrer, one assigned originally, and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right, that can be established against them, nor any privity between the plaintiffs and them. In this respect it does differ from cases, that have been cited, of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases, where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the Court. Such are bills for duties, as in the case of the *City of London v. Perkins*, in the House of Lords, where the city of London brought only a few persons before the Court, who dealt in those things, whereof the duty was claimed, to establish a right to it; and yet all the king's subjects may be concerned in this right. But because a great number of actions may be brought, the Court suffers such Bills, though the defendants might make distinct defences, and though there was no privity between them and the city. I think therefore this bill is proper; and the more so, because it appears, there are no other persons, but the defendants, who set up any claim against the plaintiffs; and it is no objection, that they have separate defences. But the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights."

Lord Eldon, in *Weale v. Middlesex Water Works Company* (1 Jac. & Walk. 369), alluding to this case, said: "That [case] of the Mayor and Corporation of York and Pilkington was this. They conceived themselves to be entitled to an exclusive fishery in the river Ouse. There were many individuals, who conceived they had certain rights in the same river; and the Corporation filed their bill to establish their exclusive right to it. It was at first considered, by no less a man than Lord Hardwicke, that the bill would not do. But, on further consideration, he was of opinion, that it was a proper bill to establish the right; for where the

§ 126. In all these classes of cases, it is apparent, that all the parties stand, or are supposed to stand, in the [*127] *same situation, and have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any. It is under such circumstances, and with such objects, that the Bill is permitted to be filed by a few, on behalf of themselves and all others, or against a few, and yet to bind the rights and interests of the others.¹ But if the Bill is filed by the plaintiffs, on behalf of themselves only, and not on behalf of all the other persons in interest, the Bill would be unmaintainable, and be held bad on demurrer.²

§ 127. The nature of the decree, also, which is asked and given, may sometimes furnish a ground to dispense with parties, where they are very numerous;³ as, for

plaintiffs stated themselves to have the exclusive right, it signified nothing what particular rights might be set up against them; because, if they prevailed, the rights of no other persons could stand. And it has been long settled, that if any person has a common right against a great many of the king's subjects, inasmuch as he cannot contend with all the king's subjects, a Court of Equity will permit him to file a bill against some of them; taking care to bring so many persons before the Court, that their interests shall be such as to lead to a fair and honest support of the public interest;—and when a decree has been obtained, then, with respect to the individuals, whose interest is so fully and honestly established, the Court, on the footing of the former decree, will carry the benefit of it into execution, against other individuals, who were not parties.”

¹ *Hickens v. Congreve*, 4 Russ. R. 562, 576, 577; *Long v. Younge*, 2 Sim. R. 369; Ante, § 107 to § 110; Post, § 132, § 133, note, § 134 *a*. The propriety of the rule of dispensing with parties interested, where they are numerous and the suit is for an object common to them all, and bringing the Bill in behalf of all, is fully recognised in *Taylor v. Salmon*, 4 Mylne & Craig, 142.

² *Douglas v. Horsfall*, 2 Sim. & Stu. R. 184. See *Mandville v. Riggs*, 2 Peters R. 487.

³ *Mitf. Eq. Pl.* by Jeremy, 179, 180. See *Wigram on Discovery*, 76, 1st edit.; *Id.* p. 169, 170, 2d edit.; *Howes v. Wadham*, *Ridg. Cas. Hard.* 199, 200; *Calvert on Parties*, ch. 1, § 1, p. 3 to p. 12. Post, § 128, § 129, § 139, § 214, § 228.

example, where the Bill seeks only for a contribution *pro ratâ* towards a common charge, the extent of the liability being clearly ascertainable, and admitting, and requiring a several apportionment. Thus, where a man proposed to raise a bank, and to procure an act of Parliament to establish and settle it; about fifty others joined with him, and were at equal expenses. The project being likely to take effect, two hundred and fifty more subscribed to raise a fund; but in effecting the project about £6000 were lost, and so it dropped. Then the persons, who had paid the £6000 out of pocket, exhibited their Bill against sixteen of the two hundred and fifty subscribers, to bear their proportions of the loss. It was objected, that the Bill ought to abate for want of parties. But the objection was overruled; and it was held, that, as the plaintiffs only prayed, that the defendants might bear their proportion of the loss, which would appear before the Master as well, as if all the two hundred and fifty subscribers were before the Court, there could be no prejudice to the defendants; and if * there should happen to be any disproportion [*128] in the accounts, the party aggrieved might have his remedy by Bill.¹

§ 128. The same doctrine was acted upon in the case of an incorporated bank, where the stockholders had divided the capital stock upon the eve of the dissolution of the corporation under its charter, leaving funds for the payment of the outstanding bank-bills and other debts, which proved inadequate to the discharge of them. Some holders of the bills of the bank sued a part only of the stockholders (the capital stock being divided into

¹ Anon. 2 Eq. Abridg. 166, pl. 7.

two thousand shares), to recover from them the amount of the bank-bills; and upon the objection, that all the stockholders were not made parties, the Court, admitting, that it was impossible, that they could all be made parties, sustained the Bill, and decreed a *pro ratâ* contribution by the defendants towards the payment of the bank-bills, in the proportion that the stock held by the defendants bore to the whole number of stockholders.¹

§ 129. It is upon similar grounds, that the decision is to be explained in the case of a mine owned by a partnership, engaged in a mining adventure, which mine had been sold by some of the partners, (who were the legal owners of the mine, and joint adventurers), with the consent of all but one partner, to a joint stock company, consisting of numerous proprietors and shares, for which [*129] payment had been made to them, partly in *money, and partly in shares of the joint company stock. The partner, who had not consented to the sale, and who claimed a definite interest in the mine and mining adventure, brought a Bill against the partners, who had sold the mine, praying, that they might, at his election, either account to the plaintiff for his proportion of the profits derived from the sale, or that out of the shares of the stock of the joint company in their hands held on their own account they might transfer to him so many shares as would be equivalent to his interest. A

¹ Wood v. Dummer, &c. 3 Mason, 308, 317, 318, 319, 321, 322. In this case it did not appear, that the other stockholders were out of the jurisdiction of the Court, or were insolvent; nor did it appear, what other Bills were outstanding. The Court, referring to these circumstances, said; that it would not take more than the proportion from the defendants, because it might thereby deprive other bill-holders of the funds, out of which alone they could obtain payment. The Bill was not so framed, as to be on behalf of all other bill-holders. Ante, § 117. See also Selyard v. Harris's Ex'rs. 1 Eq. Abridg. 74. Post, § 214 and note.

demurrer was put in for the want of proper parties, the other partners, and the proprietors of the joint stock company not having been made parties. But the Court held the objection invalid; for the proprietors at large had no interest in the controversy; and it appeared by the Bill, that the other partners had been settled with; and consequently no other persons, but the plaintiff and the defendants had any interest in the suit, as the sale and settlement were not sought to be disturbed by it,¹ and the plaintiff sought relief only against the funds or shares belonging to the defendants, and in their hands, to the extent of his claim and title and interest in the concern.

§ 129. *a.* Another case may illustrate the same doctrine. Suppose the ordinary case of a joint stock company, where the shares are transferable by delivery of the scrip receipt, and the holder, (who has, therefore, a right to sell them) should sell them, and afterwards should refuse to complete the sale, a Bill might well be brought by the purchaser against the seller to compel a specific performance of the contract of sale, without making the other shareholders parties; for they have no interest in the object of the Bill or in the controversy, the simple question being, who, as between buyer and seller, is entitled to the particular shares sold.²

§ 130. But although the numerousness of parties, as well as their being unknown, constitutes, or may constitute, a good ground for dispensing with their being made actual parties to a suit in the classes of cases before mentioned; yet (as has been already stated) this exception is not allowed to operate, where the decree

¹ *Mare v. Malachy*, 1 Mylne & Craig, 559.

² See per Lord Cottenham in *Mare v. Malachy*, 1 Mylne & Craig, 572, 573.

must directly affect the interests of the persons not before the Court, and they have a right and an interest to be heard before the decree is made. A few illustrations of this qualification upon the generality of this exception, may here be properly suggested from adjudged cases.

§ 131. Thus, for example, where a suit was brought by a few members of a voluntary society, called the Benevolent Union Society, consisting of sixty-one members, on behalf of themselves and all other members for [*130] *an account and injunction against the six defendants, who were trustees and members of the society, entrusted with the stock of the society, who had, in breach of the articles of the society, sold out a part of it, and proceeded to dissolve the society; it appeared, that by the articles it was a material part of the contract, that the society should never be dissolved, so long as seven members should support the same; and it further appeared, that all the other members (forty-seven in number), except the plaintiffs, had received their shares, and the plaintiffs' shares were in Court. It was held, that all the other forty-seven members ought to have been made parties, as they had a direct interest in the decree to be made upon the Bill, seeking, as it did, a replacement of the stock, and a continuance of the society.¹ In such a case it is clear, that the real question was, whether there could be a dissolution of the partnership and a division of the funds, or not, consistently with the articles; and in that question all the members had an equal interest to be heard, and to be protected.²

§ 132. Upon similar grounds it would seem, that a

¹ *Beaumont v. Meredith*, 3 Ves. & Beam. 180; *Evans v. Stokes*, 1 Keen R. 29; *Mocata v. Ingilby*, 14 Law Journ. 145.

² See also *Wheeler v. Van Wart*, 9 Sim. 2. 193.

shareholder in a joint stock company cannot file a Bill on behalf of himself and all other shareholders for a dissolution of the concern; but they must all be made actual parties to the suit, however numerous, and however impracticable it may be under such circumstances to proceed to a decree; for it is said to be by no means a general principle in equity, that all cases within the same mischief, as to parties, are to be held relievable simply on account of their numerousness, if the parties not before * the Court have a substantial interest in the very [*131] question of right, on which the decree must hinge.¹

¹ See *Van Sandau v. Moore*, 1 Russ. R. 441, 465; *Blain v. Agar*, 1 Sim. R. 37; S. C. 2 Sim. 289; *Long v. Younge*, 2 Sim 369; *Wheeler v. Van Wart*, 9 Sim. R. 193. See also *Small v. Atwood*, 1 Younge R. 407, 458, 459; *Evans v. Stokes*, 1 Keen R. 24. Ante § 94, § 107, § 104, *Male v. Malachy*, 1 Mylne & Craig, 559; *Taylor v. Salmon*, 4 Mylne & Craig, 141. There is not a little difficulty in this whole doctrine. Why, in cases of this sort confessedly otherwise irremediable, a Bill might not be maintained by a few in behalf of all the company, having the same interest, who do not choose to come in and object, does not seem so clear upon general reasoning, as some learned judges seem to have thought it to be. Admitting, that all have a common interest, to be affected by the decree; still if they do not choose to appear and resist the decree, it is no unfair inference, that they are content to abide by it. At all events, if the plaintiffs do make out a clear case for a dissolution, it seems unjust to deprive them of all aid, even though the decree may affect the interests of others. In what respect does such a case differ in substance from that of a common right claimed by or against all parishioners, or commoners, or creditors? If the Court should maintain the jurisdiction in a case of this sort, it might provide for all absent and opposing interests by referring the case to a Master, and allowing them to come in, and object before him to further proceedings. The authorities do not, however, appear to give any countenance to this suggestion. The arguments and the opinion of the Court in *Long v. Younge*, 2 Sim. R. 369, present the doctrine in a strong light.

It appears to me that some passages in the judgment of Lord Lyndhurst in *Small v. Atwood* (1 Younge R. 457, 458), show the difficulty of limiting the exception to cases of a common interest and benefit, and a lurking doubt of the propriety of these decisions. His language was: "It is the rule of a Court of Equity, that all persons, who are interested in a question, which is litigated in a Court of Equity, must, either in the shape

§ 133. So, it has been thought, that, where there is an assignment by a trust deed, made by a debtor for the benefit of such creditors, as should execute the assignment if any incumbrancer (not one of such creditors) should seek to enforce against the property certain securities held by him, some of which are prior, and some subsequent to the assignment, and should pray, that his rights might be established, and the priorities of himself and of all the other incumbrancers might be declared, that it will be necessary, that all the creditors, who are entitled under the trust deed, should be made parties to the Bill by name, however numerous they may be. And if the plaintiff should state his ignorance of their residences, and whether they were living or dead, it would furnish no sufficient excuse; for the Bill being to have the benefit of a charge, all the persons inter-

of plaintiffs or defendants, be brought before the Court. If that rule were to apply, in its strictness, to a case of this description, this consequence would follow, that justice in such a case as the present would be unattainable in this Court; because it is perfectly certain, that if it were necessary to put upon the record the names of all the persons, who are members of this partnership, or were members at the time, when this Bill was filed (for they then amounted to very nearly six hundred), it would be utterly impossible, that the suit could ever come to its termination, from the necessary abatements, which would, from time to time, take place from deaths and other causes. This argument, or observation, I admit, is not conclusive. I admit, that the general rule is, that all persons, who are interested in the question must be parties to a suit instituted in a Court of Equity, where that question is the object of the suit. But there are certain exceptions to that rule, which were established at a very early period, for the purpose of preventing that failure of justice, to which I have referred." See also the remarks of Lord Chancellor Brougham in *Walburn v. Ingleby*, 1 Mylne & K. 76, 77, and *Hickens v. Congreve*, 4 Russ. R. 574 to 577, and the remarks of Mr. Baron Alderson in *Fenn v. Craig*, 3 Younge & Coll. 223, 234, and of Lord Cottenham in *Taylor v. Salmon*, 4 Mylne & Craig, 141 and *Mare v. Malachy*, 1 Mylne & Craig, 559. Ante, § 76. (c), which obviously lean in favor of dispensing with parties in cases of this sort, where there would otherwise be an irremediable injustice. Post § 134. a. Ante § 126.

ested in that charge, and to repel any priority, should be made parties.¹

*§ 134. Where there are numerous share- [*133] holders, it often happens, that their shares are assigned; and under such circumstances the question may arise, how far the original assignors may be dispensed with as parties in a Bill brought by the assignees, touching some general interests of all the shareholders, against the immediate directors or agents of the company. Probably the question would be ultimately resolved upon the grounds already stated. If the object of the Bill were to enforce some interest common to all the shareholders, and by the articles of the company the

¹ *Newton v. Earl of Egmont*, 4 Sim. R. 585; S. C. 5 Sim. 130. It is observable, that in this case, upon the second hearing (5 Sim. R. 130), there was a plea put in, which gave the names and places of residence of all the creditors, who had executed the trust deed, omitting the residences of two only. The Bill was not brought by the plaintiff, as a creditor under the trust deed, on behalf of all the creditors to have the trusts executed; but it was for the establishment of his own right of priority of satisfaction out of the effects, and incidentally to ascertain the priorities of others, where there had already been a decree made in a suit in behalf of all the creditors; and the plaintiff's Bill was not on behalf of all the creditors. The Vice Chancellor on this occasion said; "I accede to the rule laid down in *Adair v. The New River Company* (11 Ves. 429, 443). That rule, however, applies only to cases, where there is one general right in all the parties, that is, where the character of all parties, so far as the right is concerned, is homogeneous: as in suits to establish a modus, or a right of suit to a mill. Notwithstanding the inconvenience arising from numerous parties, there are some cases, in which they cannot be dispensed with. Thus, if a Bill is filed to have the benefit of a charge on an estate, all persons must be made parties, who claim an interest in the charge. In this case, where the question is as to a priority of charge, the very nature of the question makes it necessary, that all the creditors should be parties. It implies a contest with every other person claiming an interest in the land. The circumstance of the persons named in the plea being judgment creditors, does not remove the difficulty; for there may have been releases, assignments, want of docketing, and other circumstances affecting each claim."

shares were assignable, it might be brought on behalf of the plaintiffs and all the other parties in interest, and sustained. But if the object of the Bill were to dissolve the company, or to subvert its articles, and especially if the right to assign were in contestation, the assignors and the other shareholders, however numerous, might be required to be made actual parties to the suit.¹

¹ See *Blain v. Agar*, 1 Sim. R. 37; *Long v. Younge*, 2 Sim. 369; *Walburn v. Ingleby*, 1 Mylne & K. 76, 77, 78; *Wheeler v. Van Wart*, 9 Sim. 193, and cases cited. But see *Adair v. New River Company*, 11 Ves. 429, and *Ante*, § 132, note, and *Post* § 135, and § 135, a. In the case of *Blain v. Agar* (1 Sim. R. 37) the Bill was brought by five persons, on behalf of themselves and the other parties to an indenture, who were either originally or by assignment holders of 1690 shares in a joint stock company, and who by the indenture had transferred their shares to the plaintiffs in trust for themselves. The Bill was brought against the directors, imputing to them fraudulent conduct in the management of the stock and property of the company; and it averred, that the plaintiffs were ignorant of the names of all the shareholders, except those, on whose behalf they sued; but it did not seek a discovery of their names. It further averred, that the plaintiffs, and those for whom they sued, had paid certain instalments or deposits of money; and that the money had been so paid upon the fraudulent misrepresentation of the defendants. It further averred, that the parties to the indenture were very numerous, so as to make it inconvenient to place them as parties on the record; and it prayed, that the defendants might be decreed to pay the money to the plaintiffs, which had been paid on the 1690 shares. There was a demurrer to the Bill for the want of parties; and the Vice Chancellor held the objection fatal. It is observable, that the Bill was not on behalf of all the shareholders, but only of those holding the 1690 shares; and it did not seek a dissolution. The objection for want of parties was twofold; first, that it was a case of partnership, and all the shareholders were not parties; secondly, that most of the shareholders were assignees of shares, and as the shares were mere choses in action the assignors ought to have been made parties to the suit, for they *might* have no right to assign their shares. The Vice Chancellor seems to have decided the case on the latter ground, and said: "The plaintiffs sue, on behalf of themselves and certain other persons, who are subscribers, together, of 1690 shares, and who have executed a deed, stated in the Bill, by which they assign to the plaintiffs their respective interests in this concern, and constitute the plaintiffs their attorneys to institute any action

§ 135. These appear, so far as the authorities go, to be the principal distinctions, applicable to the subject of * parties, when they are very numerous, and [*135] it is impracticable to bring all the persons interested before the Court. It is obvious, that, in the present state of the Equity doctrines on this subject, very large classes of cases of this nature may exist, in which no remedial justice can be administered, and irreparable mischiefs

or suit, in order to give effect to their interests, or to enter into any compromise for their claims; but upon condition that, after deducting their expenses, the plaintiffs are to hold, what they shall so recover or receive, in trust for the said other persons, respectively. Amongst many objections for want of parties, the defendants insist, that these other persons ought to have been named as parties to this suit. The plaintiffs do not deny, that, according to the general principles of a Court of Equity, these other persons ought to have been parties. But they urge at the bar, what is indeed stated in the bill, that these persons are very numerous, and that naming them as parties on the record, would in all probability, render it impossible for the plaintiffs to obtain a decree in the cause. This allegation may be very true. In certain special cases the Court has adopted a practice, which, by permitting one or more persons to represent in a suit all, who have similar interests, has avoided the inconvenience, which results from numerous parties. But it has never been stated, as a general principle, that this course may be taken in all cases within the mischief; nor has it ever been done in cases analogous to the present. And, if I were to yield to the reasoning here, I fear I should be doing, what I have no authority to do, not following the practice of the Court, but making a new practice." See the same case again before the Court after an amendment, 2 Sim. R. 289. Whether, if the Bill had been brought in behalf of all the shareholders it would have been sustainable, does not appear to have been decided. It does not seem necessary, in all cases, to make the assignors parties, as we shall presently see; nor does there seem any solid objection to a Bill's being, in common cases, maintained by a few in behalf of all shareholders, whether original shareholders or assignees, any more than in maintaining a Bill against a few shareholders, whether original shareholders or assignees, where they are too numerous to be all made parties. The latter was the predicament in *Adair v. The New River Company*, 11 Ves. 429. See also *Cockburn v. Thompson*, 16 Ves. 328, 329. *Walburn v. Ingleby*, 1 Mylne & K. 76, 77. See also the remarks of Mr. Baron Alderson in *Fenn v. Craig*, 3 Younge & Coll. 216, 224, and the cases collected in the Reporters' note (a). p. 224.

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may be done.¹ For, in many of these cases, relief may be sought, in which all the shareholders have not a common right, or a common interest, to be advanced, and protected by the Bill. And, indeed, the Bill may, upon proper grounds, seek a dissolution of the company, or the protection of rights, in which other members may have an adverse interest, or opposing wishes. Whether Courts of Equity have been wise or not in the limitations, which they have put upon their right to maintain proceedings under such circumstances, instead of allowing all persons to become parties, either upon a Bill on behalf of all, or by coming in and resisting the objects of the Bill, under the interlocutory proceedings, is a point upon which a commentator ought not perhaps to hazard any decided opinion. That much of the difficulty, however, has been imposed upon the Courts by their own choice of rules, founded, in a great measure, upon principles [*136] purely technical, will scarcely be denied. And why the same proceedings might not have been permitted, even to the extent of binding unrepresented interests, after due notice to the parties to appear and represent them, as is done in the ordinary cases of creditors against the estates of persons deceased, it is not very easy to state in a satisfactory manner.²

§ 135. *a.* It may not, however, be thought unworthy of the deliberate consideration of the profession, whether the doctrine has not already been pressed beyond the legitimate limits, within which it can safely be applied, and whether it ought to be pressed farther in its application to new cases, as they may arise in judgment. If

¹ See *Van Sandau v. Moore*, 1 Russ. R. 441, and other cases cited in Ante § 132, note. See also § 135, *a.*

² See Lord Lyndhurst's judgment in *Small v. Atwood*, 1 Younge R. 457, 458, cited ante § 132, note. Post § 135, *a.*

Courts of Equity are in the habit of declining to act in the absence of particular parties, merely because there is a possibility of their decree working some injustice to persons, not represented or before the Court, there would seem to be at least an equally strong ground to assert, that where the injury in abstaining from the exercise of jurisdiction on account of a defect of such parties, will be positive, immediate and irreparable, they ought to assert jurisdiction. In such cases, if there is no possibility of bringing such parties before the Court, the general principle would seem to apply, that parties should be dispensed with, who are beyond the reach of the Court from a moral or a physical impossibility, and that the Court should decree according to the merits of the controversy between the parties actually before it, leaving, as far as practicable, the rights of all other persons untouched, and unprejudiced by the decree, or enabling them to appear and contest the validity of the proceedings, so far as their particular interests are concerned. In truth, in many cases, Courts of Equity now assert a jurisdiction to bind the interests of many parties not actually before them ; and there does not seem any sound reason, why the possibility of injustice to third persons should overcome the duty to grant relief against present injuries and mischiefs between the parties actually before it, where the refusal must otherwise necessarily work irreparable injustice. Besides ; it is to be considered, that the general rule, requiring all persons in interest to be made parties to the suit, is, in most cases, not, in any just sense, a right of the parties brought before the Court, but rather a rule prescribed by Courts of Equity to themselves in the exercise of their jurisdiction, founded upon their own notions of public policy, or public convenience. It is, in a great measure, a rule of discretion,

founded in the anxiety of those courts to do justice among all the parties having an interest in the subject-matter or the object of the suit, whether that interest be mediate or immediate, present or future, for the purpose of suppressing future controversy and litigation. The rule is useful, when applied to its proper, legitimate purposes ; but it may be seriously asked, whether it can be justified, where, in its actual application, it must necessarily produce irremediable injustice to the persons asking relief at the hands of the Court, and there is an utter impossibility of overcoming the difficulty and proceeding against the absent parties. When all the persons in interest can be made parties, and the decree must affect their interests, there seems to be a sound reason for insisting upon a strict adherence to the rule. But when they cannot be made parties, and a decree may be made between the parties before the Court, which does not positively and absolutely conclude the rights of other persons, but leaves them to act upon those rights without prejudice, there seems good reason to say, that Courts of Equity ought, like Courts of Law, to act upon the case before them, endeavoring to provide, as far as they may, for a reasonable protection of those unrepresented rights. And the suggestion of a learned chancellor (which has been already cited), contains, on this subject, a most impressive lesson,—that Courts of Equity ought to adapt their practice and course of proceeding, as far as possible, to the actual state of society ; and not, by too strict an adherence to forms and rules established under very different circumstances, decline to administer and enforce rights, for which there is no other remedy.¹

¹ Ante § 76, c. *Taylor v. Salmon*, 4 Mylne & Craig, 141, 142. See also ante, § 120, § 132, note (1), and the cases there cited.

§ 136. Having stated the general rule, as to parties, and the general exceptions to that rule, it still remains to inquire, who, in the proper sense of the rule, are to be deemed necessary parties, whose joinder in the suit cannot be dispensed with. It has been said, that persons are necessary parties, when no decree can be made respecting the subject-matter of litigation, until they are before the Court, either as plaintiffs, or as defendants; or where the defendants, already before the Court, have such an interest in having them made parties, as to authorize those defendants to object to proceeding without such parties.¹ These propositions are true; but they furnish no sufficient test as to the question, who are necessary parties; for the inquiry is still open, when will a Court of Equity proceed to a decree without them; and what is the interest, which entitles the defendants before the Court to insist upon the presence of other persons as defendants, before a decree is made, which shall bind themselves. In a general view, all parties in interest are the proper objects of the rule. But the nature of that interest must still remain to be ascertained; as well as the point, how far it is liable to be affected injuriously by the *decree. This can be best examined by a re- [*137] view of the principal classes of cases, to which the rule has been applied, and from which its force, as well as the grounds of its application, may be fully understood.

§ 137. Before proceeding, however, to this review, it may be proper to make a few explanatory remarks of a general character. And, in the first place, in regard to the nature of the interest, it is to be considered, that it is wholly unimportant, whether it be a legal interest, or

¹ Bailey v. Inglee, 2 Paige R. 279.

an equitable interest of the absent parties in the subject-matter of the suit; and, subject to the limitations and exceptions hereafter stated, it is equally unimportant, whether it be a present, direct, and immediate interest, or a future remote fixed interest. In either case, if the interest of the absent parties may be affected, or bound by the decree, they must be brought before the Court, or it will not proceed to a decree.

§ 138. In the next place, an interest of the absent parties in the subject-matter, *ex directo*, which may be injuriously affected, is not indispensable to the operation of the general rule; for, if the defendants actually before the Court, may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive or direct, than if the absent parties were before the Court, that of itself, will, in many cases (as we shall presently see) furnish a sufficient ground to enforce the rule of making the absent persons parties.¹

§ 139. In the next place, the plaintiff may, by the frame of his Bill, as by waiving a particular claim, avoid the necessity of making persons, who might be affected by it, parties, though that claim might be an evident [*138] * consequence of the rights asserted by the Bill against other parties.² This, however, is not allowed to be done to the prejudice of others.³ Thus, for example, if the obligee of a bond, to which there are three sureties, the principal obligor being dead, were to seek, by a Bill in Equity, the full payment of the bond from

¹ *Bailey v. Inglee*, 2 Paige R. 278; *Gilb. For. Rom.* 157. See *Calvert on Parties*, ch. 1, § p. 9, 10, 11, 12. Post § 226.

² Post § 214, § 221, § 228.

³ *Mitf. Eq. Pl. by Jeremy*, 179, 180.

the sureties, all the sureties must be joined. But if he should seek only for his proportion from one surety alone, the same objection might not apply; unless the absence of the other parties would be a prejudice to him.¹

§ 140. In the next place (as has been well remarked by an eminent author), in many cases the expression, that all persons, interested in the subject, must be parties to the suit, is not to be understood as extending to all persons, who may be consequentially interested.² Thus, in the case of a Bill, which may be brought by a single creditor against the executor or administrator for satisfaction of his single demand, out of the assets of a deceased debtor (as before noticed³), although the interest of every other unsatisfied creditor may be consequentially affected by the suit; yet, that interest is not deemed such, as to require, that all the other creditors should be parties, notwithstanding the decree, if fairly obtained, will compel them to admit the demand, ascertained under its authority, as a just demand, to the extent allowed by the Court, in the administration of assets; but they will not be bound by any account of the assets taken under the decree.⁴ So, in all cases of Bills by creditors and legatees against the executor or administrator, the persons entitled to the personal assets of a deceased debtor, or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to *contest the demands of the cred- [*139] itors and legatees.⁵ And, if the suits be fairly conduct-

¹ Ante § 125; Anon. Eq. Abridg. 166, pl. 7.

² Mitf. Eq. Pl. by Jeremy, 170, 171.

³ Ante § 99, § 100 to § 103.

⁴ Mitf. Eq. Pl. by Jeremy, 100.

⁵ Mitf. Eq. Pl. by Jeremy, 170, 171; *Dandridge v. Washington*, 2 Peters R. 377.

ed, they will be bound to allow the demands, admitted in those suits by the Court, though they will not be bound by any account of the property taken in their absence.¹

§ 141. Perhaps the true explanation of this doctrine is, that, in cases of this sort, Courts of Equity proceed upon the analogy of the Common Law, which treats the personal representative of the deceased debtor or testator as the regular representative of all the persons, who are interested in the personal assets, and bound by his *bonâ fide* acts, so far as third persons are concerned.² If so, the doctrine stands upon a very intelligible and reasonable footing; and we shall presently see, that, in this view, it is not peculiar to this class of cases.³

§ 142. And this leads us, in the next place, to suggest, that Courts of Equity do not require, that all persons, having an interest in the subject-matter, should, under all circumstances, be before the Court as parties. On the contrary, there are cases, in which certain parties before the Court are entitled to be deemed the

¹ Mitf. Eq. Pl. by Jeremy, 170, 171; Anon. 1 Vern. 261; *Wiser v. Blackley*, 1 John. Ch. R. 437; *Newland v. Champion*, 1 Ves. 105; *Lawson v. Barker*, 1 Bro. Ch. R. 303. It is probably on this account, that Courts of Equity are so much disposed to favor suits brought by a creditor on behalf of all the creditors, or by a legatee on behalf of all other legatees, as the persons, thus made *quasi* parties, are entitled to appear and represent their interests before the Court, or its authorized agent (the Master), to whom the suit is referred, for the purpose of settling the accounts of the administration. But the doctrine in the text is now clearly settled, although Lord Loughborough is reported once to have doubted it. The common rule is, that in a suit brought by a creditor or legatee against an executor or creditor, the residuary legatees, or distributees, need not be made parties. Anon. 1 Vern. 261; *Lawson v. Barker*, 1 Bro. Ch. R. 303. Post § 148, § 150; *Dandridge v. Washington*, 2 Peters R. 377.

² Mitf. Eq. Pl. by Jeremy, 165, 166; *Wiser v. Blackley*, 1 John. Ch. R. 437; *Newland v. Champion*, 1 Ves. 105; *Dandridge v. Washington*, 2 Peters R. 377.

³ Post § 148.

full representatives of all other persons, or at least so far, as to bind their interests under the decree, although they are not, or cannot be made parties.¹

§ 143. Thus, for example, where real estate had been purchased by a joint fund, raised by a subscription, in shares of more than two hundred and fifty subscribers and the property had been conveyed to certain persons, as trustees, for the subscribers; and afterwards a Bill was brought against the trustees for a sale of the real estate under a mortgage made in pursuance of the trust, it was held not necessary for the subscribers to be made parties to the Bill; for the trustees, by the very nature and constitution of such a trust, must be held sufficiently to represent the interests of all the subscribers; and a different doctrine would be attended with intolerable hardship and inconvenience, as it might be impossible to make all the subscribers parties.²

§ 144. Upon similar grounds of a virtual representation of all the proper interests, where there is real estate in controversy, which is subject to an entail, it is generally sufficient (all the parties having antecedent estates being before the Court) to make the first tenant in tail *in esse*, in whom an estate of inheritance is vested, a party with those claiming the prior interests, without making any persons parties, who may claim in remainder, or reversion, after such vested estate of inheritance. It will make no difference in the case, whether the Bill be brought by or against such tenant in tail; for in each case he is equally the representative of the subsequent estates and interests.³ And

¹ See Calvert on Parties, ch. 1, § 2, p. 20 to 60.

² Van Vechten v. Terry, 2 John. Ch. R. 197. Post § 150.

³ Post § 146. Calvert on Parties, ch. 1, § 1, p. 48 to 52.

a decree for or against such first tenant in tail, will generally bind those in remainder or reversion, although, by the failure of all the previous estates, the estates in remainder or reversion may afterwards vest in [*141] *possession.¹ On this account it is, that a person so entitled in remainder or reversion, and afterwards becoming entitled in possession, may appeal from the decree made against the person having a prior estate of inheritance, and cannot avoid the effect of the decree by a new Bill;² for he is treated, as, being in some

¹ Mitf. Eq. Pl. by Jeremy, 173; 1 Mont. Eq. Pl. 63, 64; Cooper Eq. Pl. 35, 36; Id. 185, 186; Finch v. Finch, 1 Ves. 492, 493; Lloyd v. Johnes, 9 Ves. 37, 52 to 59; Cockburn v. Thompson, 16 Ves. 326; Reynoldson v. Perkins, Ambler R. 565. Mr. Cooper, in his Equity Pleadings, p. 35, 36, says, that "where there is a suit respecting a real estate, which is settled or devised to one for life, remainder to the first and other sons in tail, in the common way of limiting estates, all the persons interested, as far as the first tenant in tail in existence, must be made parties." This is perfectly correct. But he adds; "But a remainder-man, expectant upon an estate tail, need not be made a party, because he is not regarded in Equity; *neither could he be bound.*" The first reason is true; but, from what has been stated in the text, the latter reason is incorrect; for he would be bound by the decree. The truth is, that Mr. Cooper took the position from an anonymous case in 2 Eq. Cas. Abrid. 168, pl. 8, where it is said, "that an exception was taken to a Bill for want of parties, because the remainder-man, expectant upon an estate tail, was not a party, and the end of the Bill was to impeach a settlement. The exception was overruled, because such remainder-man is not regarded in Equity, neither can he be bound." S. C. Wyatt's Pract. Reg. 317. The statement from Mitf. Eq. Pl. by Jeremy, p. 173, in the text contradicts this; and the cases of Lloyd v. Johnes (9 Ves. 56, 57), Giffard v. Hort (1 Sch. & Lefr. 408, 409, 411), Reynoldson v. Perkins (Ambler. R. 565), and Cockburn v. Thompson (16 Ves. 326), also inculcate the doctrine stated in the text. Although the general rule is as stated; yet it is not to be taken, that the remainder-man is universally bound; for he is bound only in cases, where the suit is not under a contract with the tenant in tail, but it is a suit to bind the land in regard to charges or other things, equally binding and affecting all persons who take *per formam doni*. Lloyd v. Johnes, 9 Ves. 57 to 61.

² Mitf. Eq. Pl. by Jeremy, 173; Giffard v. Hort, 1 Sch. & Lefr. 408, 411; Lloyd v. Johnes, 9 Ves. 51 to 65.

sort, a privy to the decree; and he may make himself a party to the original suit, by filing a supplemental *Bill, to have benefit of the proceedings therein, [*142] for the purpose of appealing from the decree.¹

§ 145. And, as it is sufficient to bring the first tenant in tail before the Court, if in being, whether he be plaintiff or defendant in the suit; so, if there be no such tenant in tail in being, the first person in being, entitled to the inheritance, should be made a party; and if there be no such person in being, then the tenant for life; and in such a case, the decree made will bind the other persons not in being.² Thus, if there be a tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, the tenant for life may maintain a Bill for a partition, and the decree will be binding upon the sons, when they come *in esse*.³ So, if there be a tenant for life, remainder to his first son in tail, remainder over; and the tenant for life is brought before the Court before he has issue, it is settled in Equity, that the contingent remainder-men are barred, and (as has been said) from necessity.⁴ So, where there are

¹ Giffard v. Hort, 1 Sch. & Lefr. 409, 411; Osborne v. Usher, 2 Bro. Parl. Cas. 314; S. C. 6 Bro. Parl. Cas. by Tomlins, 20; Lloyd v. Johns, 9 Ves. 55, 56, 59; Cooper Eq. Pl. 77 to 83; Id. 185, 186.

² Cooper Eq. Pl. 36; Giffard v. Hort, 1 Sch. & Lefr. 407, 408. See also Dayrell v. Champress, 1 Eq. Abrid. 400, pl. 4. It has been remarked by Lord Eldon, that there are cases, where it may be proper, if not indispensable, to make a subsequent remainder-man, after the first estate of inheritance, a party; as, for example, where the prior estate of inheritance is a fee tail in a minor; for, in such a case, it may be said, that the tenant in tail may never be able to bar him; and if he is joined in such a case, it is no cause for a demurrer. Dursley v. Fitzhardinge, 6 Ves. 251. Post, § 792.

³ Gaskell v. Gaskell, 6 Sim. R. 643.

⁴ Cooper Eq. Pl. 36; Id. 77 to 83; Id. 185, 186; Giffard v. Hort, 1 Sch. & Lefr. 408. Post, § 792.

contingent limitations and executory devises to persons not in being, they may in like manner be barred by a decree against a person claiming a vested estate of inheritance.¹

§ 146. In like manner, where a Bill is brought by a tenant in tail, or by any other person having the first estate of inheritance, other persons having a subsequent vested [*143] *or contingent interest will generally be bound by the decree, and will be entitled to the benefits, as well as to the disadvantages thereof.² We say, they will generally be bound; for there may be cases, in which an exception ought to be allowed under special circumstances, and in which persons, claiming subsequent vested or contingent interests after the first estate of inheritance, would not be entitled to the benefit or suffer the disadvantage of a former decree had by or against the owner of the first estate of inheritance.³ The cases within the exception must, however, stand upon peculiar equities and interests, not affected by the same circumstances, which attach to the prior parties.⁴

§ 147. But Courts of Equity are very scrupulous of affecting the interest of persons not before the Court in cases of this sort, where their interest is not dependent upon the prior estate of inheritance, and it is practicable to make them parties. Thus, if a person is in being, claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance, by which it may be defeated, he must be made a

¹ Mitf. Eq. Pl. by Jeremy, 173, 174; Cooper Eq. Pl. 36, 77 to 83.

² Lloyd v. Johnes, 9 Ves. 52 to 61; Cooper Eq. Pl. 36; Id. 77 to 83.

³ Lloyd v. Johnes, 9 Ves. 52, 57, 58, 60, 61; Wingfield v. Whaley, 2 Bro. Parl. Cas. 447; S. C. 1 Bro. Parl. Cas. by Tomlins, 200; Cooper Eq. Pl. 77 to 83.

⁴ Lloyd v. Johnes, 9 Ves. 52, 58, 60; Cooper Eq. Pl. 80, 81, 83.

party to a Bill affecting his rights.¹ So, if a person entitled to an interest prior in limitation to any estate of inheritance before the Court, should be born pending the suit, that person must be brought before the Court by a supplementary Bill.² So, if by the determination of any contingency a new interest should be acquired, not subject to destruction by a prior vested estate of inheritance, the person having that interest must [*144] be brought before the Court in like manner.³ So, if by the death of the person, having, when the suit is instituted, the first estate of inheritance, that estate should be determined, the person, having the next estate of inheritance, and all the persons, having prior interests, must be brought before the Court.⁴

§ 148. Upon grounds somewhat analogous, where a suit is brought for the execution of a trust by or against those claiming the ultimate benefit of the trust after the satisfaction of prior charges, it is not necessary to bring before the Court the persons claiming the benefit of such prior charges; for their interests are not intended to be touched by the Bill. Thus, where a Bill is brought for the due application or distribution of a surplus to be paid after payment of debts and legacies, or other prior incumbrances, it is not necessary to make such prior creditors, legatees, or other incumbrancers, parties.⁵ It is for the like reason, that in a Bill by a bond creditor for satisfaction out of the assets of his deceased debtor, it is not necessary to make any other bond creditors, or

¹ Mitf. Eq. Pl. by Jeremy, 174; *Sherrit v. Birch*, 3 Bro. Ch. R. 228; *Handwik v. Shaen*, Colles Parl. Cas. 122.

² Mitf. Eq. Pl. by Jeremy, 174.

³ Mitf. Eq. Pl. by Jeremy, 174; *Cooper Eq. Pl.* 77, 78, 79.

⁴ Mitf. Eq. Pl. by Jeremy, 174.

⁵ Mitf. Eq. Pl. by Jeremy, 175; *Parker v. Fuller*, 1 Russ. & Mylne, 656; *Lewis v. Lord Zouche*, 2 Sim. R. 388.

creditors of a superior nature, parties to the suit ; for the decree of the Court will merely direct an account and payment by the executor or administrator of the deceased in the course of administration ; and then the executor or administrator may before the Master represent all debts, which are prior to the plaintiff's debt, and have a legal preference.¹ Perhaps, in a case of this sort, it may be more correctly stated, that the executor or administrator *is the trustee and proper representative of all the creditors, as well as of all other persons interested as legatees or distributees.²

§ 149. So, persons having demands prior to the creation of a trust may enforce those demands against the trustees, without bringing before the Court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees.³ But, if the trustees have no such power of disposition (as in the case of trustees to convey to certain uses), the persons claiming the benefit of the trust must be made parties. In many cases persons, having specific charges on trust property, are also necessary parties.⁴ But if there is a general trust for creditors or others, whose demands are not distinctly specified in the creation of the trust; inasmuch as their numbers, as well as the difficulty of ascertaining, who may answer a general description, might greatly embarrass a prior claim against the trust property, the Court will dispense with their being made

¹ Anon. 3 Atk. 572 ; Ante, § 100, note 2.

² 1 Eq. Abridg. 73 ; Anon, 1 Vern. 261 ; *Brown v. Dowthaite*, 1 Madd. R. 447. Ante, § 136, § 140, § 141 ; *Dandridge v. Washington*, 2 Peters R. 377.

³ Mitf. Eq. Pl. by Jeremy, 175 ; Anon. 1 Vern. 261. Post, § 215.

⁴ Mitf. Eq. Pl. by Jeremy, 174. Post, § 215.

parties.¹ Some of the distinctions, applicable to this subject, will appear more fully hereafter.

§ 150. Indeed, it may be laid down as a general rule, that, where any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs, or as defendants, without bringing before the Court the creditors or legatees, for whom they are trustees, which, in many cases, would be impossible.² And the rights of the creditors or legatees will be bound by the decision of the Court, when fairly obtained for or against *the trustees.³ In such [*146] cases the trustees, like executors, are supposed to represent the interests of all persons, creditors, or legatees;⁴ and, indeed, the impracticability of making the other persons parties, would seem of itself a sufficient ground for dispensing with them.⁵

§ 151. In the next place, where there is a known interest, and yet it will not be bound or concluded by the decree, Courts of Equity will sometimes dispense with the persons, representing that interest, being made parties. It is upon this ground, or one of an analogous nature, that the occupying tenants or lessees, claiming possession under the party, against whom the Bill is brought, and whose title to real property is disputed,

¹ Mitf. Eq. Pl. by Jeremy, 176. Post, § 150, § 215. Ante, § 115, a.

² See *Fenn v. Craig*, 3 Younge & Coll. 216. Ante, § 143.

³ Mitf. Eq. Pl. by Jeremy, 174; Ante § 140, 141; *Wakeman v. Grove*,

4 Paige R. 23. Ante, § 115, a, § 149. Post, § 216.

⁴ There is a difference between a trust by deed and a trust by will, for payment of debts, as to making the heir a party. In the former case (of deed) unless the heir is to have the surplus, he need not be made a party. But in case of a will, the heir is a necessary party to establish the will.—*Harris v. Ingledew*, 3 P. Will. 92.

⁵ See *Fenn v. Craig*, 3 Younge & Coll. 216. Ante § 115, a., § 148, § 149, § 216.

are not deemed necessary parties. If, indeed, he had a legal title, the title, which they may have gained from him, cannot be prejudiced¹ by any decision on his rights in a Court of Equity in their absence.² But if his title were merely equitable, they may be indirectly affected by a decision against that title;³ and on this account it might seem fit, that their interests should be properly represented before the Court. But the rule seems established upon the ground, that their rights are in some sort represented, and so far protected, as not to be absolutely concluded in the suit. If, therefore, it is intended to conclude their rights in the same suit, such tenants or lessees must be made parties to it.⁴ And in order to [* 147] guard * against any injury to the rights of such tenants or lessees, if the existence of their rights is suggested at the hearing, the Court will sometimes frame its decree expressly without prejudice to those rights, or otherwise qualify it according to circumstances.⁵

§ 152. Having made these preliminary explanations, in regard to the nature and character of the interests of persons, which entitle them to be deemed proper parties to the Bill before the Court, let us now proceed to review some of the principal classes of cases, to which the rule has been applied, from which its precise force and true bearing and objects may be more distinctly understood.

§ 153. And, first, in cases of assignments.⁶ In gene-

¹ Mitf. Eq. Pl. by Jeremy, 174, 175. See *Lawley v. Walden*, 3 Swanst. R. 142, note.

² Mitf. Eq. Pl. by Jeremy, 174, 175; 1 Mont. Eq. Pl. 64.

³ Mitf. Eq. Pl. by Jeremy, 174, 175. ⁴ Ibid. ⁵ Ibid.

⁶ See, on this subject, *Calvert on Parties*, ch. 3, p. 239 to p. 248, and *Edwards on Parties*, p. 79 to 82.

ral, the person having the legal title in the subject-matter of the Bill, must be a party (either as plaintiff or as defendant), though he has no beneficial interest therein; so that the legal right may be bound by the decree of the Court. In cases, therefore, where an assignment does not pass the legal title, but only the equitable title, to the property (as, for example, an assignment of a chose in action), it is usual, if it be not always indispensable, to make the assignor, holding the legal title, a party to the suit.¹ Indeed, the rule is often laid down far more broadly, and in terms importing, that the assignor, as the legal owner, must in all cases be made a party, where the equitable interest only is passed. Thus, it has been laid down in a book of very high authority, that if a bond or judgment be assigned, the assignor, as well as the assignee, must be a party; for the legal right remains in the assignor.² But it may

¹ It has been held, by Mr. Chancellor Walworth, that the assignee of a chose in action, who is but a nominal owner, cannot sue in Equity; but the suit must be brought by the real party in interest. *Rogers v. The Traders' Insurance Company*, 6 Paige R. 597. See also *Field v. Maghee*, 5 Paige R. 539. But surely this requires some qualification in cases where, although the assignee has but a nominal interest, yet he is a trustee for the benefit of third persons upon special trusts; such, for example, as an assignment of a chose in action for the benefit of creditors generally. On the other hand, it has been recently held by the Vice Chancellor in England, that the assignee of a chose in action (as a debt) cannot, although the real owner thereof, sue in Equity therefor, unless under special circumstances; such, for example, as where the assignor will not permit the assignee to sue in his name at law. *Messenger v. Hammond*, *The (English) Jurist*, 1839, vol. i. p. 98. This doctrine seems new; for the general understanding has always been, that where a party has an equitable right he may enforce it in a Court of Equity, and he is not driven to seek a circuitous remedy at law, through the instrumentality of third persons. This certainly is the well-established doctrine in America. Post, p. 149, note (2).

² *Mitf. Eq. Pl.* by Jeremy, 179; *Cathcart v. Lewis*, 3 Brown Ch. R. 516; S. C. 1 Ves. jr. 463; *Ray v. Fenwick*, 3 Bro. Ch. R. 25, and Mr. Bell's note (1).

perhaps be doubted, whether the doctrine thus stated is universally true.¹ The true principle would seem to be, that, in all cases, where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case. It is a very different question, whether he may not properly be made a party, as the legal owner, although no decree is sought against him; for in many cases (as we shall see) a person may be

¹ In *Bruce v. Harrington* (2 Atk. 235), Lord Hardwicke said; "It is not necessary, in every case of assignments, where all the equitable interest is assigned over, to make a person, who has the legal interest, a party. But if an obligee has assigned a bond, and a presumption of its being satisfied arises from the great length of time, the cause must stand over to make the representative of the obligee a party; because it is possible the obligee himself may have been paid, and therefore necessary to have an answer as to that particular from him or his representative." In *Blake v. Jones* (3 Anst. R. 651), one of two residuary legatees assigned his share, and the assignee brought a Bill to have his half of the residue without making the representative of the assignor (who had since died) a party. Upon an objection, taken for want of the representative of the assignor being a party, the Court said, that the Bill was well enough without his being a party, unless where the validity of the assignment is denied, or there appears to the Court some doubt upon that head. The subject was elaborately considered, and the principal authorities examined in *Trecothick v. Austin* (4 Mason R. 41 to 44). The doctrine in the text has been confirmed in other cases. See *Millar v. Bear* (3 Paige R. 467, 468), and *Whitney v. McKinney* (7 John. Ch. R. 144), where many authorities in analogous cases are collected and reviewed. In *Blain v. Agar* (1 Sim. R. 37), the assignors were not made parties; but they had an interest in the suit, and had not parted with all title. In *Macartney v. Graham* (2 Sim. R. 285), on a Bill by the last endorser to recover the amount of a lost Bill of exchange against the acceptor, it was held, that the prior endorsers were not necessary to be made parties.

made a party, although he is not indispensable.¹ But, where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, there he is not only a proper, but a necessary party. The general rule will hereafter occur under other aspects, where the legal estate is in one person, and the equitable estate is in another; and where the equitable or legal interest assigned still leaves some rights or claims to be settled, in which the presence of the assignor may be material to his own interests, or to those of the adverse party.²

¹ *Ryan v. Anderson*, 3 Madd. R. 174. Post § 156, § 167, note (4), § 169, § 178, § 181, § 189, § 193, § 184, § 211, § 213, § 221.

² In *Messenger v. Hammond*, in England, February, 1839, (The English Jurist for 1839, Vol. 1, p. 98,) the Vice Chancellor held, that an assignee of a chose in action could not sue in Equity, unless under special circumstances. On that occasion he said; "As a general proposition, a person, who has a right to sue persons owing a debt in the names of persons, to whom the debt is due, that is, a person having a right to sue B, in the name of A for a debt due from B to A, cannot file a bill in this court to recover such debt without special circumstances. If special circumstances are stated, viz. that the creditor prevents such right from being fairly exercised at law, then this court has jurisdiction to make the debtor pay to the assignee the debt owed, where the act is done by the collusion between the debtor and creditor. I never remember such a bill without special circumstances, and the question, therefore, is, are there any special circumstances stated in this long record." This is certainly contrary to what has been the general understanding in America, where it has certainly been held, that every assignee, who has an equitable assignment or right, may sue in his own name, and need not use the name of his assignor either at law or in equity, and this without any special circumstances whatsoever.—Thus, in *Field v. Maghee*, 5 Paige R. 539, it was held by Mr. Chancellor Walworth, that the assignee of a chose in action is not permitted to file a bill in equity in the name of his assignor, who is a mere nominal party; but the bill should be in his own name, that is, in the name of the real party in interest. The same point was affirmed in *Rogers v. The Traders' Insur. Company*, 6 Paige, 583, 598. See also *Harris v. Johnston*, 3 Cranch R. 311, 319. Ante, p. 147, note (1).

§ 154. But although the original assignor is not, or may not, under all circumstances, be a necessary party to a Bill to enforce the rights of the assignee under an equitable assignment; yet it is generally, if not universally true, that to a Bill to enforce or to set aside such rights, the assignee, as the person having the beneficial interest, is a necessary party; and a Bill brought by and in the name of the assignor alone would not be maintainable.¹ This, however, is but an illustration of the ordinary doctrine, that the real parties in interest shall be brought before the Court, whenever their interests may be affected.

§ 155. Where the assignor is a mere trustee for the benefit of a third person, upon a special trust, which he violates by the assignment of the property, if such third person should bring a Bill to enforce the trust against [*150] *the assignee, the trustee, or his proper representatives, should be made parties; for in such a case the proper decree would be to compel the assignee to perform the trust, and the trustee to stand as a security for having broken the trust.²

§ 156. Generally speaking, an assignee, *pendente lite*, need not be made a party to a Bill, or be brought before the Court; for every person purchasing *pendente lite* is treated as a purchaser with notice, and subject to all the equities of the persons, under whom he claims in privity.³ Still, however, it is often important to bring

¹ *Bromley v. Holland*, 7 Ves. 2, 11, 12; *S. C. Cooper R.* 9, 19; *Kirk v. Clark*, Prec. Ch. 275; *Burt v. Dennet*, 2 Bro. Ch. R. 225; *Foord v. Lear*, Rep. Temp. Finch, 265; *Movan v. Hayes*, 1 Johns. Ch. R. 339; *Sells v. Hubbell's Adm'r.* 2 Johns. Ch. R. 394; *Field v. Maghee*, 5 Paige R. 539. But see ante § 153, note (2).

² *Burt v. Dennet*, 2 Bro. Ch. R. 225.

³ 1 Story on Equity Jurisp. § 406; *Cook v. Mancius*, 5 Johns. Ch. R. 93; *Bishop of Winchester v. Paine*, 11 Ves. 194-197; 2 Story on Equity

such assignees before the Court, as parties, by a supplementary bill, in order to take away a cloud hanging over the title, or to compel the assignee to do some act, or to join in some conveyance. So that such assignee, though not a necessary party, is at the same time a proper party at the election of the plaintiff.¹

§ 157. Where an assignment is made by a debtor for the benefit of his creditors, if any creditor seeks to enforce the trusts, he can sue alone; but he must make all the other creditors, provided for in the assignment, parties, either by name, or by bringing the suit on behalf of himself and all the other creditors, who may choose to come in, and take the benefit of the decree.² But the assignees themselves may file a Bill relative to the trust *estate, and to enforce its objects, without mak- [*151] ing the creditors parties; for the assignees, in such a case, are the proper representatives of all of them.³

§ 158. Indeed, it seems (as we have seen), that in some cases of assignment of this sort, where priorities are to be ascertained, which are asserted by incumbrancers, claiming paramount to, and not in virtue of the assignment, all the creditors entitled under the assignment should be made parties by name to the suit, however numerous they may be, since each is, or may be, interested in ascertaining or repelling the priority of the claims and charges of all others. Perhaps, upon

Jurisp. § 908; *Murray v. Barlow*, 1 Johns. Ch. R. 577 to 581; *Metcalf v. Pulvertoft*, 2 Ves. & B. 204, 205. Post, § 351.

¹ 2 Story on Equity Jurisp. § 908, and cases cited in note (5); *Bishop of Winchester v. Paine*, 11 Ves. 197; *Echcliff v. Baldwin*, 16 Ves. 267; *Mechanics' Bank of Alexandria v. Setons*, 1 Peters R. 310. Post, § 351.

² *Wakeman v. Grover*, 4 Paige R. 23; ante § 103; *Hallett v. Hallett*, 2 Paige R. 15; *Egberts v. Wood*, 3 Paige R. 517; *Weld v. Bonham*, 2 Sim & Stu. 91.

³ *Wakeman v. Grover*, 4 Paige R. 23.

principle, it is not easy to see, why it might not be sufficient, in such a case, to file the Bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties, to the extent of asserting their own rights, or of enabling them to contest the matter before a Master.¹

§ 159. Secondly, in cases of joint interests, joint obligations and contracts, and joint claims, duties, and liabilities.² In cases of this sort, the general rule is, that all the joint owners, joint contractors, and other persons, having a community of interest in duties, claims or liabilities, who may be affected by the decree, should be made parties. Hence it is, that one joint tenant cannot ordinarily sue or be sued without joining the other joint tenants.³ So, tenants in common must all sue and be sued in cases touching their common rights and interests.⁴ So, persons having a common interest in a trust fund in moieties, must join in a suit, where redress is sought on account of the fund having been improperly dealt with.⁵ So, if A be tenant for life or years, remainder to * B for life, and remainder or reversion to C in fee; and waste be committed by A, a suit will not lie in Equity by B to stay waste by A, without making C a party; for they have a community of interest in the suit.⁶ But if the remainder be to the first

¹ *Newton v. Earl of Egmont*, 4 Sim. R. 585; S. C. 5 Sim. R. 130; *Burney v. Morgan*, 1 Sim. & Stu. 358-362; Ante § 103, and § 140, 143; *Hallett v. Hallett*, 2 Paige R. 15.

² See *Edwards on Parties*, p. 52 to 60. Post § 169.

³ *Cooper Eq. Pl.* 35; *Weston v. Keighley*, Rep. Temp. Finch, 82.

⁴ See *Fallowes v. Williamson*, 11 Ves. 306, 309, 310; *Cooper Eq. Pl.* 65, 66; *Brooks v. Burt*, 1 Beavan R. 106.

⁵ *Munch v. Cockerill*, 8 Sim. 219. See also *Walker v. Symonds*, 3 Swanst. R. 1, 75.

⁶ *Mollineaux v. Powell*, 3 P. Will. 268; Cox's note [F].

and other sons of B in fee tail, who are not *in esse*, remainder to C in fee, B may maintain a Bill for the waste ; making, however, the first person entitled to the inheritance, C, if *in esse*, a party ; though if such sons were *in esse*, the first tenant in tail would be a necessary party, and the remainder-man, C, would not be a necessary party.¹

§ 160. So, if a Bill is brought by the heirs of a vendor against the vendee, for a specific performance of a contract for the purchase of lands, all the heirs of the vendor ought to be made parties, either as plaintiffs, or as defendants, before a specific performance is decreed.² For the same reason, if the vendee should be dead, on a like Bill brought by the vendor or his heirs for a specific performance, the heirs (or devisees, if any), of the vendee, as well as his personal representative, should be made parties to the Bill. For although the personal estate is primarily chargeable ; yet the real estate purchased belongs in Equity to the heirs or devisees, and will be chargeable with any deficit ; and they are, therefore, proper parties to the account, and interested in the charge.³ The same rule will apply to the case, where a Bill in Equity is brought by heirs at law to set aside a conveyance, made by their ancestor, for fraud and imposition ; *for no final decree will ordinarily be [*153] made, until all the heirs are made parties, or are before the Court.⁴

¹ Cooper Eq. Pl. 35, 36 ; Gifford v. Hort, 1 Sch. & Lefr. 407, 408 ; Dayrell v. Champness, 1 Eq. Abridg. 400, pl. 4 ; Finch v. Finch, 1 Ves. 492, 493.

² Morgan v. Morgan, 2 Wheat. R. 297, 298. See Calvert on Parties, ch. 3, § 3, p. 163 to p. 170 ; Edwards on Parties, p. 129 to 136.

³ Townsend v. Camperdown, 9 Price R. 130.

⁴ Harding v. Handy, 11 Wheat. R. 104.

§ 161. In each of these cases we perceive, that there is a community of interest in all the parties, which may be affected by the decree; and, therefore, all the proper representatives of that interest are required to be before the Court.¹ But if the character of the suit should involve no common right, title or interest, to be affected by the decree, then all persons claiming in privity of estate are not necessary to be made parties. Thus, for example, if there should be a lease for years, supposed to be limited to A in fee tail, remainder to B in fee; and A should contract to sell the estate to C, and then should bring a Bill against C to enforce a specific performance of the contract, he would not be justified in making B a party to the Bill, in order to discuss the question, whether he, A, had an estate tail or not, and what would be the claim of the remainder-man, if he, A, were to die without issue; for no party plaintiff has a right to bring persons, in the situation of remainder-men, before the Court, in order to bind their rights, upon a discussion, whether a prior remainder-man had a title or not, merely to clear the plaintiff's title.²

¹ See Cooper Eq. Pl. 65; Anon. 1 Ves. jr. 29; Wood v. Duke of Northumberland, 2 Anst. 469.

² Devonsher v. Newenham, 2 Sch. & Lefr. 210, 211; Pelham v. Gregory, 1 Eden R. 518; S. C. 5 Brown. Parl. R. 435; (3 Bro. Parl. Cas. 204, Tomlin's Edition). Upon the ground of a community of interests in the common objects of a Bill, Mr. Chancellor Kent has held, that where there are several judgment creditors, claiming by several and distinct judgments, who seek the aid of a Court of Equity, to render their judgments available against certain illegal fraudulent acts of the judgment debtor, equally affecting them all, they might, to prevent multiplicity of suits, unite in one Bill for themselves alone, and were not driven to maintain separate Bills; and that the joint Bill, founded on such separate judgments, would not be demurrable for multifariousness. Brinckherhoff v. Brown, 6 John. Ch. R. 150, 151. But it may perhaps deserve consideration, whether a common interest merely in the result of a suit would justify

§ 162. The same principles apply to persons, who are affected by a common charge or burthen; for, ordinarily, *they must all be made parties, not [*155] only for the purpose of ascertaining and contesting the

such a Bill, since it would not involve any injury to any joint interest, and would not be for the common benefit of all creditors. Can several underwriters on the same policy maintain a joint Bill for a discovery of facts material to their several defences against the assured? (See Post § 537 and note, § 537 a.) The general doctrine is, that two or more separate creditors cannot, for themselves alone, maintain a joint suit for an account of assets against the executor or administrator; but the suit, in such a case, must be for all the creditors, or a distinct suit by each several creditor. See *Leigh v. Thomas*, 2 Ves. 313; *Brown v. Ricketts*, 3 John. Ch. R. 555, 556; ante § 100. In *Birkley v. Presgrave*, 1 East R. 227, Lord Kenyon said:—"It is not competent in general to file a Bill, which will conclude the interests of persons not named. There are indeed some excepted cases to that rule; as in the instance of creditors, one of whom may file a Bill for himself and the rest of the creditors, seeking an account of the estate of their deceased debtor for payment of their demands. But generally speaking, a Court of Equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. I have known the attempt sometimes made, where an estate has been contracted to be sold in parcels to many different persons, to file a Bill in the names of all of them to compel a specific performance; which has been constantly refused. Bills in Equity for a discovery are for the most part auxiliary to proceedings in a court of law: and it does not follow, that a Court of Equity has jurisdiction over the subject-matter, because it would compel a discovery. Such a proceeding does not change the nature of the jurisdiction over the original matter. The objection, therefore, arising from multiplicity of actions, is of no weight in a case like the present. The same inconvenience would exist, if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain. They must all bring their several actions for their respective losses, and no objection could be made to their recovery." He used the like illustration in *Rayner v. Julian*, 2 Dick. 677. In general, too, it may be stated, that persons, having entirely distinct and separate interests, and not having any community or priority of obligation or duty, or connected in any wrong, are not to be joined in a Bill as defendants, simply because the plaintiff has a similar right or claim against each of them. Many of the cases on this subject are reviewed in the learned opinion of Chancellor Kent in the case in 6 John. Ch. R. 150. Post § 286 and note, § 287 a., § 537 and note, and § 537 a.

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right or title to it; but also for the purpose, if it should be established, of a contribution towards its discharge among themselves. Thus, for example, (as we have already seen), where a rent charge, charged upon several estates, or upon one estate in the hands of different tenants, is sought to be enforced in Equity, all the persons in interest, as owners, or tenants, or otherwise entitled, are required (subject to the exceptions before stated) to be made parties.¹ So, where a judgment is a lien upon different parcels of land, if the owner of one parcel seeks to exonerate the same, and to obtain contribution, he must make all the owners of the other parcels parties; for he is not entitled alone to an assignment of the judgment, or to any contribution without all the proper parties being before the Court.²

§ 163. For the same reasons, where debts are charged on land by a will, in aid of the personal assets, if the charge is sought to be enforced by a sale or otherwise against the land, the heirs or the devisees affected thereby, as well as the personal representatives, are necessary parties.³

§ 164. So, on the other hand, where a Bill is filed to have the benefit of a charge on an estate, all persons must be made parties, who claim an interest in the charge.⁴ On the same ground, where legacies are made chargeable on real estate, all the legatees, whose legacies [*156] *are so charged, should be made parties to the Bill; though, if their legacies had been payable out of

¹ Ante § 93. *Anon.* Carey R. 33; 1 Eq. Abridg. 72; *Harris v. Ingle-dew*, 3 P. Will. 92-94; *Attorney General v. Jackson*, 11 Ves. 367; *Adair v. New River Company*, 11 Ves. 444; *Benson v. Baldwin*, 1 Atk. 595.

² *Avery v. Patten*, 7 John Ch. R. 211.

³ *Berry v. Askham*, 2 Vern. 26.

⁴ *Newton v. Earl of Egmont*, 5 Sim. 130; S. C. 4 Sim. R. 585; *Faithful v. Hunt*, 3 Anst. B. 751.

the personal estate only, all the legatees need not be made parties.¹ But persons, having a prior interest or incumbrance upon the property, are not necessary parties to such a suit; for their interests are not, and cannot be touched in the suit.²

§ 165. Upon similar grounds, where there are divers persons, having in succession an interest in particular property, as A for life, and B in remainder, there, if a Bill be filed to transfer the property, or in any other manner to touch the rights or interests of all the parties, they must all be made parties to the Bill.³ But, as tenants for life may have, in certain cases, rights distinct from and unconnected with those in remainder, such, for example, as a right to a partition for life, a Bill to enforce any such rights may be maintained without the remainder-man being made a party.⁴

§ 166. Upon similar grounds, in cases of persons, having a joint interest in personal estate, such as the part-owners of a ship, all the persons in interest must be made parties, either as plaintiffs, or as defendants, as the circumstances of the case may require.⁵ Thus, if an account is sought of the earnings of a ship, all the part-owners must be made actual parties directly, and not by a

¹ *Morse v. Sadler*, 1 Cox R. 352; *Faithful v. Hunt*, 3 Anst. R. 751. In the case of *Morse v. Sadler*, the Bill was brought by one legatee on behalf of himself and all the legatees; but it was held, that they must all be made actual parties, as the legacies were charged on land.

² *Parker v. Fuller*, 1 Russ. & M. 656. Ante § 149. Post § 193.

³ *Sherrit v. Birch*, 3 Bro. Ch. R. 229; Mitf. Eq. Pl. by Jeremy, 173, 174; *Anon.* 12 Mod. R. 560; *Berry v. Askham*, 2 Vern. 26; *Bayley v. Best*, 1 Russ. & M. 659.

⁴ *Baring v. Nash*, 1 Ves. & Beam. 551.

⁵ See *Calvert on Parties*, ch. 3, § 19, p. 260 to 263.

Bill merely in behalf of all,¹ unless indeed, there should arise, which is rarely the case, the exception of numerosness.² On the other hand, if two or more part-owners or others are liable to a demand, all the parties liable must be brought before the Court; and unless some clear exception to the rule exists, the suit cannot be proceeded in against one alone.³

§ 167. Upon similar grounds, wherever a suit is brought by or against partners, all of them must be joined in the suit, either as plaintiffs, or as defendants.⁴ And if one of the partners should die, and a remedy should be sought in Equity against his personal representative for the joint debt, the surviving partners should also be made parties; for they have an interest to contest the debt, and a right to be heard in taking

¹ *Moffat v. Farquharson*, 2 Bro. Ch. R. 338, and Mr. Belt's note; *Massey v. Davis*, 2 Ves. jr. 317; *Ireton v. Lewis*, Rep. Temp. Finch, 96; *East India Co. v. Neave*, 5 Ves. 172, 185; *Perrott v. Bryant*, 2 Younge & Coll. 61, 68.

² *Good v. Blewit*, 13 Ves. 397, 401.

³ *Jackson v. Rawlins*, 2 Vern. 195; *Pierson v. Robinson*, 3 Swanst. R. 139, note; *Cowslad v. Cely*, Prec. Ch. 83; *Weymouth v. Boyer*, 1 Ves. jr. 416, 422.

⁴ *Moffat v. Farquharson*, 2 Bro. Ch. R. 338; *Ireton v. Lewis*, Rep. Temp. Finch, 96; *Pierson v. Robinson*, 3 Swanst. 139; *Weymouth v. Boyer*, 1 Ves. jr. 417. If a necessary party will not consent to be made a plaintiff, though his interest is on the same side, as that of the plaintiff, he may be made a defendant. *Fallowes v. Williamson*, 11 Ves. 313; *Leigh v. Thomas*, 2 Ves. 312, 313. There is an exception in the case of a suit brought against a partnership, where there is a dormant partner; for the plaintiff has his election to make him a party or not. *Hawley v. Warner*, 4 Cowen R. 717; *Ex parte Hodgkinson*, Cooper Eq. Pl. 99, 101; *Ex parte Norfolk*, 19 Ves. 457; *Ex parte Layton*, 6 Ves. 438; *Ex parte Hamper*, 17 Ves. 404. It seems also, that in a suit, brought by partners, a dormant partner need not join, if the defendant has been contracted with by the ostensible partners only. But the authorities are not clear to the point. See Collyer on Partnership, ch. 5, sec. 1, art. 4, p. 392 and cases there cited. Calvert on Parties, ch. 3, § 15, p. 260 to p. 263; Edwards on Parties, p. 52 to p. 59.

the account.¹ In the converse case of a suit in Equity, brought against the surviving partners, to receive payment out of the partnership effects, it seems, that the same rule would for the same reason prevail.²

§ 168. In relation, however, to the case of part-owners and others, engaged in a common adventure, in order to ascertain, whether they are all to be joined in the suit, we are to see not only, whether there is a joint adventure, but whether all the profits and losses are to be borne and taken by all in certain agreed proportions ; or, whether some are to share a proportion only, as a mode of payment of wages. In the latter case, such sharers need not be made parties ; in the former case, they must all be made parties, or the Bill be filed on behalf of all. Thus, where there were a number of fishing boats employed in a particular fishery, and the adventurers consisted of the owners of the boat, the owners of the nets, and the crew of the boat, among whom the proceeds of each boat were arbitrarily divided, according to a particular agreement, thus sharing the profits and losses of the adventure ; it was held, that all of the adventurers ought to be parties to a Bill

¹ *Wilkinson v. Henderson*, 1 Mylne & K. 582, 588 ; *Holland v. Prior*, 1 Mylne & K. 237, 240 ; *Devaynes v. Noble*, *Sleech's case*, 1 Meriv. R. 539 to 572 ; *Pierson v. Robinson*, 3 Swanst. R. 139. See also *Bowsher v. Watkins*, 1 Russ. & Mylne, 277 ; *Scholefield v. Heathfield*, 7 Sim. 667 ; *Davies v. Davies*, 2 Keen R. 534 ; *Butts v. Genung*, 5 Paige R. 254 ; *Thorp v. Jackson*, 2 Younge & Coll. 553 ; Post, § 178 and note. See in 2 Keen R. 752, the form of a decree to take an account of a deceased partner's interest, where, since his death, new partners have been admitted.

² There does not seem to be any case directly deciding this point ; but the analogous case of joint obligors in the following section (§ 169) is in its favor. Another question may arise, whether the surviving partners, suing in Equity for a partnership debt or claim, are bound to join the personal representative of the deceased. See next page, note (2.)

affecting the common interest.¹ But, in the like case, if the crew were not jointly interested in the profits and losses, but were to receive a certain proportion in lieu of wages, or as a mode of calculating wages, they would not be necessary parties.²

[*159] * § 169. Upon similar grounds, in cases of joint bonds or obligations, all the parties, obligors, and obligees, are required to be made parties to the suit.³ It has been said, that, in regard to the obligors, this is only a rule of convenience, and to save those, who are severally charged, the trouble of a new suit for a contribution against those, who are not charged, and not a rule of necessity; and therefore it may be dispensed with in certain cases.⁴ This is true. But, then, the exceptions all stand upon special grounds; and the rule is now firmly established, as one of general obligation, in this as well as in all other classes of cases. It has even been pressed to the extent of declaring, that where the bond is several, as well as joint, all the obligors, whether principals or sureties, must be made parties, (to avoid circuity of action,) because they are not only entitled to contribution, but also because they are entitled to have the assistance of each other, in taking the account of what remains due on the bond.⁵

¹ *Coppard v. Page*, 1 Forrest R. 1; S. C. 2 Younge & Coll. 68.

² *Perrott v. Bryant*, 2 Younge & Coll. 61, 66, 68. In *Scholefield v. Heathfield*, 7 Sim. R. 667; the Vice Chancellor said; "I can understand in a general case, that there may be a suit by the surviving partners in a firm, which comprehended A, against the surviving partners in another firm, which also comprehended A, without making the several representatives of A a party." Post, § 178.

³ *Anon.* 2 Freem. R. 127; *Cockburn v. Thompson*, 16 Ves. 326; *Madox v. Jackson*, 3 Atk. 406; Ante § 159; *Edwards on Parties* 99 to 102; *Calvert on Parties*, ch. 3. § 14, p. 235 to p. 239.

⁴ *Cranborne v. Crispe*, Rep. Temp. Finch, 105.

⁵ *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clarke*, 2 Dick. 738; S. C. 3 Swanst. 147, note; *Cockburn v. Thompson*, 16 Ves. 326; *Bland*

The same rule is also applied, where one of the obligors is dead ; for in such a case his personal representative, as well as the survivors, must be made parties to a suit in Equity, brought for payment of the debt, whether it be for payment * by the survivors alone, or out [*160] of the assets of the deceased.¹ There are, however, exceptions to this rule standing upon peculiar grounds. Thus, if, in the case of a joint and several bond, one of the obligors (either a principal, or a surety) is insolvent, he need not be made a party.² So, if the suit is against the principal alone, without the sureties, the latter being insolvent, or not having paid any thing, and the Bill of the plaintiff seeks nothing, except against the principal, the Bill is maintainable, although the sureties might, if the plaintiff had so elected, have properly been made parties.³

§ 170. Thirdly, in cases of administration. In general it may be stated, that wherever the personal assets

v. Winter, 1 Sim. & Stu. 246. Lord King, in *Collins v. Griffith* (2 P. Will. 313) held otherwise in the case of a joint and several bond, upon reasoning, which it seems difficult satisfactorily to answer. The same point seems to have been held in *Stanley v. Stock*, Moseley's R. 383, and in Eq. Abridg. 93, K. (1). This doctrine, however, has been overruled in the later cases. See *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clarke*, 2 Dick. R. 738; *Cockburn v. Thompson*, 16 Ves. 326; *Bland v. Winter*, 1 Sim. & Stu. 246.

¹ *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clarke*, 2 Dick. 738; *Bland v. Winter*, 1 Sim. & Stu. 246.

² *Cockburn v. Thompson*, 16 Ves. 326; *Madox v. Jackson*, 3 Atk. 406; *Angerstein v. Clarke*, 3 Swanst. R. 147, note; S. C. 2 Dick. 738.

³ *Cockburn v. Thompson*, 16 Ves. 326; *Madox v. Jackson*, 3 Atk. 406; *Haywood v. Ovey*, 6 Madd. R. 113; *Angerstein v. Clarke*, 3 Swanst. 147; note; S. C. 2 Dick. 738. The case of *Chaplin v. Cooper* (1 Ves. & Beam. 16), has been thought to justify the conclusion, that, in case of a joint bond by a principal and surety, a Bill may be filed by the principal alone, without the surety, to restrain the creditor from proceeding at law to enforce a joint judgment on the bond. I do not understand, that, upon its actual circumstances, it justifies any such conclusion.

of the deceased, in the hands of his executors or administrators, or belonging to them, may be affected by the decree, they should be made parties.¹ Therefore, where a claim to property in dispute would vest in the personal representative of a deceased person, such representative should be made a party. So, where there is a trust term vested in executors or administrators, and it is required to be assigned, they must be made parties. If, in such cases, there is no general personal [*161] *representative of the deceased, an administration will nevertheless be necessary; though, where it can, by the local law, be so, it may be limited to the particular subject-matter of the suit.² In some cases, indeed, where it has appeared at the hearing, that the personal representative of the deceased was not a party to the suit, but ought so to be in the ulterior proceedings, the Court has directed, that the representative should be brought in, and heard in the proceedings before the Master, without requiring the representative to be made a party by the Bill, or otherwise. In such a case, he is considered as a party in the subsequent proceedings.³

§ 171. So, in all cases, where a suit is instituted respecting the trusts, actual or constructive, of a will,

¹ *Humphreys v. Humphreys*, 3 P. Will. 349; *Lane v. Fawlie*, 2 Madd. R. 101; Post § 214; *Calvert on Parties* ch. 3, § 2, p. 139 to 161; *Edwards on Parties*, p. 107 to 128.

² *Mitf. Eq. Pl. by Jeremy*, 178; *Foreham v. Rolfe*, 1 Tamlyn R. 1.

³ *Mitf. Eq. Pl. by Jeremy*, 177, 178; Ante § 100, note. In some cases it may be proper, even if not indispensable, to join the personal representative of the former representative of a deceased person as a co-defendant. As, for example, in a suit by a creditor against the present personal representative of the deceased, the former representative, who has received assets, may be made a party. This subject is very largely discussed in *Holland v. Prior*, 1 Mylne & K. 239 to 248. See *Williams v. Williams*, 9 Mod. R. 299.

affecting the personalty, as for the payment of a legacy, or an annuity, or for marshalling assets, or for the payment of debts, or for the distribution of the residue, the executor or administrator must be made a party.¹ Even the insolvency of the executor or administrator will not, in such a case, be an excuse for not making him a party, since the Bill necessarily seeks a discovery of the assets.²

§ 172. There are also a variety of cases, in which the executor or administrator (as well as the heir or devisee) must be made a party to a Bill, seeking the enforcement of debts against the real estate, which are *properly and primarily chargeable upon the [*162] personal assets, but which are also chargeable upon the real estate.³ Thus, for example, where a testator charges his real, as well as personal, estate with the payment of his debts; inasmuch as the personalty is by the known rules of law first chargeable with these debts, and the real estate is only an auxiliary fund, the executor or administrator is an indispensable party, not only to take an account of the assets, and to disclose, whether there is any deficiency (for an averment to that effect in the Bill will not be sufficient); but also to make the decree

¹ Cooper Eq. Pl. 34. Ante § 140, § 141, § 149. Post § 214. It seems, that every Bill, brought to obtain the benefit of an interest accruing by intestacy in the general assets, must not only make the personal representative a party, but it must further charge, that there is a surplus belonging to the plaintiff after the discharge of all his debts and all incumbrances; otherwise it will be bad on demurrer. *Stephens v. Frost*, 2 Younge & Coll. 297.

² Cooper Eq. Pl. 34, 35; *Ashurst v. Eyre*, 2 Atk. 51; S. C. 3 Atk. 341. Ante § 140, § 141, § 149.

³ Mitford Eq. Pl. by Jeremy, 176; Calvert on Parties, ch. 3, § 2, p. 139 to 161; Id. § 3, p. 162 to p. 170; Edwards on Parties 107 to 128; Id. 129 to 136.

attach primarily to the personal assets, and secondarily only to the real estate.¹

§ 173. It is upon the same ground, that where an obligor, or covenantor, has, by his bond or covenant, bound his heirs to the performance of the obligation or covenant, if he should die, and a suit should be brought to enforce the obligation or covenant in Equity against the heir; in such a case the executor or administrator would be a necessary party, though it would be otherwise at Law; for the natural fund for the payment of debts is the personal estate, and this ought first to go in ease of the land.²

§ 174. In support of this doctrine it has been said, that a Court of Equity delights to do complete justice, and not by halves; as first to decree the heir to perform the covenant, or to pay the bond, and then to put the [*163] heir upon another Bill against the executor or administrator, to reimburse himself out of the personal assets, which, for aught that appears, may be more than sufficient to answer the demand. But, where the executor or administrator and heir are both brought before the Court, complete justice may be done, by decreeing the executor or administrator to perform the covenant, or to pay the bond, as far as the personal estate will extend; the rest to be made good by the heir, out of the real assets.³

¹ *Fordham v. Rolfe*, 1 Tamlyn, 1; *Mitf. Eq. Pl. by Jeremy*, 176, 177; *Harris v. Ingledew*, 3 P. Will. 92, 94, 98; *Berry v. Askham*, 2 Vern. 26. See *Madox v. Jackson*, 3 Atk. 406, 407. Post § 176, § 180.

² *Knight v. Knight*, 3 P. Will. 333; *Cooper Eq. Pl.* 38, 39; *Plunket v. Penson*, 2 Atk. 51; *Madox v. Jackson*, 3 Atk. 406; 1 Story on Eq. Jurisp. § 571, § 573; *Galton v. Hancock*, 2 Atk. 432, 434, 435.

³ *Knight v. Knight*, 3 P. Will. 333; *Galton v. Hancock*, 2 Atk. 436; *Madox v. Jackson*, 3 Atk. 406; *Cooper Eq. Pl.* 38, 39. There is an exception, if the personal representation is in controversy in the Ecclesi-

§ 175. Notwithstanding the apparent reasonableness of this doctrine, it is not a little remarkable, that Courts of Equity have refused to act upon it, where a mortgagee brings a Bill to foreclose the mortgage against the heir of the mortgagor; for in such a case, it has been held, that though the mortgage is primarily a debt, charged upon the personal assets, yet it is not necessary to make the personal representative of the mortgagor a party. For it is said, that the mortgagee is in no ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of having the personal estate applied in exoneration of the real, he must enforce that right by filing a Bill.¹

§ 176. Upon the same ground of bringing in the party, who is primarily liable for the debt, in aid of him, who is only secondarily liable, and thus, without further litigation, of accomplishing in one suit complete justice between all the parties, if a Bill in Equity seeks satisfaction of a debt due by a covenant or obligation binding the heir of the debtor, out of real assets *devised [*164] by the debtor to a devisee, the heir of the debtor, as well as his personal representative, must ordinarily be made a party; for if any assets have descended to the heir, they are first applicable to the discharge of the covenant or obligation, unless the assets devised are

astical Court; for in such case, the representative being made a party will be dispensed with, at least, where the Bill is for discovery, in order to preserve the debt. *Plunket v. Penson*, 2 Atk. 51; *Ante* § 91; *Bradshaw v. Outram*, 13 Ves. 234; *Daniel v. Skipwith*, 2 Bro. Ch. R. 155, Mr. Belt's note.

¹ *Duncombe v. Hanstey*, cited 3 P. Will. 333, Mr. Cox's note, A; *Cooper Eq. Pl.* 38. See *Post*, § 186, § 196. *Calvert on Parties*, ch. 3, § 3, p. 167, 168.

charged with debts in exoneration of the heir.¹ So, where a testator has devised his lands, and has subjected the timber growing thereon to his debts, it seems, that the devisee, as well as the personal representative, should for the same reason be made a party to a Bill by a creditor, to recover his debt.²

§ 177. The same doctrine is applicable to the case of a contract for the purchase of lands, where either of the original parties dies before the contract is completed. If a Bill is brought by the vendor, to compel a specific performance of the contract, the purchaser being dead, the personal representative of the purchaser is a necessary party ; because the personal assets are [*165] *primarily liable for the debt.³ If the Bill further seeks to enforce the lien for the purchase money on the land itself, the heirs, if it is intestate estate, and the

¹ Mitf. Eq. Pl. by Jeremy, 176 ; Cooper Eq. Pl. 38 ; *Gawler v. Wade*, 1 P. Will. 99, 100 ; *Warren v. Stawell*, 2 Atk. 125 ; *Galton v. Hancock*, 2 Atk. 432 to 438. Lands in the hands of the devisee are made liable to the specialty debts of the testator by the statute of 3 and 4 Will. & Mary, ch. 14 ; and the statute authorizes an action jointly against the heir and devisee on such specialties. By analogy to the proceedings at Law, Courts of Equity seem to have required the heir and devisee to be joined in suits in Equity to enforce such specialties. *Gawler v. Wade*, 1 P. Will. 100 ; *Warren v. Stawell*, 2 Atk. 125 ; *Galton v. Hancock*, 2 Atk. 432, 433. Why, on the general principles stated in *Knight v. Knight*, 3 P. Will. 333, the heir at law, as the party primarily bound to pay the debt, if he has real assets, as between himself and the devisee might not be made a party, it is not easy to say. See *Galton v. Hancock*, 2 Atk. 432 to 438.

² *Wiser v. Blackley*, 1 John. Ch. R. 437. There could be no doubt in the common case of a Bill brought against the devisee, to have the timber applied to the payment of his debts. The only doubt seemed to be, whether, in a suit against the executor, the devisee was a necessary party, though he might be properly joined, if a deficiency of assets was suggested. The learned Judge simply expressed the inclination of his opinion in the case, which was acquiesced in.

³ *Townsend v. Champerdowne*, 9 Price, 130 ; Ante § 172.

devisees, if it is devised, are necessary parties, and the personal representative also; for the heirs or devisees are entitled to relief over, and to indemnity from the personal assets.¹ On the other hand, if the purchaser should die, and a specific performance should be sought against the vendor by the heirs of the purchaser, who are treated in equity as entitled to the purchase, it would be necessary to make the personal representative also of the purchaser a party; for the heirs are entitled to have the contract primarily paid or discharged out of the personal assets.²

§ 178. And not only are the personal representatives of the deceased proper parties in cases of administration, where the personal assets are concerned; but third persons, who may have possession of such assets, or may be liable to account therefor, may also, under particular circumstances (but not otherwise), be joined as parties in such a Bill.³ Thus, for example, if there are persons, who have possessed themselves of the estate of the deceased, or are his debtors, and there is collusion between them and the personal representatives; or the latter are insolvent; a creditor, or a legatee, or a distributee, may make such third persons parties to a Bill against such personal *representatives.⁴ So, in cases of part- [*166] nership, if the survivors become insolvent, a creditor may

¹ *Smith v. Hibbard*, 2 Dick. 730; *Townsend v. Champerdowne*, 9 Price, 130.

² *Champion v. Brown*, 6 John. Ch. R. 402.

³ See *Holland v. Prior*; 1 Mylne & K. 240 to 244; *Beckley v. Dorrington*, West R. 169; *Doran v. Simpson*, 4 Ves. 665; *Long v. Majestre*, 1 John. Ch. R. 305. Post § 514; *Pearse v. Hewitt*, 7 Sim. 247.

⁴ *Newland v. Champion*, 1 Ves. 105, 106; *Doran v. Simpson*, 4 Ves. 651; *Alsager v. Rowley*, 6 Ves. 748; *Beckley v. Dorrington*, West R. 169, cited 6 Ves. 749; *Burroughs v. Elton*, 11 Ves. 28, 35; *Gedge v. Traill*, 1 Russ. & Mylne, 281, note; *Holland v. Prior*, 1 Mylne & K. 239 to 248; *Wilson v. Moore*, 1 Mylne & K. 142. Post § 227, § 514.

maintain a Bill against the personal representative of a deceased partner, and join the survivors as parties in the Bill.¹ So, a residuary legatee, in a Bill against the executor for an account, may join the surviving partners, as a party defendant, in order to have a full account of all the personal assets taken at the same time, even without any charge or proof of collusion.² Indeed, it seems now to be held, that in all cases of a Bill, to obtain satisfaction of a debt or claim out of the estate of a deceased partner, his surviving partners may be joined with the personal representative of the deceased partner, without stating a case either of collusion or insolvency, upon the mere ground, that it is necessary to an entire account of the assets, and that the survivors are interested to

¹ *Newland v. Champion*, 1 Ves. 105, 106; *Holland v. Prior*, 1 Mylne & K. 240, 248, 244; *Utterson v. Mair*, 2 Ves. jr. 95; S. C. 4 Bro. Ch. R. 270. Ante § 167. Upon the same ground, if a suit in Equity is brought against the executors of a deceased partner to recover a debt from the partnership on account of the surviving partners being insolvent, the latter, or those, who represent them, it should seem, ought to be made parties, as proper parties to the account and as primarily liable to pay the debt. See *Hamersley v. Lambert*, 2 John. Ch. R. 508; *Vulliamy v. Noble*, 3 Meriv. R. 593; *Pierson v. Robinson*, 3 Swanst. R. 139; *Wilkinson v. Henderson*, 1 Mylne & K. 585; *Devaynes v. Noble*, *Sleeck's case*, 1 Meriv. R. 530, 547. Ante § 167.

² *Bowsher v. Watkins*, 1 Russ. & Mylne, 277. But in *Davies v. Davies*, 2 Keen R. 534, Lord Langdale said, that the decision in *Bowsher v. Watkins* was far from establishing the general proposition, that in every case a bill might be filed against an Executor and the surviving partner of the Testator, without charging or proving fraud or collusion; and that that case turned on special circumstances; and accordingly he overruled the doctrine in the case before him. On the other hand Mr. Baron Alderson, in *Thorpe v. Jackson*, 2 Younge & Coll. 553, held, that to a Bill of joint creditors against the estate of a deceased partner, the surviving partner ought to be made a party, even although no decree is sought against him; because he is necessarily interested in taking the accounts. Under these circumstances I have left the text in its present state. See ante § 167.

contest the demand of the plaintiff, and of all other persons claiming to be joint creditors.¹

*§ 179. In cases, where the executor or ad- [*167] ministrator is required to be made a party, it is not sufficient, that he is such by the appointment and authority of a foreign government; but he must be such by the appointment of the government, within whose territorial dominions the suit is brought. For although there may be personal assets in a foreign country, and a personal representative constituted there; yet he is not properly

¹ So the doctrine seems laid down in *Newland v. Champion*, 1 Ves. 105. It was directly decided by the Master of the Rolls in *Wilkinson v. Henderson* (1 Mylne & K. 582); and it was recognised by Lord Brougham in *Holland v. Prior*, 1 Mylne & K. 240, 242, 243, 244, where he applied the doctrine to the case of the representative of a deceased representative, without any collusion being suggested between him and the present representative. Ante § 167. The case of *Wilkinson v. Henderson* (1 Mylne & K. 582) further decided, that a joint creditor was not compellable to pursue the surviving partners in the first instance; but he might resort at once to the assets of the deceased partner, without showing, that he could not obtain full satisfaction from the survivors; leaving it to the personal representative of the deceased partner to recover from the survivors, what upon the account should appear to be due from the survivors to the deceased partner. In such a case, however, the surviving partner is properly joined as a party, as he is interested in contesting the demands of all the joint creditors, though no decree can be made against him in such suit. See also *Braithwaite v. Britain*, 1 Keen R. 219. In *Long v. Majestre*, 1 John. Ch. R. 305, Mr. Chancellor Kent recognised the same distinction made by Lord Hardwicke in *Newland v. Champion*, (1 Ves. 105). In *Simpson v. Vaughan* (2 Atk. 33), Lord Hardwicke said; "It has been said at the bar, that you may make any person a defendant, that you apprehend has possessed himself of assets, upon which you have a lien. But this certainly cannot be laid down as a general rule; for it would be of dangerous consequence to insist, that you can make any person a defendant, who has assets, unless you can show to the Court, he denies, that he has assets, or applies them improperly." In *Butts v. Genung*, 5 Paige R. 254, the surviving partner was deemed a proper party. But the point was suggested, whether, if he was insolvent, he was a necessary party; and it was left undecided. See also *Davies v. Davies*, 2 Keen, 534, and *Thorpe v. Jackson*, 2 Younge & Coll. 554, cited in this section, note (2). Ante § 167.

answerable to the process of the courts of another country; and the assets received by him must be administered according to the laws of the foreign country, from which he has derived his authority. In his character, therefore, of a foreign executor or administrator, he is not a proper or necessary party to substantiate, or to [*168] *repel, a demand affecting the personal assets of the deceased in another country, where the suit is brought.¹

§ 180. Fourthly. In cases of persons, having a title to real estate, as heirs at law or as devisees, which is charged with or liable for debts. We have already seen, that the heir and devisee must be made parties, as well as the personal representative, to a Bill, which seeks payment of a bond, binding the heirs, out of the estate devised by the debtor.² The like principle applies (as we have also seen³) to the case of a Bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate; for in such a case the heir and devisee (if the estate is devised) are ordinarily necessary and proper parties.⁴ The heir at law

¹ Story on Conflict of Laws, § 513, 514; Mitf. Eq. Pl. by Jeremy, 177, 178; Jauncey v. Sealey, 1 Vern. R. 397; Lowe v. Fairlie, 2 Madd. Ch. R. 101; Logan v. Fairlie, 2 Sim. & Stu. 284. But see Sandilands v. Innes, 3 Sim. 263, and Anderson v. Counter, 2 Mylne & K. 763.

² Ante § 176; Mitf. Eq. Pl. by Jeremy, 176; Gawler v. Wade, 1 P. Will. 99; Chaplin v. Chaplin, 3 P. Will. 367; Galton v. Hancock, 2 Atk. 432 to 438; Madox v. Jackson, 3 Atk. 406; Ashurst v. Eyre, 3 Atk. 341; Calvert on Parties, ch. 3, § 2, p. 139 to p. 160; Id. § 3, p. 161 to p. 170; Edwards on Parties, p. 107 to p. 128; Id. 129 to p. 136.

³ Ante § 172, § 176; Mitf. Eq. Pl. by Jeremy, 171, 172; Ashurst v. Eyre, 3 Atk. 341.

⁴ It is said in the text, *ordinarily*; because if the heir is out of the country, or no heir can be found, he is dispensed with as a party. Ante § 87. Mitf. Eq. Pl. 171, 172, 173. Gawler v. Wade, 1 P. Will. 99, 100. Sometimes a decree, confessedly defective, is made on account of the absence

should be a party, because it is proper, that the will, if there is one, should be established, and the title quieted against his demand, if he has any.¹ The devisee should be a party to vindicate his own interest, and to contest the right to sell or charge the estate.²

*§ 181. Upon the like ground, where an es- [*169] tate, which is mortgaged, is devised, if the devisee brings a Bill to redeem, and seeks to have the will established, the heir at law is a necessary party. But it will be otherwise, if the devisee seeks only to redeem by a title derived under the will.³ So, if the object of the Bill is to carry into effect the trusts of a will, by raising portions for younger children out of the real estate of the testator, the heir at law, and the devisee (if any is interested), must be made parties.⁴ However, (as we have already seen) where the object of a Bill is to carry into effect the trusts of a will, if the will is not sought absolutely to be established, and the heir cannot be, or is not, brought before the Court, a decree will often be made to carry into effect the trusts of the will, leaving the heir to his right to contest it, in any man-

of an heir, where such a decree can properly be made. *Harris v. Bishop of Lincoln*, 2 P. Will. 137. *Graham v. Graham*, 1 Ves. jr. 276. Where no heir can be found, it is usual to make the Attorney General a party in his stead. *Humberston v. Humberston*, 1 P. Will. 332; *Mitf. Eq. Pl. by Jeremy*, 172, 173.

¹ *Mitf. Eq. Pl. by Jeremy*, 171, 172.

² See *Mitf. Eq. Pl. by Jeremy*, 171, 172, 173; *Warren v. Stawell*, 2 Atk. 125; *Harris v. Ingledew*, 3 P. Will. 92, 98; *Jackson v. Radford*, 4 Price R. 274; *Attorney Genl. v. Green*, 2 Bro. Ch. R. 492. See also *Galton v. Hancock*, 2 Atk. 232 to 238; *Plunket v. Joyce*, 2 Sch. & Lefr. 159; *Fordham v. Rolfe*, Tamlyn R. 1, and note.

³ *Lewis v. Nangle*, 2 Ves. 431; *S. C. Ambler R.* 150. See also *Colton v. Wilson*, 3 P. Will. 190; *Morrison v. Arnold*, 19 Ves. 673; *Harris v. Ingledew*, 3 P. Will. 92, 94; *Calvert on Parties*, ch. 3, § 6, p. 179 to 187; *Edwards on Parties*, 87 to 98.

⁴ *Plunket v. Jones*, 2 Sch. & Lefr. 159.

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ner, which he may be enabled to do it.¹ So, where there is an annuity charged on lands, if the lands are sought to be affected, the heir at law is a necessary party; but it is otherwise, where the suit is only for a personal charge against the personal representative.²

§ 182. Fifthly, in cases of mortgages. And this admits of two different considerations: (1.) Who are [*170] proper *parties to a Bill to redeem: (2.) Who are proper parties to a Bill to foreclose. Each of these heads will be examined in its order. And in the first place, who are proper parties to a Bill to redeem, as plaintiffs. If the mortgagor brings the Bill against the mortgagee, there having been no death or assignment on either side, and no other circumstances, it is of course, that no other persons but them need be made parties. If the mortgagor be dead, then his heirs, or his devisee, if the estate has been devised, is the proper party to redeem, if it be a mortgage in fee; and if it be a mortgage for a term of years only, then the personal representative of the deceased. If two estates are mortgaged, and by the death of the mortgagor the equity of redemption of the two estates is vested in different persons, all of them must be made parties to a Bill to redeem.³ If a Bill to redeem charges, that a part of the mortgage, principal and interest, has been paid by the mortgagor in his lifetime, the personal representative of the mortgagor, as well as his heir or devisee, is

¹ Ante § 87; *French v. Baron*, 2 Atk. 120; *Webb v. Lilcott*, 3 Atk. 25; *Banister v. Way*, 2 Dick. R. 599; *Cator v. Butler*, 2 Dick. 438; *Thompson v. Topham*, 1 Younge & Jer. 556; *Harris v. Ingledew*, 3 P. Will. 92, 94; *Mitf. Eq. Pl. by Jeremy*, 172, 173.

² *Weston v. Bowes*, 9 Mod. R. 309.

³ *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 2. See also *Dexter v. Arnold*, 2 Sumner R. 109.

a necessary party, to take the account of what is due on the mortgage.¹ Indeed, as the personal assets are usually first to be applied in exoneration of the real estate mortgaged, it would seem, that in a Bill by an heir or devisee to redeem, he might properly make the personal representative of the mortgagor a party defendant, in order to have the assets so applied; and thus to relieve himself from the burden of the incumbrance.²

*§ 183. If the mortgagor has assigned the [*171] estate, subject to the mortgage, and the assignee is to pay off the mortgage; then the assignee may maintain a suit to redeem, without making the mortgagor a party. But if the assignment be of the whole real estate, absolutely free from incumbrances, then the mortgagor should, or at least may, be made a party, in order to be bound by the decree, and to assist in taking the account; he being primarily liable to discharge the mortgage. If the assignment is made to several persons jointly, all of them should be parties to the Bill to redeem.³

§ 184. Where a mortgagor has conveyed his equity

¹ *Cholmondely v. Clinton*, 2 Jac. & Walk. 135.

² *Howell v. Price*, 1 P. Will. 291; *Daniel v. Skipwith*, 1 Harris. Ch. Pract. by Newl. 30; *Waring v. Ward*, 7 Ves. 336 to 340; *Bradshaw v. Outram*, 13 Ves. 234; *Duke of Cumberland v. Coddington*, 3 John. Ch. R. 257; *Ryland v. Lay Touche*, 2 Bligh R. 566, 584; 1 Story on Equity Jurisp. § 571 to § 578; *Robinson v. Gee*, 1 Ves. 352; *Knight v. Knight*, 3 P. Will. 333, and note; *King v. King*, 3 P. Will. 358. There is a clear distinction, which should constantly be borne in mind, between persons who are indispensable parties, and persons, who may properly be made parties, and yet if they are not, the suit may proceed without them, without being defective. If upon a Bill to redeem, it should be charged, that the mortgagor's debt had been actually extinguished by the receipts and profits of the estate by the mortgagee during the life of the mortgagor, the personal representative of the latter, as well as his heir or devisee, should be a party to the Bill. *Ryland v. La Touche*, 2 Bligh R. 566, 584. Ante § 153.

³ *Palmer v. Earl of Carlisle*, 1 Sim. & Stu. 423, 425.

of redemption to trustees for the benefit of his other creditors, the trustees alone are generally the proper parties to a bill to redeem, and not any of the creditors entitled under the trust.¹ But a special case may exist, in which such creditors would be entitled to redeem; as for example, if the trustees should collude with the mortgagee, or should refuse to sue, or should be insolvent.²

[*172] *§ 185. Hitherto, we have been considering the more simple cases of Bills to redeem. But, in many cases, there are various persons having a privity of estate, under or with the mortgagor, of particular interests, not embracing the whole fee, who are entitled to redeem. Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence, a tenant for life, a tenant by the curtesy, a tenant in dower in many cases, a reversioner, a remainder-man, a judgment creditor having a lien on the estate, a tenant by elegit, and, indeed, every other person, being a subsequent incumbrancer, or having a legal or equitable title or lien on the premises, already subjected to a mortgage, may insist upon a right to redeem, in order to enforce his or her own claims and interests in the land, without making the other persons in interest parties.³ In such a case, the plaintiff may, however, if he chooses, for the purposes of contribution, and taking a conclusive account, make the other persons, in the same interest with himself, parties (either as plaintiffs, or as de-

¹ Cooper Eq. Pl. 175; *Troughton v. Binkes*, 6 Ves. 573, 575.

² *Troughton v. Binkes*, 6 Ves. 573, 575. In such a case, the Bill should be brought on behalf of all the creditors, for a few could not redeem for their own benefit. *Ibid.*

³ 2 Story on Equity Jurisp., § 1023; 2 Fonbl. Eq. B. 3, ch. 1, § 8, note (p).

fendants, as the circumstances may require) to the Bill to redeem.¹ In some cases, indeed, (as we shall presently see), persons, possessing the remaining interests, may be necessary parties, where the nature of the decree may affect their interests.

§ 186. Cases often exist of successive mortgages under the same mortgagor. In such a case, the second or other subsequent mortgagee, has, upon the principles already stated, a right to redeem either one or all of the *antecedent mortgages.² To a Bill brought by [*173] him for such a purpose, the mortgagor, or his heir, or other proper representative in the realty, is a necessary party ; for, it is said, the natural decree in such a case, is, that the second mortgagee shall redeem the first mortgagee, and the mortgagor or his representative in the realty shall redeem the second, or stand foreclosed. And a Court of Equity, in such a case, endeavors to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all the parties interested in the estate.³

¹ See 1 Story on Equity Jurisp., § 484 to § 490.

² No prior mortgagees, except those, who are parties to the Bill, would be bound by the decree. See the cases of *Finley v. Bank of U. States*, 11 Wheat. R. 304, and *Rice v. Page*, 2 Sim. R. 471, which, though cases of foreclosure, may furnish an analogy. See *Delabere v. Norwood*, 3 Swaust. R. 144, note ; *Godfrey v. Chadwell*, 2 Vern. 611 ; *Haines v. Beach*, 3 John. Ch. R. 459. Ante § 185.

³ *Fell v. Brown*, 2 Bro. Ch. R. 278 ; *Palk v. Clinton*, 12 Ves. 58, 59 ; *Farmer v. Curtis*, 2 Sim. R. 466 ; *Hobart v. Abbott*, 2 P. Will. 643 ; *Adams v. St. Leger*, 1 B. & Beatt. 181, 185. Ante § 175. Post § 196. *Ld. Thurlow*, in *Fell v. Brown*, (2 Bro. Ch. R. 278), pushed this doctrine so far, as to deny the second mortgagee a right to redeem, where the heir, being abroad, could not be made a party. Why, in such a case, a decree might not be made, allowing the second mortgagee to redeem, without more, especially if he prays no more, it is not easy to say. In *Palk v. Clinton*, 12 Ves. 58, the Master of the Rolls (Sir William Grant), without negating such a proceeding or decree, said, it would be very unusual, unless the mortgagor were before the Court. A case might easily be supposed, where such a decree would be the only proper decree ; as

But, in such a case, it seems, that the personal representative of the mortgagor would not be a necessary party, even though it might, perhaps, be competent to make him a party.¹

§ 187. Where a Bill is brought to redeem by the party, entitled to the Equity, against a purchaser, who is asserted to have had notice of the Equity, but who has purchased from a person, who had no notice, it seems, that the proper representatives of the latter should be brought before the Court, since their interest may be affected by the decree, and they can properly set up the defence of want of notice.²

where the first mortgagee was in possession, and the second mortgagee wished to obtain the possession, and to redeem; yet his own mortgage was not, by breach of the condition, capable of being enforced against the mortgagor. In such a case the mortgagor might be a proper party, if to be found; but if not to be found, it would be hard to say, that the second mortgagee's right to redeem was suspended. Lord Hardwicke, in *Howes v. Wadham* (Ridg. R. Temp. Hardw. 199), stated the general reasoning for making the heir a party in such a case, in these words:—"It is true, that a person, who takes a subsequent security may be compelled to redeem the first; but then the account must be entire, and the redemption entire and conclusive upon all parties, and all the securities brought before the Court. And, in the present case, the account could not be conclusive for want of the heir of the mortgagor before the Court, who may traverse such account. And therefore the party, who redeems, may pay such a sum to redeem the term, which when examined into, there may not be so much money due as against the heir. And the Court will not lead a purchaser into a snare; and the Court will not do a vain thing, that is, decree an account between the parties, which may be opened hereafter by other parties; for that would be endless; and therefore the Court will not make a decree, till it can make a complete one."

¹ *Fell v. Brown*, 2 Bro. Ch. R. 278. Ante § 173, § 175, 176. Post § 196.

² *Lowther v. Carlton*, 2 Atk. 138. Mr. Calvert, in his *Treatise on Parties* (p. 18), considers this case as an anomaly, and says, that it is not correctly reported; and he gives a fuller statement of it from the pleadings on record, by which it seems, that the Bill sought an account of the sums received under the mortgage, in taking which account the assignee of the mortgagee had a right to the assistance of his assignor. But there was a waiver at the hearing

§ 188. The next consideration under this head is, who are the proper parties to be made defendants in a Bill to redeem? In general terms, it may be stated, that all persons ought to be made parties, whose interests or rights may be affected by the decree.¹ The mortgagee is, of course, the only necessary and proper party in all cases, where there is no other outstanding interest under * him. If the mortgage is in fee, and the mort- [*175] gagee is dead, the heir at law of the mortgagee, or other person, in whom the legal estate is vested by devise or otherwise, must be made a party; because he has the legal title, and is to be bound by the decree. And the personal representative of the mortgagee also must be made a party; because, generally, he is entitled to the mortgage money, when paid, as it is to be returned to the same fund, out of which it originally came.² But if the mortgage is by a term of years, created by the owner of the fee, the personal representative of the mortgagee only, without the heir at law, is the proper party; for he alone is interested in the term, unless the term has been disposed of in favor of third persons; in which case they also should be made parties.³

§ 189. Where the mortgage has been absolutely assigned by the mortgagee, without the authority and privity of the mortgagor, it is not necessary, in a Bill brought by the latter to redeem, to make any person but the last assignee a party to the Bill, however many

of any account of the rents and profits received by the assignor, (Lord Wharton) and Lord Hardwicke put his decision expressly on the other ground.

¹ See Calvert on Parties, Ch. 3, § 6, p. 179 to 187. Edwards on Parties, 87 to 98.

² Cooper Eq. Pl. 37; Anon. 2 Freem. 52; Clarkson v. Bowyer, 2 Vern. 66.

³ Osbourn v. Fallows, 1 Russ. & Mylne, 741; Cooper Eq. Pl. 37.

mesne assignments have been made ; for, in such a case, the last assignee is understood to have contracted, not only to stand in the place of the original mortgagee, and to represent him, but also to stand in the place, and as representative of all the other mesne assignees, until the title was taken by himself ; and he may accordingly be decreed to convey.¹ Where the assignments have been made with the authority and privity of the mortgagor, whether any intermediate assignees should be made [*176] parties or not, must depend *upon circumstances, that is to say, whether they have any interests, which are recognised, and to be asserted and protected ; for if the assignments are absolute, and the amount due on the mortgage is clearly stated and admitted in the assignments, there is no ground, on which either the original mortgagee, or the mesne assignees, need be made parties, since there is nothing to settle between them.

§ 190. But where the mortgagor seeks in his Bill an account of rents and profits, or other sums received by the mortgagee before the assignment, the mortgagee should be made a party to the Bill, as well as the assignee ; for he is a necessary party to the account.²

§ 191. Where the mortgagee has not assigned his whole interest in the mortgaged property, but he retains an interest in it in part, he is a necessary party, as well as the assignee, to a Bill to redeem.³ So, where there are successive mortgages, the second embracing a part

¹ *Hill v. Adams*, 2 Atk. 39 ; *Chambers v. Goldwin*, 9 Ves. 268, 269 ; *Bishop of Winchester v. Beavor*, 3 Ves. 315, 316.

² *Anon.* 2 Freem. R. 59 ; *Lowther v. Carlton*, 2 Atk. 139.

³ *Hobart v. Abbott*, 2 P. Will. 643 ; *Norrish v. Marshall*, 5 Madd. R. 475.

only of the estates comprehended in the first; if the second mortgagee brings a Bill to redeem the first mortgagee, and the equity of redemption of the mortgagor in the different estates has become vested in different persons, all of them should be made parties to the Bill; for they are all interested in taking the account.¹

§ 192. Where the mortgagee has assigned his whole interest upon certain trusts, the trustee, and *cestuis que trust* (or beneficiaries) are equally necessary parties to the Bill to redeem.²

§ 193. (2.) In the next place, who are the proper *parties on a Bill to foreclose a mortgage.³ And [*177] first, as defendants. And here, the same general doctrine may be asserted, that all persons, whose interests are to be affected or concluded by the decree, ought to be made parties. Therefore, all persons, having an interest in the equity of redemption, should be made parties to a Bill of foreclosure,⁴ and *a fortiori* to a Bill to sell the mortgaged property; for it will not in general be sufficient, if the equity of redemption is conveyed or devised to a trustee in trust, to bring him before the Court; but the *cestuis que trust* (the beneficiaries) also should be made parties.⁵ So, if the equity of redemption belongs to different persons as devisees, or as legatees, having charges thereon, all of them should be joined as de-

¹ *Palk v. Clinton*, 12 Ves. 48; *Cholmondely v. Clinton*, 2 Jac. & Walk. 134.

² *Whistler v. Webb*, Bunb. R. 53; *Wetherell v. Collins*, 3 Madd. R. 255; *Drew v. Haman*, 5 Price R. 319.

³ See Calvert on Parties, ch. 3, § 6, p. 179 to 187; Edwards on Parties, 87 to 98.

⁴ *Calverley v. Phelps*, 6 Madd. 231; *Whistler v. Webb*, Bunb. R. 53; *Howes v. Wadman*, Ridg. R. Temp. Hardw. 199.

⁵ *Ibid.*

fendants.¹ And hence the general (although not the universal) rule is, that all incumbrancers (as well as the mortgagor) should be made parties, if not as indispensable, at least, as proper parties to such a Bill, whether they are prior or subsequent incumbrancers.² There are acknowledged exceptions; such, for example, as where a second mortgagee brings a Bill to foreclose against the mortgagor, and a third mortgagee; for in such a case the first mortgagee need not be made a party.³ If, indeed, any incumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as, also, a decree of a sale would not. The prior incumbrancers are not bound; because their rights [*178] are paramount to those of the foreclosing *party.⁴ The subsequent incumbrancers are not bound; because their interests would otherwise be concluded without any opportunity to assert or protect them.⁵

¹ *McGown v. Yorks*, 6 John. Ch. R. 450.

² *Finley v. Bank of U. S.* 11 Wheaton R. 304; *Bishop of Winchester v. Beavor*, 3 Ves. 315, 316, 317; *Haines v. Beach*, 3 John. Ch. R. 459; *Bishop of Winchester v. Paine*, 11 Ves. 198; *Monday v. Monday*, 1 Ves. and Beam. 223; *Cockes v. Sherman*, 2 Freem. R. 14; *S. C. Sherman v. Cox*, 3 Ch. Rep. 83 [46]; *Ensworth v. Lambert*, 4 John. Ch. R. 604; *McGown v. Yorks*, 6 John. Ch. R. 450. But see *Rose v. Page*, 2 Sim. R. 471; *Odell v. Graydon*, 6 Bro. Parl. R. 67, Tomlin's Edit.; Ante § 164.

³ *Rose v. Page*, 2 Sim. R. 471; *Delabere v. Norwood*, 3 Swanst. R. 144, note. See note (5), post, p. 178; Calvert on Parties, ch. 1, § 1, pp. 13, 14.

⁴ *Finley v. Bank of U. S.* 11 Wheaton R. 304; *Delabere v. Norwood*, 3 Swanst. R. 144; *Shepherd v. Guinnett*, 3 Swanst. 151; *Rose v. Page*, 2 Sim. R. 471.

⁵ *Haines v. Beach*, 3 John. Ch. R. 459; *Draper v. Earl of Clarendon*, 2 Vern. 518; *Godfrey v. Chadwell*, 2 Vern. 601; *Morret v. Westerne*, 2 Vern. 663; *Hobart v. Abbott*, 2 P. Will. 643; *Sherman v. Cox*, 3 Ch. R. 83 [46]; *S. C. Cockes v. Sherman*, 2 Freem. 14, Mr. Hovenden's note. In Bills of foreclosure it is usual to put an interrogatory to the mortgagor, &c., whether there are any, and what incumbrancers; and if the answer

§ 194. Upon similar grounds, if there is a principal mortgage, and another mortgage as collateral security

states any, it has always been the practice to make them parties. Per counsel *arguendo* in *Bishop of Winchester v. Beavor*, 3 Ves. 315. There is a reason stated by Lord Alvanley in this case, why they should be made parties; and that is, that otherwise, if the mortgagor should redeem, the Court would be guilty of the injustice of compelling the mortgagee to reconvey to the mortgagor, where it would appear by his own answer, that he had no right to it, whereby he might possess the legal title, and thus keep off thereby the other incumbrancers. If the mortgagor is an infant, the Court will inquire by the Master, if it is for his interest to have a sale, and if it is, will decree a sale. *Monday v. Monday*, 1 Ves. and Beam. 223. See also *Goodier v. Ashton*, 18 Ves. 83. In the former case, the sale was by consent. In America it is a common course to decree a sale, instead of a foreclosure, as well in the case of adults as of infants. *Mills v. Dennis*, 3 John. Ch. R. 367. *Brinckerhoff v. Thalhammer*, 2 John. Ch. R. 486. In *Rose v. Page* (2 Sim. R. 471) the Vice Chancellor decided, that to a Bill by a second mortgagee to foreclose against the mortgagor and a third mortgagee, the first mortgagee was not a necessary party, because his rights were paramount. The same point was decided as to prior annuitants in *Delabere v. Norwood*, 3 Swanst. R. 144, note; and a distinction was there taken between prior annuitants and subsequent annuitants, the latter being proper, though not necessary parties; for they are compellable to join in the sale of the mortgaged property. The cases in the text in 3 Ves. 315, 11 Wheat. R. 304, 3 John. Ch. 459, seem to treat all incumbrancers as necessary parties. Perhaps, all the authorities may be reconciled by considering all incumbrancers proper parties, though not in all cases indispensable parties. See 1 Harrison, Ch. Pr. by Newl. p. 30, (edit. 1808). Since the preceding remarks were written, I have read Mr. Calvert's observations on the same subject. (Calv. on Parties in Eq. 128 to 138). He has made a collection of the authorities applicable to the point, how far all subsequent incumbrancers should be made parties. These authorities are not all easily reconcilable; and Mr. Calvert has deduced the conclusion from a review of all of them, that the question is still left undecided in England. Two propositions are stated by him to be clear. (1.) That mortgagees have been allowed to foreclose in the absence of subsequent incumbrancers; for which, he cites *Needler v. Deeble*, 1 Ch. Cas. 299; *Roscarick v. Barton*, 1 Ch. Cas. 217; *Greshold v. Marsham*, 2 Ch. Cas. 171; *Cockes v. Sherman*, 2 Freem. R. 13; S. C. 3 Ch. Rep. 83 [46]; *Lomax v. Hide*, 2 Vern. 185; *Draper v. Clarendon*, 2 Vern. 518; *Godfrey v. Chadwell*, 2 Vern. 601, and *Morret v. Westerne*, 2 Vern. 661. (2.) That the decree of foreclosure is not conclusive upon subsequent mortgagees, who are absent; and that upon proof of collusion

for the former, both mortgagors must be made parties to a Bill of foreclosure ; for the second mortgagor has a right to redeem, and be present at the account, to prevent the burden ultimately falling on his estate to a larger amount, than the first estate might be sufficient to satisfy.¹ But incumbrancers, who become such *pendente lite*, are not deemed necessary parties, although they are bound by the decree ; for they can claim nothing, except what belonged to the person, under whom they assert title, since they purchase with constructive notice ; and there would be no end to suits, [*180] *if a mortgagor might by new incumbrances, created *pendente lite*, require all such incumbrancers to be made parties.² For a similar reason, if a mortgagee has designedly made several conveyances in trust, in order to entangle the title, and to render it difficult for the mortgagor or his representatives to redeem, the Court will not hold the plaintiff bound to trace out all the persons, who have an interest in such trusts in order to

they have been allowed to open the account ; for which he cites, *Needler v. Deeble*, 1 Ch. Cas. 299 ; *Cockes v. Sherman*, 2 Freem. 14 ; *Lomax v. Hide*, 2 Vern. 185 ; *Draper v. Clarendon*, 2 Vern. 518. Upon principle, he thinks, that subsequent incumbrancers are not necessary parties, though it may be proper to make them parties with a view to a final settlement of the rights of all the persons in interest. There is much good sense in this conclusion, as well as in the reasoning, by which he sustains it. Perhaps, the solicitude of Courts of Equity to make a final settlement of the rights of all persons interested in such a suit has carried them to an extent scarcely justifiable in point of principle or convenience. Lord Alvanley seems to have felt this, when in the *Bishop of Winchester v. Beavor* (3 Ves jr. 317), he said ; “The usual and common practice, almost without exception is, to make all incumbrancers parties. I hope, that the Court is not bound to insist upon all incumbrancers being parties.” See *Ante*, § 148, § 175, § 186.

¹ *Stokes v. Clendon*, 3 Swanst. 150 ; S. C. cited in 2 Bro. Ch. R. 276, Mr. Belt's note.

² *Bishop of Winchester v. Paine*, 11 Ves. 194, 197 ; *Garth v. Ward*, 2 Atk. 174.

make them parties.¹ The same principle would seem to apply to the converse case of a mortgagor, creating such trust conveyances in order to entangle the title, and to prevent the mortgagee from a foreclosure ; for in such a case the acts would be treated as a fraud upon the rights of the other party.

§ 195. It follows of course from what has been already suggested, that upon a Bill of foreclosure the mortgagor himself is a necessary party, as well as incumbrancers, whenever he possesses any right, which may be affected by the decree ; for he is a proper party to the account of what is due on the mortgage ; and ultimately he is entitled to redeem against all the incumbrancers, as the person having the ultimate interest.² And, besides (as has been already stated), the ordinary, or, as it is usually expressed, the natural decree in such a case is, that the mortgagor shall be foreclosed, if he does not redeem the other mortgagees, who are before the Court.³

§ 196. If the mortgagor, who is owner of the fee, should die, his heir is an indispensable party to a Bill to foreclose ; *so much so, that if he be without the jurisdiction of the Court, the cause cannot be further proceed-

¹ *Yates v. Hambly*, 2 Atk. 237.

² *Hallock v. Smith*, 4 John. Ch. R. 649 ; *Farmer v. Curtis*, 2 Sim. R. 466 ; *Fell v. Brown*, 2 Bro. Ch. R. 276 ; *Palk v. Clinton*, 12 Ves. 58, 59.

³ *Ibid.* Ante § 186. Where the Bill to foreclose is brought by a second mortgagee, the heir of the mortgagor is a necessary party, though the second mortgage comprises only a part of the estates in the first mortgage. *Palk v. Clinton*, 12 Ves. 48, 58. It is not important in this respect, whether the mortgage be in fee, or by the creation of a term of years in the mortgagee ; for the heir in each case must be made a party, as he alone is interested ; and the personal representative has nothing in the term so created, any more than in the fee. *Bradshaw v. Outram*, 13 Ves. 235.

ed in.¹ But, ordinarily, it is not necessary to bring the personal representative of the mortgagor, in such a case, before the Court; for the heir alone has a right to the equity of redemption, which it is sought to foreclose; and the mortgagee is under no obligation to intermeddle with the personal assets, or to seek an account thereof.² If the heir would have the benefit of any payments made by the mortgagor, or his personal representative, he must establish it by proofs; and he has no right to insist, that in such a suit the personal representative shall be joined to relieve him by payment out of the personal assets; but he must bring his own Bill against such representative for such relief.³ The only cases, in which the personal representative is necessary [*182] to be made a party to a Bill of *foreclosure, seem to be, where he has an interest in the equity of redemption; as, for example, where the mortgagor was possessed of a term of years, which he has mortgaged; for in such a case, the equity belongs to the personal representative,⁴ and payment is sought out of the personal

¹ *Fell v. Brown*, 2 Bro. Ch. R. 276, 278; *Howes v. Wadham*, Ridg. Rep. Temp. Hardw. 199; *Palk v. Clinton*, 12 Ves. 48, 58; *Farmer v. Curtis*, 2 Sim. R. 466; *Howes v. Wadham*, Ridg. Cas. Temp. Hard. 199, 200.

² Ante § 175.

³ *Duncombe v. Hanstey*, 3 P. Will. 333; Mr. Cox's note. Ante § 175. But, although the personal representative ordinarily is not in such a case a necessary party, the mortgagee may at his election make him a party, and seek payment of the money out of the personal assets, and the deficiency only against the heir. *Bradshaw v. Outram*, 13 Ves. 235. In 1 Harris. Ch. Pr. by Newland, p. 30 (1808), it is said, that to a Bill for the sale of mortgaged property, the personal representative of the mortgagor must be a party; for the personal estate must be first applied and exhausted before the Court will decree the real estate to be sold; and for this is cited a MS. opinion in *Daniel v. Skipwith*. The same point was decided in *Christopher v. Sparke*, 2 Jac. & Walk. 229. What is the true ground of this distinction between a decree to foreclose, and a decree to sell? Ante § 175.

⁴ *Bradshaw v. Outram*, 13 Ves. 235.

assets.¹ If the mortgage comprises both freehold and leasehold estates, the heir and the personal representative must both be made parties to the Bill to foreclose, as indeed they would be to a Bill to redeem.²

§ 197. Where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the Bill to foreclose. If the mortgagor has devised or conveyed the mortgaged property in trust, the trustees, as well as the *cestuis que trust* (or beneficiaries), are necessary parties to the Bill to foreclose.³ If he has assigned the equity in the different estates mortgaged to several persons, they must all be brought before the Court as parties, if the foreclosure is sought of all the estates.⁴ So, if the mortgagor has assigned his equity absolutely to several persons jointly, they must all be made parties.⁵ If the mortgagor has become bankrupt, and his estate is assigned under the bankrupt laws, his assignees only need be made parties to the Bill.⁶

§ 198. Where the mortgagor has devised his estate in strict settlement, it will be sufficient to bring the persons entitled to the life estate, and other prior interests, and the persons *in esse*, who have the first estate of inheritance, *before the Court.⁷ And where the es- [*183] tate is entailed, it is sufficient to bring the first tenant in tail *in esse* before the Court, if there be no prior estates; for in such cases he is treated, upon the principles already stated, as sufficiently representing all the interests of all

¹ *Bradshaw v. Outram*, 13 Ves. 235; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 135.

² *Robins v. Hodgson*, cited 1 Harris. Ch. Pr. by Newl. p. 30. (1803). Ante § 182.

³ *Gifford v. Hort*, 1 Sch. & Lefr. 386.

⁴ Ante § 182.

⁵ Ante § 182.

⁶ *Adams v. Holbrook*, 1 Harris. Ch. Pr. by Newl. 30. 1808. Ante § 182.

⁷ *Blount v. Earl of Winterton*, 1 Harris. Ch. Pr. by Newl. p. 29, (1808); *Cholmondeley v. Clinton*, 2 Jac. & Walk. 133.

the persons, claiming in privity under the mortgagor, in a Bill to foreclose.¹

§ 199. Secondly; let us next consider, who are the proper parties as plaintiffs to a Bill to foreclose. And, generally, it may be said (as has been already said), that all those, who have an interest in the mortgage, and may be affected by the decree, are proper parties.² If the mortgagee alone has any interest, he is, of course, the only necessary party. If the mortgagee has made an under mortgage, as a security for a smaller sum than is due on the mortgage, and the under mortgagee brings a Bill to foreclose, the original mortgagee is a necessary party; because the latter has a right to redeem the under mortgage; and thus also, a second account of what is due upon the original mortgage is prevented.³ If the mortgagee has assigned the mortgage absolutely, the assignee or assignees only seem to be indispensable parties.⁴

§ 200. If the mortgagee is dead, his personal representative is the proper plaintiff to bring the Bill; for, ordinarily, the mortgage money belongs to the personal [*184] *assets, and draws after it the mortgaged estate, as an incident.⁵ But if the mortgage be of a fee, the heir also of the mortgagee is a necessary party (either as plaintiff, or as defendant); for he is the owner of the legal title, though but a trustee for the personal repre-

¹ Ante § 144, 145, 146; *Yates v. Hambly*, 2 Atk. 238; *Reynoldson v. Perkins*, Ambler R. 563; *Gore v. Stackpole*, 1 Dow. R. 18; *Hopkins v. Hopkins*, 1 Atk. 590; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 133; *Fishwick v. Lowe*, 1 Cox R. 411.

² *Call v. Mortimer*, 1 Harris. Ch. Pr. by Newl. p. 30, (1808).

³ *Hobart v. Abbott*, 2 P. Will. 643; *Cooper Eq. Pl.* 37.

⁴ *Lewis v. Nangle*, 2 Ves. 231; *S. C. Ambl. R.* 150; Ante § 153.

⁵ *Freake v. Horsley*, 2 Freem. R. 180; *S. C. 2 Eq. Abridg.* 77; 1 Ch. Cas. 51; *Bradshaw v. Outram*, 13 Ves. 234.

sentative¹ and, if the mortgage is redeemed, he alone is competent to re-convey.²

§ 201. And it may be generally stated, that all persons, who have the legal interest in the mortgage, as well as those, who have the equitable interest therein, are necessary parties to a Bill to foreclose. There can be no redemption or foreclosure, unless all the persons entitled to the whole mortgage money are before the Court. Thus, for example, a person, entitled to a part only of the mortgage money, cannot file a Bill to foreclose the mortgage as to his own part of the money; but all the other persons in interest must be made parties.³ So, if the mortgage has been made to a trustee in trust, all the *cestuis que trust* (or beneficiaries) should be made parties, as well as the trustee, to the Bill to foreclose.⁴

§ 202. Upon the same ground, if the mortgagee, or his assignee, has by deed or will settled the mortgaged estate in strict settlement, the first person *in esse*, entitled to a vested estate of inheritance in remainder, and all persons entitled to prior estates, and their trustees, *if there are any, are necessary parties to the [*185] Bill of foreclosure.⁵

§ 203. Sixthly, in cases of legacies and charges un-

¹ *Scott v. Nicoll*, 3 Russ. 476; *Wood v. Williams*, 4 Madd. R. 186; *Clarkson v. Bowyer*, 2 Vern. 67; *Meeker v. Tanton*, 2 Ch. Cas. 29. Ante § 74, a.

² *Ibid.*

³ *Palmer v. Earl of Carlisle*, 1 Sim. & St. 426; *Wing v. Davis*, 7 Greenl. R. 31; *Lowe v. Morgan*, 1 Bro. Ch. R. 368.

⁴ *Wood v. Williams*, 4 Madd. R. 186; *Lowe v. Morgan*, 1 Bro. Ch. R. 368. But see *Montgomerie v. Earl of Bath*, 3 Ves. 560.

⁵ *Blount v. Earl of Winterton*, 1 Harris. Ch. Pr. by Newl. p. 29, (1808). Ante § 144 to 147.

der wills.¹ We have already had occasion to anticipate much, which would be appropriate to this head, and to state, that in the case of a pecuniary legacy, no other person except the executor, is ordinarily a necessary party to a Bill to enforce the payment of it out of the assets.² But if there is a deficiency of assets, and it so appears by the Bill, the Bill should either make all the creditors, and other legatees, parties to the suit, or it should be brought on behalf of all of them; so, that they may have their rights ascertained, and otherwise have the benefit of the decree.³ So, where several legacies are given, which are to be increased or diminished according to the state of the funds, it is proper, that a Bill, filed by one legatee, should be on behalf of all.⁴

§ 204. We have also seen, that where the residue is bequeathed to several legatees, all of them should ordinarily be made parties, either by name, or by a suit in behalf of all; and, that the same rule applies to the case of distributees, claiming in a case of intestacy; for on such cases there is a common interest in all of them.⁵ Upon these points, therefore, we need not dwell. For the like reason, where there are various appointees of

¹ See Calvert on Parties, ch. 3, § 4, p. 172 to 175; Edwards on Parties, 136 to 140.

² Ante § 105, 138, 139; *Wiser v. Blachley*, 1 John. Ch. R. 438; *Peacock v. Monk*, 1 Ves. 127; *Mitf. Eq. Pl. by Jeremy*, 168, 171; *Wainwright v. Waterman*, 1 Ves. jr. 312; *Lawson v. Barker*, 1 Bro. Ch. R. 303; *Atty. Genl. v. Ryder*, 2 Ch. Cas. 178; *Court v. Jeffrey*, 1 Sim. & Stu. 105.

³ Ante § 100; *Brown v. Ricketts*, 3 John. Ch. R. 553; *Fish v. Howland*, 1 Paige R. 20; *Egberts v. Wood*, 3 Paige R. 517, 520; *Mitf. Eq. Pl. by Jeremy*, 168.

⁴ *Brown v. Ricketts*, 3 John. Ch. R. 553. But see *Haycock v. Haycock*, 2 Ch. Cas. 124.

⁵ Ante § 105; *Hallett v. Hallett*, 2 Paige R. 15; *Sherrit v. Birch*, 3 Bro. Ch. R. 229.

personal property under the will of a *feme covert*, they should all be made parties to a Bill against her personal representative, to enforce their claim.¹

§ 205. Where legacies are by a will made a charge on the real estate in the hands of the heir or devisee, the heir or devisee entitled to the real estate must of course be a party to any Bill to enforce the charge; and the executor also must be a party, if the personal assets are not exonerated from the charge as the primary fund.² To such a Bill, all the legatees, who are entitled to the benefit of the charge, are also proper and necessary parties in their own names; for they all have a common interest in the fund.³ If there be any exceptions to the rule, they stand upon very peculiar grounds, which must be specially brought before the Court; and then, perhaps, a Bill might be maintainable in the name of one or more of the legatees, on behalf of all.⁴

§ 206. For the same reason, where by a will the executors are made trustees to sell the real estate of the testator, and out of the produce, after the discharge of debts, to pay certain sums to certain legatees, which sums are also charged on the personal assets, in case of a deficiency of the real fund; on a Bill brought by one of the legatees, to obtain his share of the proceeds, from the executors, all the other legatees are necessary parties.⁵

¹ *Court v. Jeffrey*, 1 Sim. & Stu. 105. If the appointees under the will are very numerous, the Court will dispense with their being made parties, and allow a Bill to be filed by some on behalf of all. *Manning v. Thesiger*, 1 Sim. & Stu. 106.

² Ante § 163, § 164.

³ *Morse v. Saddler*, 1 Cox. R. 352; *Hallet v. Hallett*, 2 Paige R. 15, 22; *Fish v. Howland*, 1 Paige R. 23. Ante § 164.

⁴ Ante § 105, and note (2); *Hallett v. Hallett*, 2 Paige R. 15, 22, 23; *Manning v. Thesiger*, 1 Sim. & Stu. 106.

⁵ *Faithful v. Hunt*, 3 Anst. R. 751.

§ 207. Seventhly, in cases of Trust.¹ The general rule in cases of this sort is, that in suits respecting the trust property, brought either by, or against the trustees, the *cestuis que trust* (or beneficiaries), as well as the trustees, are necessary parties. And where the suit is by or against the *cestuis que trust* (or beneficiaries) the trustees also are necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The *cestuis que trust* (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties.² For a similar reason, all persons, who have specific charges on trust property, derived under the trust, and appertaining to the due execution of it, are generally required to be made parties to suits respecting the due execution of the trust, or touching their rights therein, whenever the persons are definitely ascertained, and the trust is of a limited nature.³ There is however, this exception (as we shall presently see), that if each party is entitled to an aliquot part, as, for example, a quarter or a half of an ascertained and definite trust fund, in such a case he may sue for his own portion thereof without making the other *cestuis que trust* (or beneficiaries) parties, for there is no community of property, or other matter, in virtue of which they have or can have any interest in the suit or subject of the suit.⁴

¹ See Calvert on Parties, Ch. 3, § 9, p. 208 to 220. Edwards on Parties, 158 to 167.

² Cooper Eq. Pl. 34; Mitf. Eq. Pl. by Jeremy, 176, 179; Adams v. St. Leger, 1 B. & Beatt. 181, 184, 185; Court v. Jeffrey, 1 Sim. & Stu. 105; Wood v. Williams, 4 Madd. R. 186; Burt v. Dennet, 2 Bro. Ch. R. 225; Osbourn v. Fallows, 1 Russ. & M. 741; Malin v. Malin, 2 John. Ch. R. 238; Fish v. Howland, 1 Paige R. 20.

³ Mitf. Eq. Pl. by Jeremy, 176.

⁴ Post § 212, Hutchinson v. Tancred, 2 Keen R. 675.

§ 208. Upon the general principles of Courts of Equity, there would be an impropriety in binding either the legal claimants or the equitable claimants, unless they were fully represented, and permitted to assert their rights before the Court; and, if not bound, the decree would not be final on the matter litigated. If the *cestuis que trust* (or beneficiaries) should not be made parties to the suit, and their interests are apparent, a Court of Equity will sometimes, as a matter of indulgence, and to prevent further delay and expense, allow them (if they wish) to bring *forward their claims by petition, in order [*188] to have their interests ascertained, and their rights protected.¹ But, at all events, they may bring a Bill against their trustees and the original plaintiff, to assert and protect their rights in the other suit.²

§ 209. Upon this ground it is, that if a Bill be brought by a *cestui que trust* for a specific performance of a covenant under seal, made unto a trustee for the benefit of the plaintiff, the trustee must be made a party to the suit.³ So, if a Bill should be brought by a *cestui que trust*, to foreclose a mortgage given to a trustee for his benefit, the trustee should be made a party.⁴ So,

¹ *Drew v. Harman*, 5 Price R. 319, 324.

² *Creagh v. Nugent*, Moseley R. 355, 356. Though there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustee before the Court, together with him in whom the first estate of inheritance is vested. *Hopkins v. Hopkins*, 1 Atk. 590; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 133.

³ *Cooke v. Cooke*, 1 Vern. R. 36; *Cope v. Parry*, 2 Jac. & Walk. 538; *Hook v. Kinnear*, 3 Swanst. R. 417, note.

⁴ *Wood v. Williams*, 4 Madd. R. 186. Where the original trustees, having the legal estate and all the *cestuis que trust*, having the beneficial interest, are before the Court, intermediate trustees for the benefit of the latter are said not to be necessary parties. *Head v. Lord Teynham*, 1 Cox. R. 57. What is the ground of this distinction, since the intermediate trustees have, or may have, an equitable interest, either primary or

if a *cestui que trust* should bring a Bill to enforce the trust, against a third person, to whom the trustee has assigned the property in violation of the trust, the trustee should be made a party ; for he is ultimately bound for the due fulfilment of the trust.¹ On the other hand, if a trustee should bring a Bill for a specific performance [*189] of articles, *the *cestuis que trust* should be made parties.² So, if a Bill for the redemption, or a Bill for the foreclosure of a mortgage, should be brought against a trustee, the *cestuis que trust* are in each case necessary parties.³

§ 210. And, where there are divers trustees, in a suit to enforce the trust, or to set it aside, all the trustees should be made parties ; for all of them have a community of interest ; and otherwise there might be different suits brought by or against each ; and, under ordinary circumstances, the Bill will not be maintained, without all of them are so joined.⁴ For a similar reason, if there are divers *cestuis que trust*, all of them should be made parties to a Bill touching the common interest.⁵

secondary ? A person, with whom a trust deed has been deposited, and who has delivered it up to the original party, who executed it, if not charged with a breach of trust, need not be made a party to a Bill by the *cestuis que trust* for a specific performance of the trust, and a re-delivery to them of the deed. *Kyne v. Moore*, 1 Sim. & Stu. 6.

¹ *Burt v. Dennaet*, 2 Bro. Ch. R. 225.

² *Kirk v. Clark*, Prec. Ch. 275 ; *Douglas v. Horsfall*, 2 Sim. & Stu. 184 ; *Malin v. Malin*, 2 John. Ch. R. 238.

³ *Calverley v. Phelps*, 6 Madd. R. 229 ; *Whistler v. Webb*, Bunb. R. 53.

⁴ *In re Chertsey Market*, 1 Price R. 261.

⁵ *Hamm v. Stevens*, 1 Vern. 110 ; 1 Eq. Abridg. 72 ; *Lowe v. Morgan*, 1 Bro. Ch. R. 368, and Mr. Belt's note. But see *Montgomerie v. Marquis of Bath*, 3 Vee. 560. In *Goodson v. Ellison* (3 Russ. R. 583), where a Bill was brought by a purchaser of a portion of the trust property from the *cestuis que trust* against the trustee for a conveyance of the legal title, Lord Eldon at first thought, that all the *cestuis que trust* should be made

§ 211. Where any of the trustees are dead, the survivor or survivors of them must be made parties to a suit respecting the subject-matter of a trust.¹ And if all the trustees are dead, and the estate is an estate of inheritance, the heir, or other proper representative in the realty, of the survivor, should be made a party. But if the trust be of a term, or other chattel interest, the personal representative of the survivor only need be *made a party.² If the trustee has assigned his [*190] trust absolutely, the assignee should be made a party in his stead ; and the trustee need not be made a party, unless the assignment is a breach of trust.³

§ 212. There are, however, certain qualifications of the general rule, some of which have been already incidentally noticed, either standing upon distinct principles, consistent with the rule itself, or admitted as just exceptions to it. In the first place, if there is a certain and fixed trust fund, and each *cestui que trust* has a certain aliquot part in it, distinct from the others, so that there is no common interest in the object of the Bill, the others need not be made parties.⁴ Thus, where the object of a Bill brought by an assignee of one seventh part of an ascertained fund, standing in the name of trustees, was to compel the latter to transfer to him his seventh part in the trust fund, it was held, that the ces-

parties to the Bill, and that the trustee was not bound to convey a portion of the estate ; but was entitled to be delivered from the whole trust. But afterwards a decree was made without their being made parties. It is not very easy to perceive, from the report, how Lord Eldon escaped from his original difficulty ; for no reason is given for his change of opinion.

¹ See post § 213.

² Cooper Eq. Pl. 34 ; 1 Eq. Eq. Abridg. 72.

³ Cooper Eq. Pl. 34 ; Bromley v. Holland, 7 Ves. 3, 11 ; S. C. Cooper R. 19 ; Ante § 153 ; Burt v. Denney, 2 Bro. Ch. R. 225.

⁴ Ante § 207.

tuis que trust of the remaining six seventh parts were not proper parties; and a demurrer by them on that account was allowed.¹

§ 213. In the next place, if there are several trustees, who are all implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against one of them separately, at his election ;² for in such a case the

¹ *Smith v. Snow*, 3 Madd. R. 10. See *Montgomerie v. Marquis of Bath*, 3 Ves. 560, and *Lowe v. Morgan*, 1 Bro. Ch. R. 368, and Mr. Belt's note. Ante § 207; *Hutchinson v. Tancred*, 2 Keen R. 675.

² *Walker v. Symonds*, 3 Swanst. R. 75. *Ex parte Angle*, Barn. Ch. R. 423; S. C. 2 Atk. 163; *Wilkinson v. Purry*, 4 Russell R. 272, and Mr. Russell's note. But in *Munch v. Cockerell*, 8 Sim. R. 219, the Vice Chancellor held the contrary doctrine, and that all should be joined. See ante § 76, b.; Post § 214, and note. Whether this case is maintainable in opposition to the other authorities, may admit of question. Why should not a *cestui que trust* be at liberty to waive his rights as to some trustees and pursue them against others, where all are liable *in solido*?—See post § 214. a. It is but justice to the learned Vice Chancellor, to give his reasoning at large in the case of *Munch v. Cockerell*, and to show the manner in which he disposes of the language used in the former authorities. "I have read," says he, "through the report of *Walker v. Symonds*. Now that case itself affords one instance of what was thought at least to be the rule in the profession; because the representatives of *Donnithorne* and *Griffith*, the two deceased trustees, were made parties, along with the surviving trustee; and I observe, that Lord Eldon nowhere lays down the general proposition that, if there be three trustees, who have committed default, the suit may, at the option of the plaintiff, be brought against one only. He says no such thing; but what he does say, is, that, when three trustees are involved in one common breach of trust, the *cestui que trust*, suffering from that breach and proving, that the transaction was neither authorized nor adopted by him, may proceed against any or all of the trustees, 3 Swanst. 75. But his lordship does not tell us whether, when he uses the words 'may proceed,' he means, that they should apply to proceedings by suit, or to proceedings on a decree, which has been obtained in a suit. There is a difference between bringing the suit, originally, against all that were defaulters, and then, when a decree has been obtained, proceeding on the decree against one of them only, and proceeding, originally, in framing the suit against one defaulter only.

tort may, by analogy to the law, be treated as several, as well as joint. Again; if a Bill is brought by one trustee against the other to compel the latter to replace

The language of Lord Eldon is so general on the point, that I do not take it to be a general authority for the proposition, that, where several trustees have made default, the suit may, at the option of the plaintiff (unless there be special circumstances in the case), be brought, originally, against one only. It may constantly happen, that there has been default in some trustees, affecting portions of the trust-fund; but, if there be other trustees, that represent the fund, it is quite clear, that that, which is the fruit of the suit, must be restored as part of the fund, and must be handed over to the other trustees. Besides, it seems to me, that this proposition, which is stated to have fallen from Lord Eldon, was laid down, not with reference to any thing, which took place in the course of discussion prior to the pronouncing of the judgment, but when a discussion arose as to the form of the decree, after the substance of the judgment had been pronounced. And it seems to have been a very special case; because Donnithorne, who was the principal defaulting trustee, died first; and it appears that Isaac Harris, who was his representative, had, by a sort of composition deed, amalgamated his own assets together with those of his father, so as to form a general fund for the relief of his father's creditors: and Lord Eldon thought, that it would be exceedingly difficult for the plaintiff, Mrs. Walker, to proceed against the assets of Nicholas Donnithorne, without abandoning her claim against the other two; and she could not very well go on against the other two without abandoning her claim against the assets of Nicholas Donnithorne. And, with reference to a state of circumstances so very singular as those in that case, his lordship did assert the general proposition, which is attributed to him in the report; and he did, in point of fact, do this: he dismissed the bill as against Isaac Harris, without costs, and allowed the plaintiff to go on against the other two trustees, taking care, that it should be inserted in the decree, that all demands which Mrs. Walker might have under the trust-deed, or against the assets of Donnithorne, as assets, the surviving trustees would be entitled to enforce for their own benefit. See 3 Swan. 89. That was entirely upon the special circumstances of the case. The case of *Wilkinson v. Parry*, 4 Russ. 272, furnishes another instance of what was the opinion of the party, who prepared the bill in that case: for not only was Nicholson, who was the defaulting trustee, made a party, but Sherwin also was made a party. In that case, the Master of the Rolls did not say, that it was competent to the plaintiffs, at their own option, to proceed against Nicholson only; but that, if Sherwin had been made a party, no relief could have been had against him. The bill was filed against Nicholson and Parry; and the objection was; that

the trust stock, or to give security for it according to his own engagement solely with the other trustee;

Sherwin was not a party; but the Master of the Rolls said, that, if Sherwin had been made a party, the bill must have been dismissed as against him. The circumstances of that case were as follows: Nicholson and Parry were originally trustees, and Nicholson became desirous of retiring from the trust, and Sherwin was appointed a trustee in his place, and executed the deed; but, before he acted, he intimated a wish to be discharged from the trusteeship; and then the deed was actually prepared, appointing Parry to be sole trustee; but that deed was not executed by Sherwin. But what was the special circumstance in that case? Sherwin was a trustee, and he never had acted; and the Master of the Rolls, by saying that the bill must be dismissed as against him, took that view of the case. That case is no authority whatever for stating, that, where complaint might lawfully be made against one of the trustees, it is not necessary to make the others, against whom no complaint has been made, parties to the bill. It shows only, that, where a person had the character of trustee, but, *de facto*, was not a trustee, it was not necessary to make him a party: and, inasmuch as the bill was filed not against Nicholson only, but against Nicholson and Parry, it is one example, amongst many others, of the necessity of making all the trustees parties. In the report of the case of *Walker v. Symonds*, instances are given, in the notes, to prove a proposition which, I should have thought, hardly required proof, namely, that certain acts, mentioned in the notes, may be considered as defaults, for which the trustee may be liable. But in the very first of those cases, the case of *Bradwell v. Catchpole*, Mayhew had appeared, but had never answered, nor could he be found to be served with the process of the commission of rebellion; and, as he had not been served with a subpoena to hear judgment there could be no decree against him; but the process of contempt having been carried on against him to the utmost extent, the other defendants could not object for want of parties. That admits, that, but for that circumstance, the objection might have been made. I see, that Mr. Russell, in his report of *Wilkinson v. Parry*, states, what the general rule is. He says: 'Yet cases of breaches of trust seem to have been an exception; and it has been held, that a *cestui que trust* may proceed against the surviving trustees alone, without bringing before the court the representatives of the deceased trustee, who were involved in the same acts of misconduct.' Mr. Russell refers to the case of *Ex parte Angle*, Barnard, 423. S. C. 2 Atk. 163, and also to the decision of Lord Eldon in *Walker v. Symonds*, on which I have commented. But it does not appear to me, that *Ex parte Angle* justifies the general proposition, that it is competent to the plaintiff, at his option, to select only some of the trustees. It justifies the position, that Mr. Russell

in such a case the *cestuis que trust* need not be made parties ; for they could not found any right on their own

lays down, namely, that it has been *so held* ; because it was so held in *Ex parte Angle* : but we must look at the circumstances of that case. The proceeding in *Ex parte Angle*, was founded on the statute 4 Ann, c. 14, which regulated the way, in which proceedings should be had where, upon the petition of persons, who had suffered by fire and other calamities, undertakers were authorized to collect money for the benefit of the sufferers ; and, in that case, it appeared, that there were, originally, seventeen managers, and seven were dead ; and it was submitted, on the part of the survivors, that the representatives of the managers who were dead, ought to be brought before the court. But Lord Hardwicke said, it was not necessary to bring those representatives before the court, and that an order for accounting ought to be made against the survivors. If you look at the 4th section of the act, you will see, that it directs, that the undertakers shall, within two months, account before one of the Masters of the Court of Chancery ; and that the Master shall have power, by the common methods of the court, to examine into all frauds committed by the undertakers and their agents, or any other person concerned for or acting under them, and report the same to the court ; which report, being confirmed by the court, it shall be in the power of the Lord Chancellor to impose such fine and costs, on every such offender, as the nature of the case shall require. That, of course, implies that it was in the discretion of the judge to impose such fine and such costs on each or any of the parties, as the court thought proper ; and, of necessity, it gives the court the jurisdiction to proceed against some and omit others ; because it is useless to say, that the proceeding shall be against all, when it is in the power of the court to impose fines and costs upon such only as the court should think right. It appears to me, therefore, that this section of the act did entirely justify Lord Hardwicke in saying, that it was not necessary to bring the representatives of the deceased parties before the court. Besides, it seems, that, under the act, the court, might proceed in a summary way, and might dispense with the appearance of some of the offenders. The act, indeed, imposed certain forfeitures, and a forfeiture might have been recovered from the representatives of those, who were dead. But it might have been thought inconvenient, by that learned lord, that any action should be directed against the representatives of those who were dead ; and, therefore, he determined to impose the fines and costs on those only, who were alive, and to enforce payment of them by the process of the court. It seems to me, therefore, that the position laid down by Lord Eldon in *Walker v. Symonds*, does not support the general proposition contended for ; and the whole practice of the profession is, I believe, against it ; and, therefore, my opinion is, that, in this

part upon any such engagement, as they could have no privity with it.¹

§ 214. In the next place, the frame of the particular Bill may also furnish a ground to dispense with persons, who should otherwise be made parties.² Thus, for example, if a bill is framed for a general account of a trust fund in the hands of trustees, all of them should be made parties. But if the Bill is so framed as only to seek an account of so much of the trust fund, as has come to the hands of a particular trustee, he alone is a necessary party,³ at least unless the Bill should charge a breach of trust in all the trustees.⁴

particular case, the representatives of Evelyn and Logan, ought to be made parties." See Post § 228. See Ante, § 127, § 129, § 139, § 211; Post § 214, § 228. In *Cunningham v. Pell*, 5 Paige, 607, it was held, that the directors of a corporation were liable to the stockholders in Equity for a fraudulent breach of trust; and, that a suit might be brought against some of the directors for such breach of trust, without making all the directors parties.

¹ *Franco v. Franco*, 3 Ves. 75; Ante § 139; Calvert on Parties, ch. 1, § 1, 7, 8; Post § 221, § 228.

² Ante § 127, § 129, § 139, § 214, § 228.

³ *Selyard v. Harris's Ex'ors.* 1 Eq. Abridg. 74; Ante § 128. See *Munch v. Cockerell*, 8 Sim. R. 219. It has been suggested by a learned writer in the *London Law Magazine* for May, 1839, p. 242, that it may be doubtful, whether *Selyard v. Harris's Executors* can be safely relied on as an authority, since *Munch v. Cockerell*. I do not feel the full force of the doubt. The cases are distinguishable. In the former case a discovery was sought against the only trustee who had transacted the business of the trust; and the Lord Chancellor held, that as an account was sought only of what came to his hands, the Representatives of the other Trustees, who were dead, need not be made parties. There seems to have been no allegation of any joint breach of trust. In the latter case a breach of trust by all the Trustees was relied on. But it seems to me, that

⁴ *Munch v. Cockerell*, 8 Sim. R. 219. This qualification of the text is inserted upon the sole authority of *Munch v. Cockerell*. Whether it can be supported may admit of some question; and it is not easily reconcilable with the language of some other cases. See Ante § 213, note (3).

§ 214. *a.* So, if the Bill should contain allegations, which show, that persons, who otherwise would ordinarily be proper parties, have no interest in the controversy, and have no title to and make no claim to any interest, such an allegation in the frame of the Bill, if well founded, will dispense with the necessity of their being made parties. Thus, for example, in cases where an executor would otherwise be a proper party it is common enough to allege in bill, in order to prevent the necessity of making him a party, that he has accounted for all his receipts.¹ So, where a bill was brought by the legatee of a legatee against the trustees of stock, grounded upon a bequest of the reversionary interest in the stock to the original legatee after the death of the testator's wife, who had since died, and it was averred in the Bill, that the executors of the successive testators had all assented to the legacy; it was held unnecessary to make any of the executors parties to the Bill; for no decree could be had against them; and the legacy must be deemed to have absolutely vested in the original legatees, and so in the other legatees successively.²

§ 215. In the next place (as we have already seen),³

the decision in *Munch v. Cockerell*, cannot easily be reconciled with the doctrine of Lord Hardwicke in *Ex parte Angle*, Barn. Ch. R. 423; S. C. 2 Atk. 163, and of Lord Eldon in *Walker v. Symonds*, 3 Swanst. R. 75, notwithstanding the ingenious reasoning of the Vice Chancellor. Ante § 213, note. The same learned writer in the *Law Magazine* intimates, that the case of *Selyard v. Harris's Heirs* was not a dispensation with necessary parties; for the other trustees were not necessary parties, as the object of the Bill did not require any relief from them. This may be true, but it is a refinement upon the use of terms, which it does not seem important to discuss; and I am content to leave the text, as it stands. See Ante § 212.

¹ Per Lord Cottenham in *Mare v. Malachy*, 1 Mylne & Craig, 577.

² *Smith v. Brooksbank*, 7 Simons R. 18.

³ Ante § 149.

persons, who have demands upon trust property prior to the creation of the trust, may enforce those demands against the trustees, without making the persons, interested in the trust, parties to the suit, if the absolute disposition of the property is vested in the trustees. But if the trustees have no such absolute power of disposition (as if they are trustees merely to convey to uses), then, and in that case, the persons entitled to the benefit of the trust must also be made parties.¹

§ 216. In the next place (as we have already seen), where there is a general trust for creditors or others, whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining, who may answer a general description, [*192] *might greatly embarrass the due execution of the trust, Courts of Equity will dispense with all the creditors, and others interested in the trust, being made direct parties.² And it will be sufficient, if the Bill is brought to enforce the due execution of the trust, that it should be stated to be brought on behalf of all interested.³ And if the Bill is brought adversely to the trust by a third person, it will be sufficient to make the trustees parties.⁴

§ 217. It is upon this same ground of the numerousness of parties, as well as upon the ground of a virtual representation, and of the general nature of the trust, that trustees of real estate for the payment of debts or legacies may ordinarily sustain a suit, either as plaintiffs or as defendants, without bringing before the Court the

¹ Mif. Eq. Pl. by Jeremy, 175, 176; Ante § 149.

² Ante § 149, § 150.

³ Douglas v. Horsfull, 2 Sim. & Stu. 184; Mif. Eq. Pl. by Jeremy, 174, 176.

⁴ Anon. 1 Vern. 261.

creditors or legatees, for whom they are trustees, which in many cases would be almost impossible.¹ Hence, too, although the general rule is, that in the case of an appointment of a personal fund by the will of a *feme covert*, all the appointees should be made direct parties to the Bill for a distribution of the fund by the executor, who is a constructive trustee; yet the rule yields, where the appointees are very numerous; and, in such a case, on account of the inconvenience, a Bill may be maintained by some on behalf of all.²

§ 218. Eighthly, and lastly, on matters of Account.³ In many of the cases referred to under the preceding head, persons were required to be parties simply upon the ground, that they were proper parties to an account to *be taken in the cause. In many of them, the [*193] doctrine, however, turned upon various and more complicated considerations. It seems, therefore, fit to say a very few words in this place as to parties in matters of account in general. An account may be sought by several persons against one, or by one against several. In each of these cases, all the persons on either side, having an interest in the account, are necessary parties, and should accordingly be made such, either as plaintiffs, or as defendants. Thus, for example (as we have seen), if an account is sought by or against partners, all of the partners are proper and necessary parties to the suit.⁴ So, if two executors are bound to render an account, they should both be made parties.⁵

¹ Ante § 102, 150; Mitf Eq. Pl. by Jeremy, 174.

² *Manning v. Thesiger*, 1 Sim. & Stu. 106; *Court v. Jeffery*, 1 Sim. & Stu. 105. Ante § 204.

³ See Calvert on Parties ch. 3, § 1, p. 118 to 138; Edwards on Parties. 178, 179.

⁴ *Moffat v. Farquharson*, 2 Bro. Ch. R. 338; *Evans v. Stokes*, 1 Keen R. 24; *Stafford v. City of London*, 2 Eq. Abridg. 166. Ante § 167.

⁵ *Cowslad v. Cely*, Prec. Ch. 83; *Scurry v. Morse*, 9 Mod. R. 89.

§ 219. Upon similar grounds, wherever different persons are interested in an account, though not in the same right, they should all be joined; as, for instance, heirs and personal representatives, residuary legatees and distributees, mortgagors and mortgagees, and their assignees;¹ persons receiving and holding assets in succession in virtue of their representative character;² and persons having distinct interests in the same security,³ either jointly, or in succession.

§ 220. Sometimes, where there is a defect of parties, which is made apparent at the hearing, and is not previously objected to, the Court will proceed to a final decree, if the plaintiff will undertake to give effect in [*194] *the cause to the utmost rights, which the absent parties could have claimed, if they had been before the Court, and those rights are such, as do not affect the rights of the defendants, who are before the Court.⁴

§ 221. We may here also advert to a point of considerable practical importance (of which incidentally notice has been already taken), and that is, that in many cases it furnishes no ground of objection, that persons are joined as parties in the suit, who, if they had been omitted, could not have been deemed necessary parties; for, in a variety of cases, it is in the option of the plaintiff to join them or not as defendants.⁵ Thus, for example, if a trustee has fraudulently or improperly

¹ Ante § 172, 173, 181, 185, 186, 196, 201.

² Ante § 159 to § 176; *Hindmarsh v. Southgate*, 3 Russ. R. 328; *Holland v. Prior*, 1 Mylne & K. 237; *Anderson v. Caunter*, 2 Mylne & K. 763.

³ *Palk v. Clinton*, 12 Ves. 48; *Hobart v. Abbot*, 2 P. Will. 643; *Norrish v. Marshall*, 5 Madd. R. 475.

⁴ *Harvey v. Cooke*, 4 Russ. R. 34, 54, 55.

⁵ Ante § 153, § 156, § 214.

parted with the trust property, the *cestui que trust* may proceed against the trustee alone, to compel satisfaction for the breach of trust, or he may at his election join the assignee also, if he was party to the fraud, or if he seeks redress against him.¹ So, if a pawnee or other person, lawfully in possession of jewels, should deliver them over to a third person for custody, he may have a bill for a redelivery and account of them without making the pawner or his representatives a party.² So, a person, who is a mere nominal or formal party may sometimes be dispensed with, although if he were joined in the suit, there would be no ground for any exception on his part.³

§ 222. Hitherto we have spoken of cases, where private persons only are interested in the subject-matter of the suit. But the same principle is applicable to cases, where the Government itself is a party in interest.⁴ In all such cases, it is essential, that the Attorney General, who is the proper public officer of the Government, should be made a party, either as *plaintiff, or as defendant, to protect and assert [*195] the interests of the public.⁵ Hence it is, that in cases of public charities the Court always requires the Attorney General to be made a party to the suit; because the

¹ *Bailey v. Inglee*, 2 Paige R. 278, 279; *West v. Randall*, 2 Mason R. 197, 198; Ante § 137.

² *Saville v. Tancred*, 1 Ves. 101; *Calvert on Parties*, ch. 1, § 1, p. 7; Ante § 213.

³ *Butler v. Pendergrass*, 16 Vin. Abridg. Party, 248; S. C. 2 Bro. Parl. Cas. 170; *Fletcher v. Ashburner*, 1 Bro. Ch. R. 497, 498. See also *Saville v. Tancred*, 1 Ves. 101. *Calvert on Parties*, ch. 1, § 1, p. 7, 8.

⁴ See *Calvert on Parties*, ch. 3, § 26, p. 301 to 308; *Edwards on Parties*, 60, 61, 62.

⁵ *Atty. Genl. v. Brown*, 1 Swanst. 265, 290, 291, 294; *Cooper Eq. Pl.* 17, 22; *Mif. Eq. Pl. by Jeremy*, 21, 22, and note; *Id.* 30; *Id.* 102, 169, 172.

Crown or Government, as *parens patriæ*, superintends the administration of all charities, and must, in cases of this sort, act by its proper officer, who is the Attorney General.¹

§ 223. We have thus reviewed some of the most important classes of cases, which serve to illustrate the general rule, as to the necessary parties to a Bill in Equity, and also to illustrate the exceptions to that rule. In general, it may be said, that in most of these classes of cases the doctrine, which is applied, is in a high degree reasonable and convenient, and promotive of the ends of justice. In some of them, the doctrine can scarcely be treated otherwise, than as founded in mere artificial or technical reasoning; sometimes, as stopping short of the proposed objects, for which it is adopted; sometimes, as introductive of anomalies not easily referable to any common principle; and sometimes, as subversive, either totally or partially, of the ends of justice, by obstructing, or extinguishing all chances of any remedy in Equity. Perhaps, however, it may be found, upon a close survey of the whole matter, that a different doctrine in these latter instances would work out inconveniences and mischiefs in an opposite direction, which would be equally liable to objection, and equally to be lamented. So that, after all, we may rather impute [*196] *these apparent blemishes in the system to the general inability of all human contrivances to attain entire justice, than to any positive omission to provide a safe, uniform, and effective remedy in all practicable cases.

§ 224. In concluding this part of our subject, we may

¹ *Wellbeloved v. Jones*, 1 Sim. & Stu. 40; *Mitf. Eq. Pl. by Jeremy*, 17, 22, 30, 102, 169.

here quote the language of Lord Redesdale, as furnishing at once an admonition and a motive to further diligence, and to more copious inquiries into the true grounds of necessary parties, when new cases arise, which may require new applications of principles. "In some cases, however," (says that eminent judge), "it may still remain a question of considerable difficulty, who are necessary parties to a suit. It may, indeed, be doubtful, until the decision of the cause, what interests may be affected by that decision ; and sometimes parties must be brought before the Court to litigate a question, who had, according to the decision, no interest in the subject ; and, as to whom, therefore, whether plaintiffs or defendants, the Bill may be finally dismissed, though the Court may make a decree on the subject, as between other parties, which will be conclusive on the persons, as to whom the Bill may be so dismissed, but which the Court would not pronounce in their absence, if amenable to its jurisdiction. Sometimes, too, a plaintiff, by waiving a particular claim, may avoid the necessity of making parties, who might be affected by it, though that claim might be an evident consequence of the rights asserted by the Bill against other parties. This, however, cannot be done to the prejudice of others."¹

§ 225. Let us now proceed to the consideration of the correlative inquiry, who ought not to be made, or who *need not be made, parties to a Bill in Equity.² [*197] And, here, the point most usually arises in relation to parties defendants, although it is by no means confined to them.³

¹ Mitf. Eq. Pl. by Jeremy, 179, 180 ; *Williams v. Williams*, 9 Mod. R. 299. See also § 236, § 237, § 279, § 509, § 541, § 544.

² See Calvert on Parties, ch. 1, § 3, p. 65 to 73.

³ Post § 229, § 232, § 236, § 237, § 279, § 509, § 541, § 544.

§ 226. In the first place (as we have already seen), the rule, as to necessary parties, does not extend to all persons, who may be consequentially interested or affected by the suit; as, for example, in the case of a Bill by a creditor for payment of his debt out of the assets of his deceased debtor, whether it is a suit brought for himself alone, or on behalf of all others.¹

§ 226. *a.* Upon the like ground, where a Bill is brought for a discovery merely, in aid of a defence in an action at law, no other person except the actual plaintiff at law, should be made a party to the Bill of discovery, although he may be beneficially interested in the subject-matter of the action at law. Thus, if an action at law is brought by an agent upon a policy of insurance, and the underwriters file a Bill of discovery in aid of their defence to the suit at law, the Bill should be brought against the agent alone; and his principal, not being a party to the suit at law, ought not to be joined in equity, although he has the real interest in the suit.² The same rule would apply to an agent bringing a Bill for a discovery in aid of his own action at law, where the principal ought not to be joined as plaintiff, although he has a substantial interest.³

§ 227. In the next place, a person is not properly a party to a suit, between whom and the plaintiff there is no proper privity or common interest; but his liability,

¹ Mitf. Eq. Pl. by Jeremy, 170, 171, 175; Ante § 140.

² *Irving v. Thompson*, 9 Sim. R. 17; *Fenton v. Hughes*, 7 Ves. 287. Lord Abinger decided directly the other way, in *Glyn v. Soares*, 1 Younge & Coll. 664. See also *Taylor v. Longworth*, 14 Peters R. 172. Post § 569.

³ *Glyn v. Soares*, 3 Mylne & Keen, 450; *Irving v. Thompson*, 9 Sim. R. 17; *Fenton v. Hughes*, 7 Ves. 287. The case might be different, if the Bill were not only for discovery, but also for relief. *Irving v. Thompson*, 9 Simon R. 17, 29; *Taylor v. Longworth*, 14 Peters R. 172. Post § 569.

if any, is to another person. This may be illustrated by the common case of a Bill brought by a creditor against an executor or administrator for payment of his debt out of the assets.¹ To such a Bill a debtor to the estate is not ordinarily a proper party ; because his liability is solely to the executor or administrator. But if a special case is made out, such as collusion between him and the executor or administrator, or insolvency of such personal representative ; then, and in that case, the debtor may be made a party, as a means of uprooting the fraud, or of securing the property.²

§ 228. In the next place, the plaintiff may (as we have already seen), in some cases, by the very structure of his Bill, and the prayer of relief, obviate the necessity of making one, otherwise interested, a party.³ Thus, where the plaintiff alone is concerned in interest, as to a demand upon a person not made a party, he may, *by a waiver of that claim, dispense with [*198] his being a party.⁴ So, if, at the hearing, the plaintiff waives any relief against a person not made a party.⁵

§ 229. In the next place, the non-joinder of a mere nominal or formal party will often be dispensed with, if entire justice can be done without him ; or if he cannot properly be made a party to the suit.⁶ Indeed, the

¹ *Utterson v. Mair*, 2 Ves. jr. 95 ; *Gedge v. Traill*, 1 Russ. & Mylne, 281 ; 2 Story on Equity Jurisp. § 836.

² Ante § 127, § 129, § 139, § 167, § 178, § 214.

³ See ante § 127, § 139, § 213, § 214.

⁴ Mitf. Eq. Pl. by Jeremy, 179, 180 ; *Williams v. Williams*, 9 Mod. R. 299 ; Ante § 127 to § 130, § 214.

⁵ *Pawlet v. Bishop of London*, 2 Atk. 296 ; *Northey v. Northey*, 2 Atk. 77.

⁶ *Butler v. Pendergraft*, 2 Bro. Par. Cas. 170 ; S. C. 4 Bro. Par. Cas. by Tomlins, 174 ; 16 Viner Abridg. 248, pl. 5. Ante § 221.

joinder or non-joinder of mere nominal or formal parties will not ordinarily be allowed by the Court, as a valid objection to proceedings under the Bill.¹

§ 230. In the next place, no person need be made a party to a Bill, who claims under a title paramount to that brought forward, and to be enforced in the suit; or who claims under a prior title or incumbrance, not affected by the interests or relief sought by the Bill.² Thus, for example, on a Bill to carry into effect the trusts of a will, a person, who claims by a title paramount to that will, ought not to be made a party, in order to bring into contestation his rights under such paramount title.³ So, where a Bill seeks merely the application of the surplus of a trust fund, after discharging prior incumbrances, the prior incumbrancers are not necessary parties.⁴

§ 231. In the next place, no person should be made [*199] *a party, who has no interest in the suit, and against whom, if brought to a hearing, no decree can be had.⁵ Upon this ground it is, that a person, who is a mere agent in the transaction, ought not to be made a party to a Bill; as, for example, an auctioneer, who has sold an estate, the sale being the matter in controversy;⁶

¹ *Wormley v. Wormley*, 8 Weat. 451.

² Ante § 148, § 149.

³ *Devonsher v. Newenham*, 2 Sch. & Lefr. 207 to 212; Ante § 161; *Pelham v. Gregory*, 1 Eden R. 520; S. C. 6 Bro. Ch. R. 575; (3 Bro. Par. Cas. by Tomlins, 204); *Eagle Fire Insurance Company v. Lent*, 6 Paige, 635; *Lange v. Jones*, 5 Leigh R. 192. Ante § 148, § 149.

⁴ *Mitf. Eq. Pl. by Jeremy*, 175; Ante § 148, § 149.

⁵ *Mitf. Eq. Pl. by Jeremy*, 160; 2 *Eq. Abridg.* 78, pl. 12; *Smith v. Snow*, 3 *Madd. R.* 10; *West v. Randall*, 2 *Mason R.* 192, 197; *Trecothick v. Austin*, 4 *Mason R.* 42; *Petch v. Dalton*, 8 *Price R.* 12; 1 *Harris. Ch. Pr.* by Newland, 38, (1808); *Le Texier v. Marquis of Anspach*, 15 *Ves.* 164; *Cooper Eq. Pl.* 41, 42; 2 *Madd. Ch. Pr.* 146, 147; 2 *Story on Equity Jurisp.* § 1499. Post § 570.

⁶ *Cooper Eq. Pl.* 41, 42. Post § 570.

or a steward or receiver of the rents and profits, where the controversy is between the vendor and the vendee to a Bill for a specific performance;¹ or an attorney or solicitor, who has negotiated an annuity, to a Bill to set it aside, on account of a defective memorial;² or an arbitrator to a Bill, to enforce or to set aside an award.³

§ 232. In cases too, where the objection of a want of interest applies, it is or may be equally as fatal, when applicable to one of several plaintiffs, as, it is when applicable to one of several defendants.⁴ Indeed, in the former case, the objection is or may be fatal to the whole suit; whereas, in the latter case, it is fatal (if properly taken and in due time) to the suit only against the defendant improperly joined.⁵ But in cases of this sort, if there is any charge of fraud connected with the transaction, in which the agent, or steward, or attorney, or solicitor, or arbitrator, participated, *and it is so [*200] charged in the Bill; there, he may properly be made a party; for even if no other decree would be warranted by the circumstances of the case against him, he might be decreed to pay the costs of the suit, if his principal should happen to be or should become insolvent.⁶

¹ Cooper Eq. Pl. 42; *McNamara v. Williams*, 6 Ves. 143.

² Cooper Eq. Pl. 42; 2 Madd. Ch. Pr. 146, 147.

³ Mitf. Eq. Pl. by Jeremy, 160, 161; Cooper Eq. Pl. 178; *Steward v. East India Company*, 2 Vern. 380; Mitf. Eq. Pl. by Jeremy, 160; 2 Eq. Abridg. 78.

⁴ Ante § 224. Post § 236, § 237, § 509, § 541, § 544, § 569.

⁵ *Makepeace v. Hathorne*, 4 Russ. R. 244; *King of Spain v. Machado*, 4 Russ. R. 225, 241; *Hunter v. Richardson*, 6 Madd. R. 89; Mitf. Eq. Pl. by Jeremy, 160, 161. Ante § 224, § 229; Post § 236, § 237, § 541 to § 544. § 569.

⁶ Cooper Eq. Pl. 42; Mitf. Eq. by Jeremy, 160, 161; *Id.* 189; 2 Story on Equity Jurisp. § 1500; *Bowles v. Stewart*, 1 Sch. and Lefr. 227; *Le Texier v. Marq. of Anspach*, 15 Ves. 164; *Fenton v. Hughes*, 14 Ves. 287, 288, 289; *Stewart v. East India Company*, 2 Vern. 380 and note, and 14 Ves. 253; *Lingood v. Eade*, 2 Atk. 501; *Lingood v. Croucher*, 2 Atk. 395;

§ 233. Another exception has been sometimes made upon a ground not entirely satisfactory, and which may now be considered as of very doubtful authority. It is the case of a bankrupt, in which it is admitted, that though he ought not generally to be made a party to a Bill against his assignees touching his estate; yet, if in such a Bill any discovery of his acts, before he became a bankrupt, is sought, he may properly be joined and compelled to make the discovery.¹ And the same proposition has been put in a more general form; that where a person, having had an interest in the subject-matter, has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.²

Church v. Lequesne, 2 Ves. 315. Post § 570. In such a case the Bill itself should pray costs against the agent, &c.; for otherwise a demurrer would lie. *Le Texier v. Marq. of Anspach*, 15 Ves. 164. The same principle applies to the case of a debtor to a testator's estate, who cannot ordinarily be joined in a creditor's suit against the executor for payment of his own debt; but he may be, if collusion is charged between him and the executor. 1 Mont. Eq. Pl. 45, 46, note (o); 2 Mont. Eq. Pl. 141; Mitf. Eq. Pl. by Jeremy, 158, 159; *Elmslie v. Macaulay*, 3 Bro. Ch. R. 624.

¹ Mitf. Eq. Pl. by Jeremy 161.

² Mitf. Eq. Pl. by Jeremy, 161. The whole doctrine has been shaken, if not overturned in *Whitworth v. Davis*, 1 Ves. and Beam. 548, 549, 550, and *Griffin v. Archer*, 2 Anst. 478. Lord Redesdale's own mode of stating the proposition in the passage cited in the text shows, that he deemed it doubtful. He has added; "It is difficult to draw a precise line between the cases, in which a person, having no interest, may be called upon to answer for his own acts, and those, in which he may demur, because he has no interest in the question. Thus, where a creditor, who had obtained execution against the effects of his debtor, filed a Bill against the debtor, against whom a commission of bankruptcy had issued, and the persons claiming as assignees under the commission, charging, that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was overruled, and the decision affirmed on rehearing. A differ-

§ 234. For the same reason a mere witness ought not to be made a party to a Bill, although the plaintiff might deem his answer more satisfactory than his examination; for he has no interest in the cause, and no decree can be had against him; nor would his answer be evidence against his co-defendant. And he ought not to be harassed by the trouble or expense of a litigation, in respect to which he has nothing to gain or to lose.¹

§ 235. There are some exceptions, however, to this general doctrine, which have been introduced upon peculiar reasons, and, whether satisfactory or not, which are now well established. Thus, for example, the officers of a corporation, although they may be mere witnesses, may be joined in the defence in a suit against the corporation. The reason assigned for this distinction between *the cases of individuals and the cases of corpo- [*202] rations is, that the former may be required to answer upon their personal and corporal oaths; whereas a corporation cannot be sworn, and therefore must put in its answer under its common seal only; and however false its answer may be, the corporation can never be convicted of perjury. Under such circumstances it has been thought allowable to compel the officers of the corporation to answer to the material facts upon their

ence has also been taken, where a person concerned in a transaction, impeached on the ground of fraud, has been made party to a Bill for discovery merely; or as having the custody of an instrument for the mutual benefit of others." Mitf. Eq. Pl. by Jeremy, 161, 162.

¹ Cooper Eq. Pl. 41, 42; Mitf. Eq. Pl. by Jeremy, 188; *Wych v. Meal*, 3 P. Will. 310 and Mr. Cox's note (1); *Newman v. Godfrey*, 2 Bro. Ch. R. 332; *Plummer v. May*, 1 Ves. 426; *Fenton v. Hughes*, 7 Ves. 287 to 290; *Dummer v. Chippenham*, 14 Ves. 252; *Whitworth v. Davis*, 1 Ves. and B. 550; *Griffin v. Archer*, 2 Anst. R. 478; *Lloyd v. Lander*, 5 Madd. R. 282; 2 Story on Equity Jurisp. § 1499.

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own personal oaths; and thus to enable the plaintiff better to frame his Bill, and better to draw and pen his interrogatories towards obtaining a fuller discovery.¹ And in truth it must be admitted, that the officers are generally the only persons, who can give the information.²

§ 236. Having stated these general doctrines in relation to the joinder and omission of parties, it may be proper to add in this connexion (though the matter will necessarily come in review hereafter), that, if the want of proper and necessary parties is apparent on the face of the Bill, the defect may be taken advantage of by demurrer.³ And in many cases, and especially if the defect be vital to the character of the Bill, and to the relief asked, the [*203] objection *may also be insisted upon at the hearing. And, if the Court shall proceed to a decree, the decree may be reversed for error on this account.⁴

¹ *Wych v. Meul*, 3 P. Will. 310; *Moodalay v. Morton*, 1 Bro. Ch. R. 469; *Whitworth v. Davis*, 1 Ves. and B. 550; *Dummer v. Chippenham*, 14 Ves. 252, 253, 254; *Cooper Eq. Pl.* 42; *Mitf. Eq. Pl. by Jeremy*, 160 and note; *Id.* 189; *Le Texier v. Marq. of Anspach*, 15 Ves. 164, 165; *Gibbons v. Waterloo Bridge Company*, 5 Price R. 493; *Bramley v. Westchester County Manuf. Co.*, 1 John. Ch. R. 366; 2 Story on Equity Jurisp. § 1500.

² It seems, however, that though it is not an unusual rule, that the officers of a corporation may be made parties; yet that a special ground, such as to peculiar information, should be laid. Thus, in *Howe v. Bent* (5 Madd. R. 19), where an officer of the Bank of England was made a party to a Bill of discovery, when certain stock in question in the cause was transferred, it was held on demurrer, that he was not properly joined, because he was a mere witness.

³ Post § 541 to § 544.

⁴ *Cooper Eq. Pl.* 33, 185; *Mitf. Eq. Pl. by Jeremy*, 180, and the cases there cited; *Pract. Reg. by Wyatt*, 299; 1 *Daniell Ch. Pract.* 384 to 388; 2 *Daniell Ch. Pract.* 37, 38; *Whiting v. Bank of U. States*, 13 Peters R. 14. The mere nonjoinder of a proper party cannot avail the defendant in a Bill of review, unless it operates to his prejudice; and there is the more reason for this rule, because the absent person is not bound by the decree; but may, in another suit, vindicate his rights. *Whiting v. Bank of U. States*, 13 Peters R. 14. Post, § 283, § 509, § 541, § 544.

If the defect is not apparent on the Bill, it may be propounded by way of a plea, or it may be relied on in a general answer.¹ If it is insisted on only at the hearing, the Court will often, if there are merits, allow the cause to stand over, in order to make new parties, or, if the Bill is dismissed, it should be without prejudice.²

§ 236. *a.* It is no answer to the objection of a want of proper parties, that the persons, not parties, might, if made so, object, that the Bill is multifarious. Many Bills may not be multifarious as to some persons, interested in the whole subject-matter, which would be so as to others, interested only in part of it. But that is no reason for the Court proceeding in the absence of any person, who ought to be present, as to any part of the case. It at most can only prove, that the plaintiffs have adopted a wrong course from the beginning; and that the error is irremediable under the ordinary permission to amend by making parties.³

§ 237. If, on the other hand, the defect in the Bill should be a joinder of improper parties (as, for example, persons having no interest, or mere witnesses), in such a case, if the defect is apparent on the face of the Bill, it may be brought forward by a demurrer by the party improperly joined; or he may, at the hearing, in some cases, rely on it, as a ground for a dismissal of the Bill as against him.⁴ If the defect is not apparent on the face of the Bill, the party improperly joined may rely on the

¹ Cooper Eq. Pl. 289; Mitf. Eq. Pl. by Jeremy, 280.

² *West v. Randall*, 2 Mason R. 181; *Mechanics Bank of Alexandria v. Setons*, 1 Peters R. 306; *Hunt v. Wickliffe*, 8 Peters R. 215; Ante § 73; Post § 541, § 544.

³ *Lumsden v. Frazer*, 1 Mylne & Craig, 589, 602; S. C. 7 Simons R. 555.

⁴ Post, § 283, § 509, § 541, § 544, § 569.

objection by way of a plea, or insist upon it in his answer.¹ It is not safe, however in any case, to rely upon the mere nonjoinder or misjoinder of parties, as an objection at the hearing ; for if the Court can make a decree at the hearing, which will do entire justice to all the parties, and not prejudice their rights, notwithstanding the nonjoinder or misjoinder, it will not then allow the objection to prevail.² The true course, therefore, is, to take it by way of demurrer, when it is apparent on the face of the Bill ; or, if not apparent, by plea or by answer.³ When the objection of want of proper parties exists, the Court will ordinarily allow the defect to be supplied by an amendment of the original Bill, or by a supplemental Bill, as the stage of the proceedings, at which the objection is taken, may require.³

§ 238. Where a demurrer, or a plea, is put in for the want of proper parties, if a demurrer, it must appear, if a plea, it must be shown, who are the proper parties, not indeed by name, for that might be impossible ; but in such a manner as to point out to the plaintiff the objec-

¹ Cooper Eq. Pl. 42 ; Mitf. Eq. Pl. by Jeremy, 160, 161 ; Post § 541, § 544.

² Lambert v. Hutchinson, 1 Beavan's R. 277 ; Post § 283, § 544 ; Pringle v. Crooks, 3 Younge & Coll. 666. In this last case, a doubt was suggested, whether in any case a misjoinder of a defendant was a ground of demurrer. Post § 544, and note. The very point as to a nonjoinder of a defendant arose in the case of Whiting v. Bank of U. States, 13 Peters R. 6-14 ; and it was there held, that unless the nonjoinder operated a prejudice to the rights of the other defendants, it could not be taken advantage of at the hearing, or upon a rehearing on a Bill of Review. See also Russell v. Clarke's Ex'rs. of Cranch, 69 ; Elmendorf v. Taylor, 10 Wheaton R. 152 ; Carneal v. Banks, 10 Wheaton R. 181 ; Mallon v. Hinde, 12 Wheaton R. 193 ; Mechanics Bank of Alexandria v. Setons, 1 Peters R. 306 ; Vattier v. Hinde, 7 Peters R. 252 ; Boone's Heirs v. Chiles, 8 Peters R. 532. Ante § 232. Post § 541, § 544.

³ Post, § 541, § 884.

tion to his Bill, and enable him to amend by adding the proper parties.¹ Indeed, cases may occur of such a nature, as even to require the names to be stated, if the more general description is not sufficient to enable the plaintiff to ascertain with reasonable certainty the names of the absent parties.² For example, if it should appear in the case of a Bill to enforce a rent charge for a charity, that *other lands also were charged, it [*204] might be required in the plea to set forth, who are the present owners of these lands, and their precise locality, if the transaction were of great antiquity, and the original description were loose and indeterminate.³

¹ Mitf. Eq. Pl. by Jeremy, 180, 181; Atty. Genl. v. Jackson, 11 Ves. 369, 370; Post § 543. See Atty. Genl. v. Poole, 4 Mylne & Craig, 17; 1 Daniell Ch. Pract. 384 to 388.

² Atty. Genl. v. Jackson, 11 Ves. 367, 368, 369, 370, 371.

³ Ibid. Atty. Genl. v. Wyburgh, 1 P. Will. 509; Atty. Genl. v. Shelly, 1 Salk. R. 163.

CHAPTER V.

BILLS—GENERAL FRAME OF.

§ 239. HAVING gone through with these preliminary considerations as to parties, we shall now proceed to a more particular consideration of some of the general rules and principles applicable to the structure of Original Bills for relief. We have already had occasion to state the nature, and general character, and appropriate subdivisions and parts of such Bills, which should be borne in mind in our subsequent inquiries.

§ 240. In the first place, then, as to the certainty, which is required in the statements of Bills. With reference to certainty in pleadings at the common law, there are said to be three kinds, applicable to different parts of the pleadings, founded, as it should seem, upon one general maxim; *certa debet esse intentio, et narratio, et certum fundamentum, et certa res, quæ deducitur in judicium*. The first kind is certainty to a common intent; and that is sufficient in a bar, which is to defend the party, and to excuse him. The second is certainty to a certain intent in general, as in counts, replications, and other pleadings of the plaintiff, that is, to convict the defendant, as in indictments, &c. The third is, certainty to a certain intent in every particular, as in estoppels, which are odious in the law.¹ It has been said, that in pleading there must be the same strictness in equity as in law;²

¹ Co. Litt. 303, a.

² Story v. Lord Windsor, 2 Atk. 632.

as, for example, it has been adjudged, that if a plea sets up a *bonâ fide* purchase without notice, as a defence, it will not be sufficient to state in it, that the vendor being seised, or pretending to be seised, did convey, &c.; but there should be a direct averment, that the vendor was actually seised.¹ But, however true this may be as to a plea in equity, technically so called, it can hardly be affirmed to be true in the framing of Bills or Answers, in respect to which more liberality prevails.² And it may perhaps be correctly affirmed, that certainty to a common intent is the most, that the rules of equity ordinarily require in pleadings for any purpose.³

§ 241. In the next place, it may be affirmed, as an elementary rule of the most extensive influence, that the Bill should state the right, title, or claim of the plaintiff with accuracy and clearness; and that it should in like manner state the injury or grievance, of which he complains, and the relief, which he asks of the Court. The other material facts ought to be plainly, yet succinctly alleged, and with all necessary and convenient certainty, as to the essential circumstances of time, place, manner,

¹ *Story v. Lord Windsor*, 2 Atk. 632; Beam. Eq. Pl. 21.

² 3 Black. Comm. 446; 1 Mont. Eq. Pl. 27, note (m); 2 Mont. Eq. Pl. 92, 93, note (A. I.); *Carew v. Johnston*, 2 Sch. & Lefr. 305; *Carlton v. Leighton*, 3 Meriv. R. 671.

³ *Wigram on Points in Discov.* 77, 1st edit. Id. p. 123, 124, 2d edit.; *Cooper Eq. Pl.* 181. It is sometimes laid down in the Reports as well as in elementary works, that there should be the same certainty in a Bill in Equity, that there is in a declaration and other pleadings at the common law. So Lord Hardwicke is reported to have said in *Story v. Lord Windsor*, 2 Atk. 632. See also *Mitf. Eq. Pl. by Jeremy*, 284; 1 Mont. Eq. Pl. 25. But the proposition is not strictly accurate; and it has been well said by Mr. Woodeson, (3 Woodes. Lect. 55, p. 370), that the matter of the Bill need not be set forth with that decisive and categorical certainty, which is requisite in pleadings at the common law. Thus, a part of the allegations of a bill may be in the disjunctive.

and other incidents.¹ If title deeds or other instruments are referred to, they should not be set out in *hæc verba*; but the substance of such portions only of them as are necessary to a right understanding of the real matters of the Bill.²

§ 242. Uncertainty in a Bill (as has been well observed), may arise in various ways. (1.) The case intended to be made by the Bill may be vague and uncertain. (2.) The case intended to be made may be certain; but the allegations of the Bill may be so vague and general, as to draw with them the consequences and mischiefs of uncertainty in pleadings.³ (3.) Some of the material facts may be stated with sufficient certainty, and others again with so much indistinctness or incompleteness, as to their nature, extent, date, or other essential requisites, (as, for example, in stating the title of the plaintiff,) as to render inert or inefficient those, with which they are connected, or upon which they depend. In each of these cases the defect may be fatal to the objects of the Bill; or, if not fatal, it may greatly embarrass the party in the mode of redress, or in the extent of the discovery, or in the application of the evidence.⁴

¹ Mitf. Eq. Pl. by Jeremy, 41; Cooper Eq. Pl. 5; Wyatt Prac. Reg. 57.

² Wyatt Pract. Regis. 57, 58; Barton Eq. Pl. 31, note (2); Beam. Ord. in Ch. 25, 69, 70, 160, 167; Hood v. Inmann, 4 John. Ch. R. 437. In the *East India Company v. Henschman* (1 Ves. jr. 289), the Lord Chancellor adverted to the looseness and prolixity of the Bill, in which a great many letters were set forth; and then added—"Allow the demurrer, and let them (the plaintiffs) file another Bill in three lines to suit the point, instead of stating all these letters, to show, that the transactions, appearing fair, in fact are not fair. Where is the use of that? What is the allegation?"

³ Wigram on Discov. 77, 78, 1st edit.; Id. p. 123, 124, 125, 2d edit.

⁴ Wigram on Discov. 84, 85, 86, 1st edit.; Id. p. 131, 132, 2d edit. Where the charge in the Bill is very general, it is often sufficient in the answer to make a general denial of its truth. Where it is special and specific in

§ 243. A few examples, derived from adjudged cases, may serve to illustrate these principles. Thus, where the East India Company brought a Bill against one of their servants, for a breach of his covenants while in their employment, alleging, that he had entered into a combination with the Board of Trade, at Fort William, to defraud the Company; that he had made certain false representations to the Company in his letters; that he had made false charges against them; and that he had made large profits in his transactions with the natives; and it prayed for an account of the profits, &c.; upon a general demurrer, it was held, that the Bill was bad, from the vague and indeterminate manner, in which the charges were stated. The natural mode of making the charges would have been, to have alleged, that the defendant exercised the trade under the orders of the Company, and that by color of this contract with the Company, he took the profits, as if they were his own; whereas it was the trade of the Company.¹

§ 244. So, where a Bill was brought to perpetuate a right of common and of way, the charge in the Bill was, that the tenants, owners and occupiers of certain lands of a manor, *in right thereof or otherwise*, from time, whereof the memory of man is not to the contrary, had, and of right ought to have, common of pasture, &c. in a certain waste, &c.; the Bill was held bad on demurrer; for the manner, in which the right of common was claimed, was not set forth with any certainty. It was not set forth as common appendant or as common appurtenant, but

circumstances, the answer must make specific denials. See Wigram on Discov. 84 to 87, 1st edit.; Id. 131 to 136, 2d edit. Hence it is often very material, in cases of exceptions to an answer for insufficiency, to look to the precise allegations of the Bill, and to the interrogatories framed thereon. Wigram on Discov. 196, 1st edit.; Id. 190 to 196, 2d edit.; Hare on Discov. 36, 40.

¹ East India Company v. Henchman, 1 Ves. jr. 287, 288.

as that, "or otherwise," which was no specification at all, and left any sort of right open to proof. On that occasion the Court said: "Special pleading depends upon the good sense of the thing; and so does pleading here. And though pleadings in this Court run into a great deal of unnecessary verbiage, yet there must be something substantial; the party must claim something.¹

§ 245. So, where a Bill sought a discovery and delivery up of title deeds to the plaintiff, and alleged, that at the time of the marriage of his father and mother, his mother was seised, and possessed, or entitled to divers freehold, copyhold and leasehold estates, as one of the co-heiresses of her father, *or* under his marriage settlement, *or* his will, *or* codicil, *or by some such or other means*; and that upon the marriage of the plaintiff's father and mother, or before, or at some time after the said marriage, some settlement or settlements was or were executed, whereby all or some parts of the said estates were conveyed upon certain trusts and purposes, in such a manner, as that estates for life were given to his father and mother, or one of them, or at least an estate for life to his father, with a provision by way of jointure or otherwise for his mother, who died in the lifetime of his father, remainder to the first son of his father and mother, or to their first and other sons severally and successively, *or in some manner*, so that the plaintiff, upon the death of his father and mother, or the death of his father, became seised or entitled to all or most of the estates, &c., *either in fee or absolutely, or as tenant for life, or in tail in possession, or in some other manner*, as would appear by the deeds, &c., in the defendant's possession; upon demurrer, the Bill was held

¹ Cresset v. Mitton, 1 Ves. jr. 449; S. C. 3 Bro. Ch. R. 481.

bad for vagueness and uncertainty; and that the defendants could not plead to it, but must discover all deeds relating to their estates.¹

§ 246. So, where a Bill was founded upon the supposed due execution of a power, and insisted in the alternative, that it was a good execution of the power at law, and if not, that it was a good execution of the power in Equity; the Bill was held bad on demurrer; for the plaintiffs ought to state distinctly, whether their case is at law, or in equity; for if it be good at law, there may be no remedy in equity.²

§ 247. So, where a Bill was brought to perpetuate the testimony of witnesses, touching a right to a way, and there was a demurrer, because the way claimed was not set forth with sufficient certainty; the Court held, that the way should be set forth with the same certainty as at law, *per, et trans*.³

§ 248. So, where a Bill was filed by a corporation against the defendant, claiming certain duties under letters patent, in respect of which a discovery was prayed, in aid of an action at law; but the Bill did not state with certainty, by whom, or what description of persons in particular, the duties were payable, nor the particular nature of the duties themselves; the Court allowed a demurrer to the Bill. For, though in the case of duties imposed by an act of parliament, the Court is bound to take notice of them; yet, in the case of a grant of the crown, there should be some averment of the *quantum* of duties, and of the individuals, by whom they are payable; for the Court cannot otherwise know the facts.⁴

¹ *Ryves v. Ryves*, 3 Ves. 343; Cooper Eq. Pl. 5, 6.

² *Edwards v. Edwards, Jac.* Rep. 335.

³ *Gell v. Hayward*, 1 Vern. 312; Cooper Eq. Pl. 312.

⁴ *The Mayor of London v. Levy*, 8 Ves. 398, 401; Cooper Eq. Pl. 5.

§ 249. So, where, in a Bill by an heir at law, the plaintiff sought, among other things, to restrain the defendant from setting up any outstanding terms, or other incumbrances, to defeat the plaintiff at law; but the Bill contained no averment of any outstanding terms, it was held bad upon demurrer; for the Court will not proceed upon a mere vague allegation, that the action may be defeated by setting up outstanding terms.¹

§ 250. So, where a Bill was for an injunction to an action at law, brought for the recovery of the produce of certain foreign specie; and the Bill suggested in general terms, that in a particular year the plaintiffs had frequently been employed as agents to the defendants, who were resident abroad, and that they had various dealings and transactions, and that mutual accounts subsisted between them, and in particular, that at a period stated in the Bill the defendants remitted the specie in question; and the Bill prayed an account of the transactions and an injunction; but there was no statement, that there were unsettled accounts, or that a balance was due to either party; the Bill was held bad on demurrer, on account of the facts being too loose and vague to support it.²

§ 251. Upon similar grounds, where a Bill seeks a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point, and state particular acts of fraud.³ So, in a Bill to open a settled account it is not sufficient to allege generally, that it is erroneous; but the specific errors should be pointed out.⁴

¹ *Jones v. Jones*, 3 Meriv. R. 160, 172, 173.

² *Frietas v. Don Santos*, 1 Y. & Jerv. 574.

³ *Palmer v. Mure*, 2 Dick. R. 489.

⁴ *Johnson v. Curteis*, 3 Bro. Ch. R. 265; *Taylor v. Haylin*, 2 Bro. Ch. R. 310; *Knight v. Bamfield*, 1 Vern. 180.

§ 252. But, although a general charge is insufficient ; yet it does not follow, that the plaintiff in his Bill is bound to set forth all the minute facts. On the contrary, the general statement of a precise fact is often sufficient ; and the circumstances, which go to confirm or establish it, need not be (though they often are) minutely charged ; for they more properly constitute matters of evidence, than matters of allegation.¹ Thus, for example, if a Bill is brought to set aside an award, bond or deed for fraud, imposition, partiality, or undue practice ; it is not necessary in the Bill to charge minutely every particular circumstance ; for that is matter of evidence, every part of which need not to be charged.²

§ 253. And general certainty is sufficient in pleadings in equity. Thus, for example, the statement of a feoffment without livery of seisin, or of a bargain and sale without statement of the enrolment thereof, will be sufficient.³ So, in a Bill for a specific performance of a contract, if it be alleged to be in writing, it is not necessary to allege it to be signed by the party ; but it will be presumed to be so signed.⁴

§ 254. And, although (as we have seen) setting forth the plaintiff's title in alternatives may not be sufficient ; yet we are not from that to draw the general conclusion, that a Bill can never be brought with a double aspect. On the contrary, where the title to relief will be precisely the same in each case, the plaintiff may aver facts of a

¹ Ante § 28.

² *Chicot v. Lequesne*, 2 Ves. 318 ; *Clarke v. Periam*, 2 Atk. 337 ; *Wigram on Discov.* 84, 85, 1st edit. *Id.* 131, 132, 2d edit. *Cooper Eq. Pl.* 7. See *Faulder v. Stuart*, 11 Ves. 302.

³ *Harrison v. Hogg*, 2 Ves. jr. 328 ; *Cooper Eq.* 181.

⁴ *Dunn v. Calcrafft*, 1 Sim. & Stu. 543 ; *Cozine v. Graham*, 2 Paige R. 177.

different nature, which will equally support his application. Thus, for example, if a plaintiff should seek to set aside a deed upon the ground of fraud and imposition and undue influence ; the plaintiff, in such a case, may charge insanity in the party making the deed, and he may also charge great weakness and imbecility of mind.¹

§ 255. These may suffice as illustrations of the general doctrine as to certainty, and as to looseness and vagueness in the statement of the case made by the Bill. In the next place, it is a general rule, that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision.² Thus, for example, if a Bill is brought to charge a defendant as assignee of a lease, it will not be sufficient to state in the Bill, that the plaintiff has been informed by his steward, that the defendant is so assignee. But the fact must be positively averred ; for it is essential to the very claim set up by the Bill.³ On the other hand, the claims of the defendant may be stated in general terms. And if a matter, essential to the determination of the claims of the plaintiff, is charged to rest in the knowledge of the defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the Bill, a precise allegation thereof is not required.⁴ Thus, for example, if a Bill is brought for a partition, it will be sufficient certainty as to the defendant's title, if it should state, that the defendant is seised in fee of, or otherwise well entitled to, the other remaining undivided parts of the

¹ *Bennet v. Wade*, 2 Atk. 325 ; *Cotton v. Ross*, 2 Paige R. 395 ; *Lloyd v. Brewster*, 4 Paige R. 537 ; 3 Woodes. Lect. 55, p. 371.

² *Mitf. Eq. Pl. by Jeremy*, 41, 42 ; *Cooper Eq. Pl.* 6.

³ *Ibid.* *Lord Uxbridge v. Staveland*, 1 Ves. 56.

⁴ *Mitf. Eq. Pl. by Jeremy*, 42, *Cooper Eq. Pl.* 6.

premises. But such an allegation by the plaintiff of his own title would not be sufficient; and he should set it forth positively and determinately.¹

§ 256. Still, however, even when the fact rests within the knowledge of the defendant, if it constitutes a material allegation in the Bill, and is the foundation of the suit, it must be clearly stated. As, for example, if a Bill seeks a discovery, whether the defendants are assignees, &c. it will not be sufficient to allege, that the plaintiff has been informed, that the defendants are assignees; but the fact must be positively averred.²

§ 257. And this leads us to remark in the next place, that every fact essential to the plaintiff's title to maintain the Bill, and obtain the relief, must be stated in the Bill, otherwise the defect will be fatal. For no facts are properly in issue, unless charged in the Bill; and of course no proofs can be generally offered of facts not in the Bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the Court pronounces its decree *secundum allegata et probata*.³ The reason of

¹ *Baring v. Nash*, 1 V. & Beam. 551, 553. In the case of *Ford v. Pearing* (1 Ves. jr. 72), it seems to have been thought, that, in a Bill by an heir for a discovery and delivery of title deeds, it was not necessary for the plaintiff to state every link of his pedigree, if there is a clear averment and claim of his title as heir. But quære, whether the Bill should not shew the precise manner, in which the party claims as heir, before he can call upon the defendant to discover and deliver him any title deeds, as these are facts peculiarly within his own means of knowledge? However, in *De Corne v. Hollingsworth* (1 Cox R. 421, 422), the Court ruled the same point, as it was ruled in 1 Ves. jr. 72.

² *Lord Uxbridge v. Staveland*, 1 Ves. 56.

³ *Cooper Eq. Pl.* 5, 7; *Ante* § 28; *Crocket v. Lee*, 7 Wheat. R. 522, 525; *Gresley on Evid.* 22, 23; *Norbury v. Meade*, 3 Bligh R. 211; *Hall v. Maltby*, 6 Price R. 240; *Jackson v. Ashton*, 11 Peters R. 229; *James v. McKernon*, 6 John. R. 564; 3 Woodes. Lect. 55, p. 371.

this is, that the defendant may be apprized by the Bill, what the suggestions and allegations are, against which he is to prepare his defence.¹ Thus, if an obligee should bring a Bill to recover from an heir the amount of a bond, alleging real assets in his hands by descent; the Bill will be demurrable, unless it also states positively and directly, that the defendant is heir, and that the heir is bound by the bond.² So, if a Bill should be brought by a lessor against an assignee, touching a breach of covenant in a lease, and the covenant, as stated in the Bill, should appear to be collateral, and not running with the land, and therefore not binding on assigns; it should be expressly stated in the Bill, not only, that the covenant did bind the lessee, but the assigns; otherwise the Bill would be fatally defective.³

§ 257. *a.* So, if a judgment creditor should bring a Bill to enforce his security against the debtor's equitable interest in a freehold estate, he must aver in his Bill, that he has previously sued out an *elegit*; and if he does not, the Bill will be fatally defective, since an *elegit* is an indispensable prerequisite to the maintenance of the Bill.⁴ So, if a judgment creditor should bring a Bill alleging, that the defendant to a Bill, to deprive him of the benefit of his judgment, had got into his hands, goods of the debtor, under pretence of a debt due to himself, and should pray a discovery of the goods; but should not aver in his Bill, that he had sued out execution on

¹ Cooper Eq. Pl. 5, 7; Ante § 28; and cases before cited.

² *Crosseing v. Honor*, 1 Vern. R. 180; Mitf. Eq. Pl. by Jeremy, 163; Cooper Eq. Pl. 179.

³ Mitf. Eq. Pl. by Jeremy, 163; *Lord Uxbridge v. Staveland*, 1 Ves. 56; Cooper Eq. Pl. 179.

⁴ *Neate v. Duke of Marlborough*, 3 Mylne & Craig, 407, 416, 417; Mitf. Eq. Pl. by Jeremy, 126.

the judgment, the Bill would be fatally defective, because until he had so done, the goods were not bound by the judgment, and consequently the plaintiff had no title to the discovery.¹

§ 258. For a like reason, where a Bill was brought by a holder of shares (of which some were original and some derivative), in an unincorporated joint stock company against the directors, alleging a fraud by the latter, by which they had made a profit at the expense of the company, and praying an account, it was held demurrable; because it only stated the plaintiff to be a shareholder by purchase; but it did not specifically state the mode, in which the plaintiff became such a shareholder, and the manner of his holding his derivative shares, and that he had performed the conditions, on *which alone, by the rules of the company, a [*216] transfer was allowed.²

§ 259. So, if a Bill should be brought in aid of an action at law, it should allege, by whom, and against whom the action is brought, or is to be brought, and the other material circumstances, by which the Court may be enabled to judge of the plaintiff's right of action. For, it will never be admitted, that a party shall file a Bill, not venturing to state, who are the persons, against whom the action is to be brought, nor the circumstances touching the right of the plaintiff, and the liabilities of the defendants, which may enable the Court, which is presumed to know the law, to decide, whether it is a fit case for its interposition, or not; but merely stating circumstances, and averring, that the

¹ Mitf. Eq. Pl. by Jeremy, 187, 188; Id. 126; *Angell v. Draper*, 1 Vern. R. 399. Post § 319.

² *Walburn v. Ingleby*, 1 Mylne & K. 61.

plaintiff has a right against the defendants, or against some of them.¹

§ 260. Lord Redesdale has commented on this subject with great clearness and accuracy; and it may therefore be useful to quote his very language and illustrations. "Though the plaintiff," (said he), "in a Bill may have an interest in the subject; yet if he has not a proper title to institute a suit concerning it, a demurrer will hold. Therefore, where persons, who had obtained letters of administration of the estate of an intestate in a foreign Court, on that ground filed a Bill seeking an account of the estate, a demurrer was allowed; because the plaintiffs did not show by their Bill a complete title to institute a suit concerning the subject; for, though they might have a right to administration in the proper Ecclesiastical Court in England, and might, therefore, really have an interest in the thing demanded by their [*217] *Bill, yet not showing, that they had obtained such administration, they did not show a complete title to institute their suit. And where an executor does not appear by his Bill to have proved the will of his testator, or appears to have proved it in an improper or insufficient Court, as he does not show a complete title to sue as executor, a demurrer will hold."²

§ 261. He then adds; "Want of interest in the subject of a suit, or of a title to institute it, are objections to a Bill seeking any kind of relief, or filed for the purpose of discovery merely. Thus, though there are few cases, in which a man is not entitled to perpetuate the testimony of witnesses; yet if, upon the face of the Bill, the plaintiff appears to have no certain right to,

¹ *Mayor of London v. Levy*, 8 Ves. 400, 404; *Cooper Eq. Pl.* 180.

² *Mitf. Eq. Pl. by Jeremy*, 155, 156.

or interest in the matter, to which he craves leave to examine, in present or in future, a demurrer will hold. Therefore, where a person claiming as devisee in the will of a person living, but a lunatic, brought a Bill to perpetuate the testimony of witnesses to the will against the presumptive heir at law ; and where persons, who would have been entitled to the personal estate of a lunatic, if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a Bill, in the lifetime of the lunatic, to perpetuate the testimony of witnesses to his legitimacy against the Attorney General, as supporting the rights of the Crown, demurrers were allowed. For the parties in these cases had no interest, which could be the subject of a suit ; they sustained no character, under which they could afterwards use the depositions ; and therefore the depositions, if taken, would have been wholly nugatory. So, in every case, where the plaintiff in a Bill shows only the probability of a future title, upon an event, which may never happen, he has no right to institute any suit concerning it ; and a demurrer will hold to any [*218] kind of Bill on that ground, which will extend to any discovery, as well as to relief.”¹

§ 262. The Bill too, should not only show the title and interest of the plaintiff in the subject-matter of the suit ; but there must be sufficient averments to show, that the defendant also has an interest in the subject-matter, and is liable to answer to him therefor.² For it has been well remarked, that a plaintiff may have an interest in the subject of his suit, and a right to institute a suit concerning it, and yet may have no right to call on a

¹ Mitf. Eq. Pl. by Jeremy, 156, 157.

² Mitf. Eq. Pl. by Jeremy, 160 ; Cooper Eq. Pl. 174, 179.

defendant to answer his demand. This may be for want of privity between the plaintiff and the defendant. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and has a right to have it applied to answer his demands in a due course of administration; yet he has no right to institute a suit against the debtors to his testator's estate, for the purpose of compelling them to pay their debts in satisfaction of his legacy. For there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator unless by collusion between the representative and the debtors, or other collateral circumstance, a distinct ground is given for a bill by the legatee against the debtors.¹ For the same reason, where a debtor is entitled to part of the residue of the estate, either as legatee, or as distributee, his creditor cannot maintain a Bill against the personal representative of the deceased, making the debtor, and the other residuary legatees or distributees parties, for the purpose of having the assets applied towards the payment of his demand.²

[*219] * § 263. The Bill also, for the same reason, if it founds the right against the defendant upon his having notice, should charge it directly; otherwise, it is not matter in issue, on which the Court can act.³ And where the notice relied upon is to be proved by confessions or admissions to witnesses, it seems proper, although not indispensable, to insert in the Bill the dates of the confessions or admissions, and the names of the witnesses; for otherwise the defendant will not be con-

¹ Mitf. Eq. Pl. by Jeremy, 158. See also Cooper Eq. Pl. 174, 175, 176; Ante § 178, § 227; Post § 514.

² Ibid.

³ *De Tastet v. Tavernier*, 1 Keen R. 169.

cluded by their testimony at the hearing ; and the Court may direct further inquiries on the subject.¹

§ 264. The rule even proceeds farther ; for, if an admission is made in the answer, it will be of no use to the plaintiff, unless it is put in issue by some charge in the Bill ; and the consequence is, that the plaintiff is frequently obliged to ask leave to amend his Bill, although a clear case for relief is apparent upon the face of the pleadings. This would occur, for example, when a Bill is brought against an executor for an account ; and it prays an account of the personal estate of the testator ; but it does not charge any acts of mismanagement or misconduct in the executor, but simply charges, that he has received assets. In such a case, although the answer should disclose gross acts of mismanagement, or wilful negligence and default, whereby assets had not been received, no decree for an account upon such matters could be obtained upon a Bill so framed ; for it would not be matter in issue.²

§ 265. Care also should be taken to frame the charging part, and the interrogatory part of the Bill, with such certainty, that it may bring out all the facts, *which are required by the exigency of the case. [*220] Thus, for example, if the Bill seeks a discovery of money received by the defendant, it should, in the interrogatory part, following the charging part, inquire not only, whether the defendant had received the money, but whether any other person had received it by his order, or for his use.³ So, if the Bill inquires about

¹ *Earle v. Pickin*, 1 Russ. & Mylne, 547 ; *Gresley on Evid.* 288. See also *Hall v. Maltby*, 6 Price, 240, 258, 259 ; *Smith v. Burnham*, 2 Sumner R. 612 ; *Hughes v. Garner*, 2 Younge & Coll. 328.

² *Gresley on Evidence*, 23.

³ *Ibid.* 20, 23.

deeds, papers and documents, it should be stated, that they are in the custody or power of the defendant, and that the truth of the matters in the Bill would appear from them; for, otherwise, a motion to produce them might be successfully resisted.¹

§ 266. On the other hand, care must be taken not to overload Bills by superfluous allegations and redundant and unnecessary statements, or by scandalous and impertinent matter; for if any Bill be found such, upon due reference to and report of a Master, the plaintiff and his counsel will be liable to pay costs.² One of the ordinances of the Court of Chancery, constituting a fundamental rule of the Court, is aimed against this transgression of the good sense, as well as the good taste, of Equity Pleadings. It declares, "that counsel are to take care, that the same (Bills, answers, and other pleadings) be not stuffed with repetitions of deeds, writings, or records, in *hæc verba*; but, that the effect and substance of so much of them only, as is pertinent and material, be set down, and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other [*221] impertinences, *occasioning needless prolixity; to the end, the ancient brevity and succinctness in Bills and other pleadings may be restored and observed. Much less may any counsel insert therein matter merely

¹ *Gresley on Evid.* 23. See *Id.* 44, as to the manner of framing interrogatories.

² *Mif. Eq. Pl. by Jeremy*, 48; *Gilb. For. Rom.* 91; *Emerson v. Dalison*, 1 Ch. Rep. 194; *Willis v. Evans*, 2 B. & Bent. 228; 3 *Woodes. Lect.* 55, p. 373. An exception for impertinence must be supported in toto, or it will fail altogether. *Wagstaff v. Bryan*, 1 Russ. & Mylne R. 30. See *Tench v. Cheese*, 1 Beavan R. 571, 574, and cases on impertinence generally cited, *Id.* p. 575, note.

criminous or scandalous, under the penalty of good costs to be laid on such counsel.”¹

§ 267. However; in cases of mere impertinence, the Court will not, because there are here and there a few unnecessary words, treat them as impertinent; for the rule is designed to prevent oppression, and is not to be so construed, as to become itself oppressive.²

§ 268. In examining the question, whether an allegation or statement in the Bill is relevant or pertinent, it must be recollected, that a Bill in Chancery is not only a pleading for the purpose of bringing before the Court, and putting in issue the material allegations and charges, upon which the plaintiff's right to relief rests, as is done in a declaration in a suit at law; but it is also, in most cases, an examination of the defendant upon oath, for the purpose *of obtaining evidence to establish the plain- [*222] tiff's case, or to counter-prove or destroy the defence, which may be set up by such defendant in his answer.

¹ Beames Ord. in Ch. 165, 166, 167; Id. 25; Id. 69, 70; Wyatt Pract. Reg. 57, 58; Cooper Eq. Pl. 18, 19; Hood v. Inman, 4 John. Ch. R. 437. Mr. Cooper, in his Equity Pleadings (p. 19), says:—“Prolixity appears to have been anciently a fault in a Bill of the kind above-mentioned. And Lord Keeper Bacon, to prevent it, appears to have made an order, that no Bill should contain above fifteen sheets of paper, which, by a subsequent order of Lord Chancellor Egerton, were to be written fifteen lines in a sheet; and if the complainant exceeded the allotted quantity, it was a ground of demurrer; but which was afterwards changed into recompensing the defendant by costs, as is at present done for irrelevant matter. The letter of this rule of pleading has been long done away; but the principle of it still remains in the existing rules of the Court, as to scandal and impertinence, and in the regulated quantity of writing in office-copies, which may be traced to the above ancient orders for their foundation and origin.” It is clearly impertinence not only to state irrelevant facts, but to cite public statutes at large, or to state matters of law; for the Court is bound to take judicial notice of the latter, without any averment. 1 Mont. Eq. Pl. 26; 2 Mont. Eq. Pl. 91, 92.

² Del Pont v. De Tastet, 1 Turn. & Russ. 459.

The plaintiff may, therefore, state any matter of evidence in the Bill, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the Bill, as a pleading, or in ascertaining or determining the nature, and the extent, and the kind of relief, to which the plaintiff may be entitled, consistently with the case made by the Bill; or which may legally influence the Court in determining the question of costs. And where any allegation or statement contained in the Bill may thus affect the decision of the cause, if admitted by the defendant, or established by proof, it is relevant, and cannot be excepted to as impertinent.¹

§ 269. It was to prevent these glaring faults of scandal and impertinence, alike mischievous and oppressive (which might make the records of the Courts the vehicles of slander or idle gossip), that Courts of Equity, at a very early period, required (as we have seen) all Bills to have the signature of counsel affixed to them;² and if no such signature appears, or the signature is not genuine, the Bill will be dismissed, or ordered to be taken off the files of the Court.³ If either of these faults exist in a Bill, it may be objected to by the defendant in the first stages of the cause, upon a motion to refer it to the Master, to inquire into the foundation of the objection. *But nothing, which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous.

¹ *Hawley v. Wolverton*, 5 Paige R. 523; *Mechanics Bank v. Levy*, 3 Paige R. 606.

² Ante § 47.

³ *Cooper Eq. Pl.* 18, 19; *Mitf. Eq. Pl. by Jeremy*, 48, and note (a); *Dillon v. Francis*, 1 Dick. R. 68; *French v. Dear*, 5 Ves. 547; *Abergavenny v. Abergavenny*, 2 P. Will. 312.

Thus, for example, in Bills to set aside deeds, or other instruments for fraud, there are often to be found gross charges in relation to the matter of the asserted fraud. But these charges are not, by any rule of the Court, to be deemed scandalous. And indeed, such a proceeding might be dangerous to the cause itself, and prevent a due investigation of its merits. Hence it is, that nothing pertinent to the cause is ever deemed scandalous; and the degree of the relevancy is not deemed material.¹

§ 270. It is obvious, that a Bill may contain matter, which is impertinent, without the matter being scandalous; but if, in a technical sense, it is scandalous, it must be impertinent.² According to the ordinary practice of the Court, a Bill cannot be referred for impertinence, after the defendant has answered or has submitted to answer.³ But it may be referred for scandal at any time;⁴ and even upon the application of a stranger to the suit.⁵ The reason of the difference seems to be, that mere impertinence is not in itself prejudicial to any one; it is but a naked superfluity. But scandal is calculated to do great and permanent injury to all persons, whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders; and the Court, in aid of the public morals, is bound to interfere

¹ Cooper Eq. Pl. 19; *Fenhoullet v. Passavant*, 2 Ves. 24; *St. John v. St. John*, 11 Ves. 526, 539; *Coffin v. Cooper*, 6 Ves. 514; *Ex parte Simpson*, 15 Ves. 477.

² Cooper Eq. Pl. 19; *Fenhoullet v. Passavant*, 2 Ves. 24; *Ex parte Simpson*, 15 Ves. 477.

³ Gillb. For. Rom. 91; Cooper Eq. Pl. 19.

⁴ Cooper Eq. Pl. 19; Anon. 2 Ves. 631.

⁵ *Coffin v. Cooper*, 6 Ves. 514.

to suppress such indecencies, which may stain the reputation, and wound the feelings of the parties and their relatives and friends.¹

§ 271. In the next place, a Bill should not be, what is technically termed, multifarious; for if it is so, it is demurrable, and may be dismissed by the Court of its accord, even if not objected to by the defendant.² By multifariousness in a Bill is meant the improperly joining in one Bill distinct and independent matters, and thereby

¹ In *Ex parte Simpson* (15 Ves. 477), Lord Eldon said:—"If that, which is stated, is material to the issue, it may be false; but cannot be scandalous: if relevant, it is not impertinent, though scandalous in its nature; if relevant and pertinent, it cannot be treated as scandalous; and if false, it must be dealt with in another way. But, if irrelevant, and especially if also scandalous, there would be much reason to regret, that a Court should not be armed with the power to protect parties from the expense, and its records from the stain, which too frequently arise from the introduction of irrelevant and scandalous matter upon affidavits in this jurisdiction." And again; "The Court ought to take care, that in a suit, or in this proceeding (in bankruptcy), allegations, bearing cruelly on the moral character of individuals, and not relevant to the subject, shall not be put upon the record."

² Mitf. Eq. Pl. by Jeremy, 181, and note; Cooper Eq. Pl. 182. Multifariousness must be objected to by the defendant on demurrer, and cannot be objected to by him at the hearing. *Ward v. Cooke*, 5 Madd. R. 122; *Wynne v. Callender*, 1 Russ. R. 293; *Whaley v. Dawson*, 2 Sch. & Lefr. 370, 371. But the Court may, however, take the objection at the hearing *sua sponte*; for the Court is not bound to allow a Bill of such a nature, although the party may not take the objection in season. *Greenwood v. Churchill*, 1 Mylne & K. 559. The reason, why multifariousness must be taken by the defendant by demurrer, and not at the hearing, is said by Lord Redesdale to be, that the objection of multifariousness proceeds on this ground, that though the union of distinct matters, in some cases, avoids multiplicity of suits; yet it creates unnecessary trouble and expense to the party, who has no concern with the other transaction, by putting him to the trouble and expense of a litigated question, with which he has nothing to do. This can be taken advantage of only by demurrer; because, if the defendant answer, the expense is in a great measure incurred; and it will be too late for him to complain, when he chooses to suffer the cause to proceed to a hearing. *Whaley v. Dawson*, 2 Sch. & Lefr. 371. As to misjoinder of parties, see ante § 203, § 237; Post § 509, § 530, § 538, § 539, § 540, § 541, § 544.

confounding them; as for example, the uniting in one Bill of several matters, perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same Bill.¹ In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection.² In the former case, the defendant would be compellable to unite, in his answer and defence, different matters wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the other might be fully ripe for a hearing.³ Indeed, Courts of Equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the com-

¹ Cooper Eq. Pl. 182; Mitf. Eq. Pl. by Jeremy, 181, and note; West v. Randall, 2 Mason R. 201; Saxton v. Davis, 18 Ves. 80; Berke v. Harris, Hardr. R. 337; Fellows v. Fellows, 4 Cowen R. 682. "Seeking," (said Lord Eldon) "to enforce different demands against persons liable respectively, but not as connected with each other, it (the Bill) is clearly multifarious." Saxton v. Davis, 18 Ves. 80. See also West v. Randall, 2 Mason R. 181. Post § 530, § 531, § 538, § 539, § 540, § 541. Perhaps in strictness of language, it would be more correct to call it a misjoinder, where different and distinct claims are mixed up in the same bill, against the same defendant. Campbell v. Mackay, 1 Mylne & Craig R. 618. See also Atty. Genl. v. St. John's College, 7 Simons R. 241. Post § 530, § 531.

² Mitf. Eq. Pl. by Jeremy, 181; Cooper Eq. Pl. 183; Ward v. Duke of Northumberland, 2 Anst. R. 469; Benverie v. Prentice, 1 Ch. R. 200; Berke v. Harris, Hardr. R. 337; Whaley v. Dawson, 2 Sch. & Lefr. 371; West v. Randall, 2 Mason R. 201; Brinckerhoff v. Brown, 6 John. Ch. R. 139; Fellows v. Fellows, 4 Cowen R. 682. Post § 530.

³ Whaley v. Dawson, 2 Sch. & Lefr. 371; Berke v. Harris, Hardr. R. 337; Boyd v. Hoyt, 5 Paige R. 65. Post § 530.

mon law, and thus to prevent confusion in its own pleadings, as well as in its own decrees.¹

§ 271. *a.* But the objection must still be confined to cases, where the case of each particular defendant is entirely distinct and separate in its subject-matter from that of the other defendants; for the case against one defendant may be so entire, as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection of multifariousness could not be allowed to prevail.²

§ 272. A few examples may illustrate this doctrine [*226] of multifariousness in *each of its branches. Thus, if an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one Bill against the vendor for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances;³ and therefore there should be a distinct Bill upon each contract. On the other hand, the vendor, in the like case, would not be allowed to file one Bill for a specific performance against all the purchasers of the estate, for the same reason.⁴ So, if a Bill should be brought for a specific

¹ Cooper Eq. Pl. 182. Post § 530.

² Atty. Genl. v. Poole, 4 Mylne & Craig R. 17, 31; Turner v. Robinson, 1 Sim. & Stu. 313; Atty. Genl. v. Cradock, 3 Mylne & Craig, 85; Post § 278, a. Multifariousness as to one defendant, constitutes no necessary ground of objection by the other defendants; for a bill may be multifarious as to one defendant, and not as to the rest. Atty. Genl. v. Cradock, 8 Simons R. 466; S. C. 3 Mylne & Craig, 85. Post § 274, and note, § 530, § 538, § 539, and note. See also Lumsden v. Frazer, 7 Simons R. 555; S. C. 1 Mylne & Craig, 889; Ante § 236, a.

³ Cooper Eq. Pl. 182; Rayner v. Julian, 2 Dick. R. 677; Brookes v. Lord Whitworth, 1 Madd. R. 88. Post § 530, § 531, § 532, § 533.

⁴ Cooper Eq. Pl. 182; Brookes v. Lord Whitworth, 1 Madd. R. 86; Lumsden v. Frazer, 7 Sim. R. 555; S. C. 1 Mylne & Craig R. 889.

performance, upon the sale of an estate, it would be multifariousness to include in such a Bill, a prayer for relief against third persons, who should claim an interest in the estate, and who were unconnected with the sale.¹ Thus, for example, if a purchaser of an equity of redemption under a contract of sale, should file a Bill for a specific performance, he could not properly join the mortgagee in such Bill, or any third person, claiming an interest in the equity of redemption, who had not joined in the contract.²

¹ *Mole v. Smith*, Jacob R. 490, 494.

² *Tasker v. Small*, 3 Mylne & Craig, R. 63, 68 to 71. On this occasion Lord Cottenham said: "It is not disputed, that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation, as the defendant had agreed, that he should be placed in. It is obvious, that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities, which arise out of it, are as much strangers to a proceeding to enforce the execution of it, as they are to a proceeding to recover damages for the breach of it. And so is the admitted practice of the Court. But it is said, that this case ought to be an exception to the rule, because Phillips, in whom, as first mortgagee, the legal estate is vested, is not willing to convey it to the plaintiff, the purchaser, without having competent authority for so doing, and, that, the question being raised, whether the legal estate can be so conveyed, Mrs. Small is of necessity made a party to the suit. This proposition assumes two points; first, that Phillips is himself a proper party to the suit; and, secondly, that, being so, it is competent for him to require, that Mrs. Small should be made a party to it. Phillips is merely a mortgagee, against whom no bill can properly be filed, except for the purpose of redeeming his mortgage, and, that by a party entitled to redeem. This bill does not pray any redemption of Phillips's mortgage, and, if it had, the plaintiff would not be entitled to file such a bill. He is only

§ 273. So, where a Bill was brought against a corporation to establish eight charitable bequests, of which

connected with the property by having contracted to purchase the equity of redemption, and, until that purchase is completed, he cannot redeem the mortgage. Phillips has no interest in the specific performance of the contract; he is no party to it; and the performance of it cannot affect his security or interfere with his remedies. Supposing, however, that it was competent for the plaintiff to redeem Phillips's mortgage, he can only be so entitled as standing in the place of the mortgagor; but a mortgagee can never refuse to restore to his mortgagor, or those, who claim under him, upon repayment of what is due upon the mortgage, the estate, which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it, any more than a tenant is at liberty to dispute his landlord's title. Phillips, therefore, is bound, upon payment, to restore the legal estate to his mortgagor or to those who claim under him. By Phillips's mortgage deed the equity of redemption was reserved to Small. If the plaintiff could shew such equity of redemption to be vested in him, he would be entitled, upon paying the mortgage debt, to demand a re-conveyance of the estate, without regard to any other question affecting the title to the property. I am, therefore, of opinion, that Phillips himself is not a proper party to this suit, and, that he cannot, by not himself insisting upon the objection, make Mrs. Small a proper party; and, that, even if he were himself properly made a defendant, the objection raised by him at the bar, though not by his answer—for by his answer he offers to re-convey upon being paid his mortgage debt—would not make Mrs. Small a proper party. But it was argued at the bar, that the plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle, that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property. In *Mole v. Smith*, (Jac. 490) Lord Eldon says, that when a bill is filed for a specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate. Such was his opinion in a case in which the vendor was plaintiff, and the defendants were persons whom the vendor sought to compel to join in completing the title. How much stronger is the objection, where the purchaser is the plaintiff, and the only connection between him and the defendants is the incomplete disputed contract."

seven were for the benefit of poor members of the corporation exclusively, and the eighth was subject to a fixed payment to another corporation, which made the latter a necessary party thereto; it was held, that the Bill was multifarious; for the latter corporation had no interest in the other seven charities.¹

§ 274. For the same reason, where a Bill by a creditor sought an account against an executor and trustee of the testator's estate, and also to set aside a sale made by the executor and trustee to a purchaser, who was made a party to the Bill; it was held demurrable for *multifariousness; for the purchaser had nothing [*227] to do with the general settlement of the accounts of the estate, and ought not to be involved in any litigation respecting it.²

§ 274. *a.* So where devisees and legatees brought a Bill against the trustees and executors under the will and against a mortgagee of a part of the estates, alleging

¹ Attorney General *v.* Merchant Tailors' Company, 1 Mylne & Keen R. 189. Post § 532, § 283.

² *Salvidge v. Ryde*, Jacob R. 151; S. C. 5 Madd. 138. In this case, the Lord Chancellor overruled the decision made by the Vice Chancellor, reported in 5 Madd. 138, which overruled the demurrer by the purchaser. On that occasion, the Vice Chancellor said:—"To this Bill the defendant, Laying, has demurred for multifariousness; and it is alleged for him, that he has no concern with the general accounts of the testator's estate, and that he ought not to be joined as a party in a suit for such purposes; but that, if it were thought fit to impeach the sale made to him, it ought to have been the subject of a distinct Bill. In order to determine, whether a suit is multifarious, or in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause; but whether the plaintiff's bill seeks relief in respect of matters, which are in their nature separate and distinct. If the object of the suit be single, but it happens, that different persons have separate interests in distinct questions, which arise out of that single object, it necessarily follows, that such different persons must be brought before the Court, in order that the suit may conclude the whole subject. Here, the Bill has the single object of an account of the

collusion between the trustees and executors and the mortgagee, and that they refused to compel the mortgagee to account for the rents and profits or to redeem the mortgage, and the Bill prayed for an account of the testator's effects, and that the mortgage might be redeemed; the Bill was held, on a demurrer by the mortgagee, to be multifarious; for the mortgagee had nothing to do with the general settlement of the accounts of the estate.¹

§ 275. So, where a Bill was brought for a partition, and also to set aside a lease, made by the plaintiff to a third person, of a part of the estate, on the ground of fraud; it was held, that the Bill was multifarious; for the parties, against whom the partition was sought, ought not to be involved in any litigation, as to the validity of the lease, in which they had not any interest.²

§ 276. So, where a Bill was brought by a tenant of a colliery under a lease and a subsequent agreement, for an account under the agreement, against the executors of the landlord, and also against his heir, the tenant having continued to hold under the latter on the same terms, [*228] *after the death of the ancestor; it was held, that the Bill was multifarious in joining distinct claims, to wit, one against the executors, and one against the heir;

real and personal estate of this testator; and that account in part depends upon the question, whether the defendant Laying is, or not to be considered as the purchaser of this property." See *Campbell v. Mackey*, 1 Mylne & Craig, 603, 617 to 625; Ante § 272 a; Post § 578, a. See also *Atty. Genl. v. Cradock*, 3 Mylne & Craig, 85, in which *Salvidge v. Hyde* is much commented on by Lord Cottenham. Post § 539, note.

¹ *Pearse v. Hewitt*, 7 Sim. R. 471.

² *Whaley v. Dawson*, 2 Sch. & Lefr. 367, 370, 371. See *Story v. Johnson*, 2 Younge & Coll. 586, that a court of equity in making partition will have regard to the sub-interests acquired under one tenant in common by distinct purchases from him.

and on that occasion, it was said by the Court, that the cases, where unconnected parties are allowed to be joined in a suit are, when there is one common interest among them all, centering in the point in issue in the cause.¹

§ 277. For the same reason, an author cannot file a joint Bill against several booksellers, for selling the same spurious edition of his work ; for there is no privity between them ; and his right against each of them is not joint, but is perfectly distinct.²

§ 278. It is true, that in this last case the author has a general right, which he asserts against all persons whatever, who may violate that right ; and, therefore, it may seem at first view, that it would be proper to join all of them, though not in privity with each other, upon the same ground, on which, in the case of a several fishery, upon a Bill of peace, persons claiming by distinct titles, not in privity with each other, may be joined. Perhaps, the true distinction between the cases (if there be any substantial one), is, that in the case of the fishery, the right asserted is purely local, and limited to a few *persons, who have a common interest against [*229] the right set up ; and that common interest centres in the point at issue in the cause. But in the case of a

¹ *Ward v. Duke of Northumberland*, 2 Anst. 469, 477 ; *Cooper Eq. Pl.* 183. See also *Brinckerhoff v. Brown*, 6 John. Ch. R. 139 ; *Fellows v. Fellows*, 4 Cowen R. 682. The cases here referred to are included in the class, where a right of fishery is claimed against many persons ; or a right of common by or against many persons ; or a right to duties against many persons. See Ante § 121, § 124, § 125 ; *Cooper Eq. Pl.* 40, 41, 184 ; 2 Mont. Eq. Pl. 94, note (A. L.) See *Boyd v. Hoyt*, 5 Paige R. 65, which seems to have proceeded mainly on local law, and local statutes ; and *Brinckerhoff v. Brown*, 6 John. Ch. R. 139, and *Fellows v. Fellows*, 4 Cowen R. 682, where the subject was much discussed.

² *Dilly v. Doig*, 2 Ves. jr. 486 ; *Cooper Eq. Pl.* 182, 183 ; *Brinckerhoff v. Brown*, 6 John. Ch. R. 155.

copy-right, the claim is absolutely against the whole community ; and it is not fit, in such a case, that the public should be represented, or bound by a suit, in which a few only are parties.¹

¹ It is not very easy upon general principles to reconcile the cases on this subject. In the case of the *Mayor of York v. Pilkington* (1 Atk. 283), in the case of the several fishery, already cited (Ante § 125), Lord Hardwicke at first held, that the defendants could not be joined in the Bill, because there was no privity, and they held by distinct titles ; and, therefore, they were so many distinct trespassers upon the several fishery. But he afterwards changed his opinion, upon the ground, as it should seem, that to prevent multiplicity of suits, bills of peace had been allowed to be brought, where there was a general right claimed by the plaintiff, and yet there was no privity between the plaintiffs and the defendants, nor any general right on the part of the defendants ; and many more might be concerned than those before the Court. Lord Eldon, in *Weale v. Middlesex Water Works Co.* (1 Jac. & Walk. 360), already cited (Ante § 126, note), considered the decision to have held, that where the plaintiff stated an exclusive right, it signified nothing, what particular rights might be set up against him. He added, that it had been long settled, that if any person has a common right against a great many of the King's subjects, a Court of Equity will permit him to file a Bill against some of them, taking care to bring so many persons before the Court, that their interests may be such, as to lead to a fair and honest support of the public interest. This language seems very applicable to the claim of a copy-right against many violators. On the other hand, in *Hilton v. Lord Scarborough*, 4 Vin. Abridg. 425, pl. 35 ; S. C. 2 Eq. Abridg. 171, D., Lord Macclesfield held, that a Bill to be quieted in the possession of an ancient ferry, used with a rope, over the river Ware, brought against twenty defendants, who had cut the rope (probably at different times), did not lie ; for, he said, that the plaintiff might have trespass for cutting the rope, and a ferry is in the nature of a public highway ; and a Bill does not lie to be quieted in the possession of a highway. That would be to enjoin all the people of the whole kingdom. Mitf. Eq. Pl. by Jeremy, 148 ; 2 Story on Eq. Jurisp. § 858. This case would seem to point to a distinction between a public right, and a private right asserted by the defendants, and also between a claim of the plaintiff in derogation of a public right, and one merely in derogation of private or local rights. But the case of *Mayor of London v. Perkins* (4 Bro. Parl. Cases, 158 ; S. C. 3 Bro. P. C. 602, Tomlins' edit.), does not seem to have recognised the distinction. The opinion of Lord Loughborough, in *Dilly v. Doig* (2 Ves. jr. 486), is very imperfectly and obscurely given ; and the language imputed to him seems open to misrepresentation. He said ; " The right against the dif-

§ 278. *a.* On the other hand, there may be cases in which multifarious matters of distinct natures may be involved in the Bill; and yet from the objects of the Bill the objection of multifariousness as to a particular defendant ought not to prevail. Thus, for example, if a person before marriage should settle a fund on his wife for life, and after her death on the children of the marriage, and the trustees were, after the wife's death, authorized to apply the interest thereof to the maintenance of the children; and after the marriage he should settle another fund in other trustees for similar purposes, and afterwards he should by his will make a part of the trustees in both deeds trustees upon certain trusts for the benefit of his children, and should appoint them executors of his will and guardians of his children in conjunction with his wife; if, after his death, a Bill should be filed by the wife and children against all the trustees in the deed, for an account and execution of the trusts; although at first view it might seem open to the objection of multifariousness, yet, inasmuch as all the plaintiffs have a common interest in the exe-

ferent booksellers is not joint; but perfectly distinct; there is no privity." "In the case cited (*The Mayor of York v. Pilkington*), the Bill was to prevent multiplicity of suits. One general right was liable to invasion by all the world. So, a Bill to establish the custom of a mill. They stand upon a distinct ground. I do not remember any case upon patent rights, in which a number of people have been brought before the Court as parties, acting all separately upon distinct grounds." Now, the case before his Lordship was one of a general right, liable to invasion by all the world, and the Bill would prevent a multiplicity of suits. I cannot but suspect an error in the reporter, and that his Lordship meant to make a distinction between such rights, as the right of the plaintiff of a universal nature, against all the world, and open to invasion by all, and a mere private right, such as a right to a private several fishery, or a private right of custom to a mill; thus taking the very distinction in 2 Eq. Abridg. 171. See post § 530 to § 540.

cution of all the trusts, and there cannot be a due execution of some of the trusts without involving the consideration of all the trusts arising under the deed and the will, the Court would not suffer the objection to prevail.¹

¹ *Campbell v. Mackay*, 7 Sim. R. 564; S. C. on Appeal, 1 Mylne & Craig, 603. In delivering his judgment in this case, the circumstances of which are but imperfectly stated in the text, Lord Cottenham said:—"The first observation, that occurs, is, that although the defendants are not all trustees of the same deeds, the suit seeks some relief against all of them, and that there is a common interest in all the plaintiffs under all the instruments. The proposition, contended for on the behalf of the demurring parties, is, that, as a general rule—and the rule is supposed to be supported by the dicta of Sir John Leach, in *Salvidge v. Hyde* (5 Madd. 138),—it never can be permitted, that distinct matters should be united in the same record. The proposition, of course, if carried to its full extent, would go to prevent the uniting several instruments in one Bill, although the same parties were liable in respect of each, and the same parties were interested in the property, which was the subject of each. So, that if, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits, as there were instruments. That is a proposition, to which I do not assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits in cases, where it could answer no purpose to have the subject-matter of the contest split up into a variety of separate bills. To lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered, what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule. The language of Sir John Leach, in *Salvidge v. Hyde*, is of course to be understood with reference to the particular case before him; and, considered in that point of view, it was perfectly correct, although, stated as a general proposition, it would run counter to a numerous class of cases. The only way of reconciling the authorities upon the subject is, by adverting to the fact, that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is, in fact, more properly misjoinder; that is to say, the cases

§ 279. All the foregoing are cases, where the objection of multifariousness arises on account of various de-

or claims, united in the Bill, are of so different a character, that the Court will not permit them to be litigated in one record. It may be, that the plaintiffs and defendants are parties to the whole of the transactions, which form the subject of the suit; and, nevertheless, those transactions may be so dissimilar, that the Court will not allow them to be joined together, but will require distinct records. But, what is more familiarly understood by the term multifariousness, as applied to a Bill, is, where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connexion whatever. The form of demurrers for multifariousness strongly illustrates this distinction, at least as it used to be understood; for the old form of the demurrers, upon the last-mentioned ground, went on to state the evil of uniting distinct matters in one record, whereby parties were put to great and useless expense, an objection which has no application in a case of misjoinder. The distinction is clearly taken in a case which has been very much relied upon, but which by no means bears out the proposition it was cited to support,—the case of *Ward v. The Duke of Northumberland* (2 Anst. 469). In that case the plaintiff had been tenant of a colliery under the preceding Duke of Northumberland, and continued also to be tenant under his son and successor, the then Duke; and he filed a Bill against the then Duke and Lord Beverley, who were the executors of their father, seeking relief against them in respect of transactions, part of which took place in the lifetime of the former Duke, and part, between the plaintiff and the then Duke, after his father's decease. To this Bill the defendants put in separate demurrers; and the forms of the two demurrers, which were very different, clearly illustrate the distinction I have adverted to. The Duke could not say, that there was any portion of the Bill, with which he was not necessarily connected; because he was interested in one part of it as owner of the mine, in the other, as representing his father. But his defence was, that it was improper to join in one record a case against him as representative of his father, and a case, against him, arising out of transactions in which he was personally concerned. The form of his demurrer was, that there was an improper joinder of the subject-matters of the suit. Lord Beverley's demurrer, again, was totally different: it was in the usual form of a demurrer for multifariousness, and proceeded on the ground, that, by including transactions, which occurred between the plaintiff and the other defendant, with transactions between the plaintiff and the late Duke (with the latter of which only Lord Beverley could have any concern), the Bill was drawn to an unnecessary length, and the demurring party exposed to improper and useless expense. Both demurrers were allowed, and

defendants being improperly joined in a suit upon distinct and independent matters. But the like principle equally

both, it may be said, in a sense, were allowed for multifariousness; but it is obvious, that the real objection was very different in the two cases. In *Harrison v. Hogg* (2 Ves. jr. 323), which was also more properly a case of misjoinder, the plaintiffs endeavored to unite in one record a demand, in which all the plaintiffs jointly had an interest, with a demand in which only one of them had an interest; and the demurrer was allowed upon the ground, that the subject-matters were such as, in the opinion of the Court, ought not, according to the rules of pleading, to be included in one suit. In *Saxton v. Davis* (18 Ves. 72), the suit prayed an account against the representatives of a bankrupt's assignees, and against Davis, a person, who claimed through those assignees, and also against a person, who had been his assignee under the Insolvent Debtors' Act; and there also the Bill was held to be bad for multifariousness. One of the cases, which (like that of Lord Beverley in *Ward v. the Duke of Northumberland*), applies to the situation of a party, brought before the Court as a defendant on the record, where he has an interest in a portion only of the subject-matter, is *Salvidge v. Hyde* (5 Madd. 138), in which the demurrer, though overruled by the Vice Chancellor, was afterwards allowed by Lord Eldon on appeal (Jac. 141). That was a Bill to administer a testator's estate, and to set aside a sale made of a part of it by the executor to a purchaser. Sir John Leach's judgment proceeded upon the principle, that as the primary object of the suit was the administration of the estate, and the estate could not be effectually administered without ascertaining, whether the sale was to stand or be set aside, the purchaser was properly made a party on the record, with a view to the decision of that question. When the demurrer came before Lord Eldon on appeal, his Lordship did not consider that circumstance a sufficient ground of exception to the general rule; and he held, that the defendant, claiming as a purchaser from the executor, had a perfectly distinct case, and had a right to have that case discussed and decided by itself, without being mixed up in a suit for the general administration of the estate.—What would be required in order to support the defendants' proposition, would be some case in which, there being a common interest in the plaintiffs, and the defendants representing and being interested in all the different questions raised on the record, and the suit having a common object, a demurrer for multifariousness had been successful. No case has been produced to show, that the Court will not permit such a suit to be instituted. But, in the course of the argument, cases were referred to, which prove, when examined, that the Court has not gone that length, and that it has always exercised a discretion in determining, whether the subject-matters of the suit are properly joined or not. It is not very easy,

applies to an improper joinder of plaintiffs, who claim no common interest, but assert distinct and several claims

à priori, to say exactly, what is or ought to be the line regulating the course of pleading upon this point. All that can be done is, in each particular case as it arises, to consider, whether it comes nearer the one class of decisions or the other. A remarkable illustration of the distinction, taken by the Court, is to be found in *The Attorney General v. The Merchant Tailors' Company* (5 Sim. 288, and 1 Mylne & Keen, 189). That was an information praying the due administration of a number of charitable trusts, all of which had a common object; that is to say, although they varied in their terms, and, to a certain degree, in their object, there was still a great similarity; the funds, in all of them, being applicable to loans for the benefit of freemen of the corporation of Merchant Tailors. In one of those trusts, however, another corporation had such an interest as, in the opinion of the appellate Court, rendered that other corporation a necessary party to the suit, before the particular, trust in which it was concerned could be carried into execution; and it was there contended, that those charities could not be united in one information, because they were of different foundations, and depended upon different grants, and that it was therefore a misjoinder, or, according to the language of the demurrer, multifarious, to unite so many different objects in one suit. The Court, however, did not acquiesce in that reasoning; but held, that in so far as the defendants had a common responsibility, and the trusts had a common object, the charities were all properly joined: but there being one particular charity, in which a third party had such an interest, as to make him a necessary party, if the trusts of it were to be administered, the Court considered, that the administration of that charity could not be comprised in the same information with the rest; not on the ground of a misjoinder, but according to the ordinary form of the objection, because the party, so made a defendant on account of his interest in that single charity, had no connection with the other charities, and was involved by the suit in complicated and expensive proceedings, although he was concerned with a small part only of the subject-matter in litigation. The decision of the present Vice Chancellor, in *The Attorney General v. The Goldsmith's Company* (5 Sim. 670), went upon the same principle, though it came to a different conclusion; for his Honor, in giving judgment, plainly showed, that he considered the rule, which I before stated to be extracted from *The Attorney General v. The Merchant Tailors' Company*, as the rule to be adopted in practice. In that case, there were several distinct defendants and several distinct charities. The information stated the trusts of one of the charities, and then alleged the existence of several others for similar purposes, but without setting out or specifying the original endowments; and his Honor held, that what

against one and the same defendant.¹ Thus, for example, if two plaintiffs should, in one Bill, bring a joint

the information so alleged was not sufficient to shew to the Court, that the other trusts were of so similar a nature as to justify their being united in one record. That such was the view on which the Court proceeded, is manifest from the language of his Honor's judgment. 'If,' (observes his Honor in that case), 'it had been so alleged in the information as to show, that the character of all these other bequests was homogeneous, though there might be minute differences between them, they might all have been comprised in the same information.' The result of the principles to be extracted from those two cases, negatives the proposition, that where there is a common liability and a common interest, the common liability in defendants and the common interest in plaintiffs, different grounds of property cannot be united in one and the same record. On the contrary, both those cases are consistent with the doctrine, that they may be so united. The case of *Turner v. Robinson* (1 Sim. & Stu. 313), which was also referred to in the argument, was a very strong case; and I believe the present Vice Chancellor has said of it, that he could not acquiesce in the propriety of the judgment. Nevertheless, it shows the opinion of the learned Judge, who decided it, and proves, how little disposed he was to entertain the objection of multifariousness, where the justice of the case did not absolutely require it. The case of *Knye v. Moore* (1 Sim. & Stu. 61), was a very remarkable instance of the Court deciding against an objection, which more properly would be a misjoinder; and it is not, therefore, in strictness, to be classed with other cases, which I have already mentioned. There, a mother, who claimed an annuity for herself, joined her children with her as co-plaintiffs in a Bill, the object of which was to establish two distinct claims, arising under separate instruments; the mother claiming an annuity under one, and the mother and children claiming the benefit of a settlement under the other; and that was held not to be multifarious. In *Kensington v. White* (3 Price, 164), a Bill was filed by seventy-two underwriters to restrain several actions on different policies effected upon different ships. The defendants, indeed, had a common interest in all, because they were the owners of the ships, and plaintiffs in all the actions; but here were seventy-two individuals, all not only liable to separate actions, but actually defendants in separate actions, united together against the parties, who were plaintiffs in all the actions, for the purpose of obtaining, by one

¹ *Exeter College v. Rowland*, 6 Madd. R. 94; *Yeaton v. Lenox*, 8 Peters R. 123; Ante § 232, § 236, § 237, § 509, § 530, § 541, § 544. As to misjoinder of plaintiffs, in a Bill of discovery in aid of a defence to an action at law, see post § 569.

demand, and a several demand, against the same defendant, it would be demurrable on the ground of multifariousness.¹ So, if two plaintiffs, claiming under distinct promissory notes given to them severally should file a joint Bill on account thereof. So, if two plaintiffs, who had given distinct and several promissory notes to the defendants, should file a joint Bill to recover back money paid by them severally to the defendant on those notes, it would be demurrable; for the several contracts have no connection with each other.² So, if A, B, and C, being the next of kin, and D, being the sole heir at law, should unite in one suit against an administrator, for an account of the personal and real estate of the intestate, the Bill would be multifarious; for the claims of the next of kin to an account of the personal estate, are wholly distinct from those of the heir to the real estate.³ So,

Bill, a discovery in aid of the defence against all the actions; and that was held in the Court of Exchequer not to be multifarious. It is not, however, necessary for the present purpose, to carry the doctrine to any thing like that extent. This is simply the case of three instruments, under each of which the plaintiffs are entitled to a fund, and the defendants, who demur, are all of them accounting parties; the only peculiarity in the case being, that the defendants are not all parties to all the instruments in respect of which the relief is prayed." 1 Mylne & Craig R. 617-625. See Post § 283, § 284, § 284 a, § 530, § 538, § 539, § 540, § 541. See also Lumsden v. Frazer, 7 Simons R. 555; S. C. 1 Mylne & Craig, 589.

¹ Harrison v. Hogg, 2 Ves. jr. 323, 328; Cooper Eq. Pl. 183; Boyd v. Hoyt, 5 Paige R. 65.

² Yeaton v. Lenox, 8 Peters R. 128.

³ Maud v. Acklom, 2 Sim. R. 331; Dunn v. Dunn, 2 Sim. R. 329. There is an apparently anomalous decision in Turner v. Robinson, 1 Sim. & Stu. 313; S. C. 6 Madd. 94. But it was disapproved of in a later case cited in Dunn v. Dunn, 2 Sim. R. 329, note (a). In Lord Foley v. Carlon, 1 Younge R. 373, an objection for multifariousness, in joining several defendants, was overruled. But it does not appear upon what precise ground this was done, though probably from there being in effect a joint charge of fraud against all the defendants.

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if several distinct holders of script or shares in a loan should sue on behalf of themselves and all others, to have their subscriptions refunded, the Bill would be multifarious; for their interests and demands are distinct and several.¹

§ 280. The same objection equally lies, where two distinct matters are united in the same Bill brought by a single plaintiff against the same defendant. Thus, for example, where a Bill was brought for a discovery, and also for a commission to examine witnesses abroad, in aid of a defence at law to two separate actions for two separate and distinct libels, brought by the same plaintiff against the same defendant, and the Bill sought to have the examination of the witnesses taken under one commission, and not distinct commissions to issue as to each action; the Bill was on demurrer held multifarious; for it might retard or prejudice the proceedings of the plaintiff at law in one action, by requiring him to wait until the depositions for both were returned,² and the defendant was prepared for his defence and trial in both. Besides; the depositions taken under the commission must be published and used at the trial, which should first take place, though it might happen, that the witnesses in the second action might come within the jurisdiction before the trial of the second action; and thus the premature publication of the testimony, in opposition to the principles and practice, upon which Courts of Equity act in those cases, might be dangerous to truth and justice at the second trial.³ But the broader and more general ground is, the inconvenience

¹ *Jones v. Garcia del Rio*, 1 Turn. & Russ. 297; Ante § 236, § 237; Post § 509, § 540, § 541, § 544.

² *Shackell v. Macauley*, 2 Sim. & Stu. 79.

³ *Ibid.*

of mixing up distinct matters, which may require very different proceedings or decrees by the Court, and embarrass the defendant in Equity in his proper defence against each.¹ On this account, it would have made no difference in the case, if the plaintiff had prayed for two distinct commissions in the Bill; for not only would such a suit be an entire novelty in the Court, but injustice would be done to the defendant in Equity by compelling him to wait for his costs upon the first commission until the return of the second.²

§ 281. For the like reason, where a Bill impeached a will on account of the alleged incapacity of the testator, and sought to take testimony *de bene esse* in a suit already brought, and also to perpetuate the testimony of witnesses; on a demurrer, the Court held the Bill multifarious; for the decretal order for the publication of the testimony would be very different on a commission **de bene esse*, and on a commission to [*232] perpetuate the testimony.³

§ 282. So, where an information against a corporation alleged, that the corporation was seised of certain real estates for purposes of public utility, and of other real estates in trust for private charity, and charged a misapplication and abuse of both funds; the Court held the Bill multifarious; for the case of the one fund was wholly distinct from the other, as to rights and objects.⁴ The same objection was held well taken to a Bill, which mixed up various donations given for various purposes, alleged to be misapplied by the same defendants.⁵

¹ See *Atty. Genl. v. St. John's College*, 7 Sim. R. 241; *Ante* § 532, note.

² *Shackell v. Macauley*, 2 Sim. & Stu. 79.

³ *Dew v. Clarke*, 1 Sim. & Stu. 108; 2 Story on Equity Jurisp., § 1516.

⁴ *Atty. Genl. v. Carmarthen*, Cooper R. 31; *Johnson v. Johnson*, 6 John. Ch. R. 163.

⁵ *Atty. Genl. v. Goldsmith's Company*, 2 Sim. 670. It is said by Lord

§ 283. However ; although a Bill is ordinarily open to objection for multifariousness, which contains two distinct subject-matters, wholly disconnected with each other ; yet, if one of them be clearly without the jurisdiction of a Court of Equity for redress, it seems, that the Court will treat the Bill, as if it were single, and proceed with the other matter, over which it has jurisdiction, as if it constituted the sole object of the Bill.¹ And even if there be a misjoinder of a party plaintiff, and the objection is not taken until the hearing, the Court will sometimes permit a decree to be made at the hearing, when it appears that notwithstanding the misjoinder, justice can be done to all parties.²

[*233] *§ 284. And a Bill is not to be treated as multifarious, because it joins two good causes of complaint, growing out of the same transaction, where all the defendants are interested in the same claim of right, and

Redesdale, that, as the defendants may combine together to defraud the plaintiff of his rights, and such a combination is usually charged in the Bill, it has been held, that the defendant must so far answer the Bill, as to deny combination. (Mitf. Eq. Pl. by Jeremy, 181.) The case of *Powell v. Arderne*, 1 Vern. R. 416, fully supports this statement. But the proposition, so far as it applies to the general charge of combination, is now overruled ; and it is maintainable only, where a special combination is charged. Ibid. note (b) ; *Cooper Eq. Pl.* 183. See also Mr. Ruithby's note to *Powell v. Arderne*, 1 Vern. 416, and *Lansdowne v. Elderton*, 8 Ves. 526, 527 ; *Oliver v. Haywood*, 1 Anst. R. 82 ; *Brookes v. Lord Whitworth*, 1 Madd. R. 86.

¹ *Knye v. Moore*, 1 Sim. & Stu. 61 ; *Dew v. Clarke*, 1 Sim. & Stu. 108 ; *Varick v. Atty. Genl.* 5 Paige R. 137, 160 ; *Pringle v. Cooke*, 3 Younge & Coll. 666 ; Ante § 273. The proper course for the defendant in such a case is said to be, to answer to the proper matter within the jurisdiction of the Court, and to demur to the other for want of equity ; or the defendant might answer to both, and make the exception, as to the want of equity in the latter, at the hearing. *Varick v. Smith*, 5 Paige R. 160 ; Ante § 278, a.

² *Lambert v. Hutchinson*, 1 Beavan R. 277, 286 ; Ante § 237 ; Post § 530, § 541, § 544.

where the relief asked for, in relation to each, is of the same general character.¹

§ 284. *a.* In respect to the manner of taking the objection of multifariousness, it will more fully come under consideration in a subsequent part of this work.² But it may be proper to state here, that the objection is usually taken by way of demurrer; and if not so taken, and the cause goes on to a hearing, the objection will not then always be fatal to the suit. Indeed, strictly speaking, the objection is then waived by the parties; although the Court *proprio jure* may insist upon it.³ Where a joint claim against two defendants is improperly joined with a separate claim against one of them, both or either may demur to the Bill for multifariousness; and it will be held bad as to the party demurring.⁴

§ 285. Another exception, which has already been alluded to, is, where the parties (either plaintiffs or defendants) have one common interest touching the matter of the Bill, although they claim under distinct titles, and have independent interests.⁵ The cases respecting rights of common, where all the commoners may join, or one may sue or be sued for all; of parishioners to establish a general modus; or of a parson to establish a general right of tithes against parishioners; and others of a like nature, already stated under another head, fully exemplify the doctrine; for in all of them there is a common interest centering in the point in issue in the cause.⁶

¹ Varick v. Smith, 5 Paige R. 160; Ante § 161, note, § 271 a, § 278 a.

² Post § 530 to 540.

³ Greenwood v. Churchill, 1 Mylne & Keen, 546.

⁴ Boyd v. Hoyt, 5 Paige R. 65.

⁵ Ante § 120, § 121.

⁶ Ante § 120, § 121; Cooper Eq. Pl. 40, 41, 184; Mitf. Eq. Pl. by Jeremy, 170, 182; Ward v. Duke of Northumberland, 2 Anst. 469, 477;

§ 286. The same principle has been supposed properly to justify the joining of several judgment creditors in one Bill against their common debtor and his grantees, to remove impediments to their remedy, created by the fraud of their debtor in conveying his property to several grantees, although they take by separate conveyances, and no joint fraud in any one [*234] *transaction is charged against them all. In such a case (it is said), the fraud equally affects all the plaintiffs, and they may jointly sue; and all the defendants are implicated in it in different degrees and proportions, and therefore are properly liable to be jointly sued.¹

Brinkerhoff v. Brown, 6 John. Ch. R. 130. See *Fellows v. Fellows*, 4 Cowen R. 682.

¹ *Brinkerhoff v. Brown*, 6 John. Ch. R. 139. In *Brinkerhoff v. Brown*, (6 John. Ch. R. 157), Mr. Chancellor Kent, after an elaborate review of the cases, said; "The principle, to be deduced from those cases, is, that a Bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct. And when we consider, that the plaintiffs, in the case now before me, are judgment creditors, having claims against the Genessee Company perfectly established, and not the subject of litigation in this suit; and that the general right claimed by the Bill is a due application of the capital of that Company to the payment of their judgments; that the subject of the Bill and of the relief, and the only matter in litigation is, the fraud charged in the creation, management, and disposition of that capital; and in which charge all the defendants are implicated, though in different degrees and proportions; I think we may safely conclude, that this case falls within the reach of that principle, and that the demurrer cannot be sustained." In the case of *Fellows v. Fellows*, 4 Cowen R. 682, the same principle was fully carried out by the Court of Errors, after a very full discussion. See also *Boyd v. Hoyt*, 5 Paige R. 65. The case of *Lord Foley v. Carlon*, 1 Younge R. 373, seems (as already intimated) to have proceeded upon the ground of a joint charge of fraud; but it has a close resemblance to the cases in 6 John. Ch. R. 139, and 4 Cowen R. 682. *Wynne v. Callender*, 1 Russ. R. seems distinguishable from that in 1 Younge R. 373, principally on the ground, that there was no joint charge of fraud in all the holders of the Bills. Without meaning to question the doctrine above

§ 286. *a.* The same principle has been supposed to justify the uniting in one Bill for discovery and relief, or for discovery merely, of distinct underwriters, as plaintiffs, upon the same policy or upon different policies, upon the ground of a common fraud which vitiated all the policies and furnished a good ground of defence at law, as well as a good ground to cancel all the policies, if it was fully established in proof; for under such circumstances (it is said) they have a common interest.¹

§ 287. In the next place, a Bill may be objectionable for the opposite fault to that of multifariousness, that is to say, for an undue divisibility or splitting up of a single cause of action, and thus multiplying subjects of litigation. Courts of Equity (as we have seen) discourage, in various forms, the promotion of unreasonable *litigation; and, on this ground, for the pur- [*235] pose of preventing a multiplicity of suits, they will not permit a Bill to be brought for a part of a matter only, where the whole is the proper subject of one suit.² Thus, for example, they will not permit a party to bring a Bill for a part of one entire account; but will compel him to unite the whole in one suit; for otherwise, he might split it up in various suits, and promote the most oppressive litigation.³ Upon a ground somewhat analogous, if an ancestor has made two mortgages, the heir will not be allowed to redeem one without the other;

referred to, it may well be doubted, whether there are any English authorities, which fully bear out the propositions in the cases in 6 John. Ch. R. 139, and 4 Cowen R. 682, or are easily reconcilable with them. Ante § 161, note 2; Post § 537, and note, § 537, *a.*

¹ *Kensington v. White*, 3 Price R. 164; *Mills v. Campbell*, 2 Younge & Coll. 389, 396, 397. See Ante, § 278, and note, *ibid.* p. 230; Post § 537, and note, § 537, *a.* See also *Campbell v. Mackay*, 1 Mylne & Craig, 224, 625.

² Cooper Eq. Pl. 184, 185; Mitf. Eq. Pl. by Jeremy, 183.

³ Cooper Eq. Pl. 104, 185; *Purefoy v. Purefoy*, 1 Vern. 29; Mitf. Eq. Pl. by Jeremy, 183.

for, in such a case, the equity of the heir, like that of the ancestor, is to redeem the whole or none.¹

§ 288. In the next place, where the sole foundation of the jurisdiction in Equity is the want of a discovery, and, as incident thereto, relief is consequent upon that discovery, care must be taken to frame the Bill and accompanying affidavit, so as to bring it clearly within the admitted doctrine and practice of the Court. Thus, a Bill, seeking a discovery of deeds or writings, sometimes prays relief, founded on the deeds or writings, of which the discovery is sought. If the relief so prayed be such, as might be obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his Bill an affidavit, that they are not in his custody or power, and that he knows not, where they are, unless they are in the hands of the defendant. [*236] *But a Bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief, grounded upon them, does not require such an affidavit.²

§ 289. In the next place, the matters of the Bill should be such, as clearly to entitle the party to all the discovery, which he seeks in aid of his prayer for relief; for, if the discovery is not material, the Bill will on this point be open to demurrer. Thus, where a Bill, filed by a mortgagor against a mortgagee to redeem, sought a discovery, whether the mortgagee was a trustee, a demurrer to the discovery was allowed; for, as no trust was declared upon the mortgage, it was not material to

¹ *Purefoy v. Purefoy*, 1 Vern. 29; *Shuttleworth v. Laycock*, 1 V. m. 245; *Margrave v. Le Hooke*, 2 Vern. 207; *Coleman v. Winch*, 1 P. Will. 245; *Willie v. Lugg*, 2 Eden. R. 78, 80; 2 Story on Equity Jurisp. § 1023, note (1); *Ex parte Carter*, Ambler R. 733; *Ireson v. Denn*, 2 Cox R. 425; *Jones v. Smith*, 2 Ves. jr. 376.

² *Mitf. Eq. Pl. by Jeremy*, 54; *Cooper Eq. Pl.* 61.

the relief prayed, whether there was any trust reposed in the mortgagee or not.¹

§ 290. In concluding these brief remarks upon some of the more important rules, applicable to the structure of the common original Bills for relief, it may be added, that in all cases, where the interference of a Court of Equity is sought, the plaintiff should not only clearly show his title, and right to demand the assistance of the Court in his favor; but also, that the case is one, of which the Court has jurisdiction, and to which it ought to apply its remedial justice. If this is not done, the suit is fatally defective and the Bill must fail.²

¹ Mitf. Eq. Pl. by Jeremy, 192; *Harvey v. Morris*, Rep. Temp. Finch, 214; 2 Story on Eq. Jurisp. § 1497.

² See Mitf. Eq. Pl. by Jeremy, 125, 133, 141; Id. 110, 154, 155, 163; Ante § 10, § 241; *Cooper Eq. Pl.* 179; *Bedell v. Hoffman*, 2 Paige R. 199; *Barton's Suit in Eq.* 45, 46.

CHAPTER VI.

BILLS OF INTERPLEADER AND CERTIORARI.

§ 291. THERE are, however, two other sorts of original Bills for relief (as has been already stated), viz. Bills of Interpleader, and Bills of Certiorari, upon the structure of which it may be proper to say a few words. And, first, as to a Bill of Interpleader. It is exhibited, where two or more persons claim the same debt, or duty, or other thing, from the plaintiff by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty, or other thing, fears, that he may suffer injury from their conflicting claims, and therefore he prays, that they may be compelled to interplead, and state their several claims, so that the Court may adjudge, to whom the same debt, duty, or other thing, belongs.¹ As every such Bill is founded upon the admitted want of interest in the plaintiff, and is, at the same time, susceptible of being used collusively to give an undue advantage to one of the contending parties, two things are required as precautions to prevent any abuse of the proceeding. In the first place, the plaintiff must annex an affidavit, that there is no collusion between him and any of the parties; in the next place, if there is any money due, he must bring it into Court, or at least offer to do so

¹ Mitf. Eq. Pl. by Jeremy, 48, 49; Cooper Eq. Pl. 45, 46; 1 Eq. Abridg. 80, I, marg.; 2 Story on Equity Jurisp. § 806 to § 824; 1 Mont. Eq. Pl. 232. See *East India Company v. Campion*, 11 Bligh R. 181, 182; *Atkinson v. Manks*, 1 Cowen R. 691.

by his Bill.¹ If he does not do so, it is in strictness a good ground of demurrer.²

§ 292. In the next place, in a Bill of Interpleader it is necessary, that the plaintiff should state his own rights, and thereby negative any interest in the thing in controversy; and also should state the several claims of the opposing parties.³ If the Bill does not show, that each of the defendants, whom it seeks to compel to interplead, claims a right, both of the defendants may take the objection by demurrer; one, because the Bill shows no claim of right in him; the other, because the Bill, showing no right in the co-defendant, shows no cause of interpleader.⁴ An objection equally fatal will be, that the plaintiff shows no right to compel the defendants to interplead, whatever rights they may claim.⁵

§ 293. The claims, too, should be specifically set forth, so that they may appear to be of the same nature and character, and the fit subject of a Bill of Interpleader. This position may easily be illustrated by stating, that Bills of Interpleader (at least independ-

¹ Mitf. Eq. Pl. by Jeremy, 49, 43; Cooper Eq. Pl. 49, 50; Barton's Suit in Eq. 47, note (1); 2 Story on Equity Jurisp. § 809.

² Ibid; Metcalf v. Hervey, 1 Ves. 248; Hyde v. Warren, 19 Ves. 321, 323; Dungey v. Angove, 3 Bro. Ch. R. 36.

³ Mitf. Eq. Pl. by Jeremy, 49, 141, 142; 1 Mont. Eq. Pl. 232, 233. In Dungey v. Angove, 2 Ves. jr. 311, Lord Loughborough is reported to have said: "The Bill is singular; for it suggests a case. An interpleading Bill never does that." It is not very clear, what his Lordship meant by this statement. In one sense, every Bill of Interpleader must suggest a case, that is, it must suggest a case, which justifies the interposition of the Court. What his Lordship probably meant was, that it never suggests the whole case of the defendants, or the validity of their respective titles, by a full display and comparison of them, calling upon the Court to interpose and decide upon such statement of them. See Mohawk & Hudson Railroad Company v. Clute, 4 Paige, 384, 391.

⁴ Mitf. Eq. Pl. by Jeremy, 142; 2 Story on Equity Jurisp. § 821.

⁵ Mitf. Eq. Pl. by Jeremy, 142, 143.

ently of statutable provisions), do not ordinarily lie, except in cases of privity of some sort between all the parties; such as privity of estate, or title, or contract, and where the claim by all is of the same nature and character. But where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the Bill is wholly unmaintainable.¹

§ 294. Thus, for example, a tenant, liable to pay rent, may file a Bill of Interpleader, where there are several persons claiming title to it in privity of contract, or of tenure, to compel them to ascertain, to whom it is properly payable.² But if a mere stranger should set up a claim to the rent by a title paramount, and not in privity of contract or tenure; or if he should set up a claim of a different nature, such as a claim to the mesne profits, in virtue of his title paramount; in such a case, no Bill of Interpleader would lie in behalf of the tenant; for the debt or duty is not the same in nature or character.³

§ 295. The Bill should also show, that there are proper persons *in esse*, capable of interpleading, and of setting up opposite claims; for, otherwise, the objects of the Bill would be unattainable. On this account, where a Bill was brought founded on a rumor, that

¹ Mitf. Eq. Pl. by Jeremy, 142, 143, note (r); Cooper Eq. Pl. 48; Dungey v. Angove, 2 Ves. jr. 304; Smith v. Target, 2 Anst. R. 529; Johnson v. Atkinson, 3 Anst. R. 798.

² Ibid; 2 Story on Equity Jurisp. § 811, § 812 to § 821. See also Lowndes v. Cornford, 18 Ves. 299; Langston v. Boylston, 2 Ves. jr. 101; Dungey v. Angove, 2 Ves. jr. 304, 310, 312.

³ Dungey v. Angove, 2 Ves. jr. 304, 310; Johnson v. Atkinson, 3 Anst. R. 798; 2 Story on Equity Jurisp. § 812; Cooper Eq. Pl. 48, 49; Langston v. Boylston, 2 Ves. jr. 101, 108; Clarke v. Byne, 13 Ves. 383, 386; Lowe v. Richardson, 3 Madd. R. 277.

there was issue by a person, which issue was suggested to be entitled to the estate in question, and praying, that if there was any such person, he might interplead with the defendant, the Bill was held to be one of a novel impression, and fatally defective.¹ The Bill would be equally defective, if it did admit, and show a title in each of the claimants.²

§ 296. The remarks, hitherto made, are applicable to the titles and claims asserted by the parties, who are called upon to interplead. But the plaintiff should also show a clear title in himself to maintain the Bill; for otherwise the Bill will be dismissed, however proper in other respects the case might be for an interpleader.³ Thus, for example, if the Bill should show, that the title of the plaintiff is that of an agent of one of the parties only, as if he had received money by the authority of his principal and for his use, he would be bound to pay over the money to his principal, notwithstanding any intervening claims of a third person; for a mere agent, to receive for the use of another, cannot be converted into an implied trustee by reason of an adverse claim; since his possession is the possession of his principal.⁴

§ 297. For a like reason, the plaintiff should, (as has been already stated) show in his Bill, that he claims no interest himself; for it is in truth the very foundation of his Bill, that he is a mere holder of the stake, which

¹ *Metcalf v. Hervey*, 1 Ves. 248; *Cooper Eq. Pl.* 46, 47; 2 Story on Equity Jurisp. § 821; 1 Mont. Eq. Pl. 234.

² Story on Equity Jurisp. § 821; *East India Company v. Edwards*, 18 Ves. 377.

³ Mitf. Eq. Pl. by Jeremy, 142, 143.

⁴ *Nicholson v. Knowles*, 5 Madd. R. 47; *Lowe v. Richardson*, 3 Madd. R. 277; 2 Story on Equity Jurisp. § 814 to 820.

is equally contested by the defendants, and that he is wholly indifferent between them.¹ The prayer of the Bill should also be correctly framed, by praying, that the defendants may set forth their several titles, and may interplead, and settle, and adjust their demands between themselves. The Bill also generally prays an injunction to restrain the proceeding of the claimants, or either of them, at law ; and whenever this is done, the Bill should offer to bring the money into Court ; and it must be brought into Court before the Court will ordinarily act upon this part of the prayer.²

§ 297. *a.* In an interpleader Bill, if the defendants do not deny the statements of the Bill, the ordinary decree is, that the defendants do interplead ; and the plaintiff then withdraws from the suit.³ But the defendants, or

¹ *Langston v. Boylston*, 2 Ves. jr. 101, 103 ; *Mitchill v. Hayne*, 2 Sim. & Stu. 63 ; *Slingsby v. Boulton*, 1 Ves. & B. 334 ; *Burnett v. Anderson*, 1 Meriv. R. 405 ; *Cooper v. De Tastet*, 1 Taml. 177 ; 1 Mont. Eq. Pl. 234, 235.

² *Wyatt Pract. Reg.* 78, 79 ; *Mohawk & Hudson Railroad Company v. Clute*, 4 Paige R. 384, 391 ; *Richards v. Salter*, 6 John. Ch. R. 445. The common form of the prayer is given in Van Heythuysen's *Equity Draftsman*, p. 299, in a case of rent. It prays, "that they (the defendants) may severally set forth and discover, what right or title they and each of them claim or have in and to the said moiety of the said premises ; and how they and each of them derive and make out the same ; and that they may set forth, to which of them the said rent and arrears of rent doth, or do of right belong, or is or are payable, and may interplead and settle, and adjust their demands between themselves, your orator being ready and willing, and hereby offering to pay the said rent and arrears of rent to such of the said confederates, to whom the same shall appear to belong, being indemnified. And that your orator may be at liberty to bring the same into this honorable Court, which your orator doth hereby offer to do, for the benefit of such of the several parties, who shall appear to be entitled thereto. And that the said several defendants, and each and every of them, may be restrained by the injunction of this honorable Court, from all proceedings at law against your orator for the said rent and arrears of rent. And for further relief," &c. See also *Barton's Suit* in Eq. 46, 47.

³ *City Bank v. Bangs*, 2 Paige R. 570, 573 ; *Angell v. Hadden*, 16 Ves. 203 ; 4 Bro. Ch. R. 309, n. ; Post § 362.

either of them, are at liberty to contest and deny the allegations in the Bill, or to set up distinct and independent facts in bar of the suit; and in such a case the plaintiff must reply to the answer and close the proofs in the usual manner, before he can bring the cause to a hearing between himself and the defendants; and at the hearing only can insist (if such is his right) to a decree, that the defendants do interplead.¹

§ 297. *b.* We may conclude this head of interpleader by remarking, that although a Bill of Interpleader, strictly so called, lies only, where the party applying claims an interest in the subject-matter; yet there are many cases, where a Bill, in the nature of a Bill of interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a Bill against the several claimants, in the nature of a Bill of interpleader for relief. So, it seems, that a purchaser may file a Bill, in the nature of a Bill of interpleader, against the vendor, or his assignee, and any creditor, who seeks to avoid the title of the assignee, and pray the direction of the Court, as to whom the purchase-money shall be paid. So, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons, as to their title to the mortgage money, he may bring them before the Court,

¹ *City Bank v. Bangs*, 2 Paige R. 570, 572; *Statham v. Hall*, 1 Turner & Russ. 30; 2 Story Eq. Jurisp. § 822, § 824; *Jones v. Gilman*, Cooper's R. 49; *Beymer v. Buchanan*, 1 Cox R. 425; *Duke of Bolton v. Williams*, 4 Bro. Ch. R. 297.

to ascertain their rights, and to have a decree for a redemption, so that he may make a secure payment to the party entitled to the money. In these cases, the plaintiff seeks relief for himself; whereas in an interpleading Bill, strictly so called, the plaintiff only asks, that he may be at liberty to pay the money, or deliver the property to the party, to whom it of right belongs, and may thereafter be protected against the claims of both. In the latter case, the only decree, to which the plaintiff is entitled, is a decree, that the Bill is properly filed; or, in other words, that he shall be at liberty to pay the money, or bring the property into Court, and have his costs; and that the defendants interplead, and settle the conflicting claims between themselves. So, a Bill, in the nature of an interpleading Bill, will lie by a bank, which has offered a reward for the recovery of money stolen, and a proportionate reward for a part recovered, where there are several claimants of the reward, or a proportion thereof, one or more of whom have sued the bank. And in such a Bill all the claimants may be made parties, in order to have their respective claims adjusted.¹

§ 298. Secondly, in regard to Bills of Certiorari. The object of this Bill (which is rarely, if ever, used in America) is to remove a suit in Equity, pending in some inferior Court, into the Court of Chancery, or into some [*242] other proper superior Court of *Equity, (if any such there be) on account of some alleged incompetency of the inferior Court, or some injustice in its proceedings. This species of Bill, having this sole object, merely prays the writ of certiorari. The Bill first states

¹ 2 Story Eq. Jurisp. (2d edit.) § 824, and cases there cited; *Bedell v. Hoffman*, 2 Paige R. 199.

the proceedings in the inferior Court ; it then states the cause of the incompetency of the inferior Court, by suggesting, that the cause is out of its jurisdiction ; or that the witnesses live out of the jurisdiction ; or that the defendants live out of the jurisdiction, and are not able, by age or infirmity, or the distance of the place, to follow the suit there ; or that for some other cause, equal justice is not likely to be done them ; and it then prays a writ of certiorari, to certify and remove the record and the cause to the superior Court.¹ It does not pray, that the defendant may answer, or even appear to the Bill ; and, consequently, it prays no writ of subpœna, though a subpœna must be sued out and served.² When the cause is removed from the inferior Court, the Bill exhibited in that Court is considered as an original Bill in the Court of Chancery, or other superior Court, and is proceeded upon as such.³ The proceedings, however, on it are peculiar ; but they belong rather to the practice, than to the pleadings of a Court of Equity.⁴

¹ Wyatt Pr. Reg. 82, 83, 84 ; 1 Harris. Ch. Pr. by Newl. 49. The form of the writ of certiorari will be found in Hinde's Ch. Pr. 581. The proceedings to justify the superior Court in retaining the Bill, and the suggestions, on which the removal of the proceedings from the inferior Court are required, are to be proved by satisfactory depositions in the superior Court. Wyatt Pr. Reg. 83, 84 ; 1 Harris. Ch. Pr. by Newl. 49, 50, 51.

² Mitf. Eq. Pl. by Jeremy, 50 ; Wyatt Pr. Reg. 82 ; Cooper Eq. Pl. 50, 51 ; Hinde Ch. Pr. 581 ; Id. 28 ; 1 Mont. Eq. Pl. 244. In the form of the Bill given in Van Heyth. Eq. Drafts. 312, there is a prayer for a subpœna, and also for an answer. But the proposition in the text is laid down in all the authorities cited to support it. See also 1 Mont. Eq. Pl. 244, and note (2). See Barton's Suit in Equity, 51, 52, where the common form of the prayer is given.

³ Mitf. Eq. Pl. by Jeremy, 51.

⁴ Mitf. Eq. Pl. by Jeremy, 50, 51 ; Cooper Eq. Pl. 50, 51 ; Hinde Ch. Pr. 28 to 32.

CHAPTER VII.

BILLS NOT PRAYING RELIEF—BILLS TO PERPETUATE TESTIMONY, AND TO TAKE TESTIMONY *DE BENE ESSE*, AND BILLS OF DISCOVERY.

§ 299. WE come, in the next place, to the consideration of Original Bills, not praying for relief. These (as we have seen¹) are of two kinds. (1.) Bills to perpetuate testimony, or to examine witnesses *de bene esse*. (2.) Bills of Discovery, technically so called. Upon the peculiar frame and structure of each of these classes of Bills a few words are proper to be said.

§ 300. And first, in regard to Bills to perpetuate testimony. The sole object of such a Bill is to assist other Courts, and to preserve evidence to prevent future litigation.² In order to maintain such a Bill, it is necessary to state on its face all the material facts, which are necessary to maintain the jurisdiction. It must, in the first place, state the subject-matter, touching which the plaintiff is desirous of giving evidence.³ Thus, for example, if the object of the Bill is to perpetuate the testimony of the witnesses to a deed respecting real estate, the deed should be properly described, and the names of the witnesses, who are to prove the same, be set forth.⁴ And if the object of the

¹ Ante § 19.

² Cooper Eq. Pl. 52; Mitf. Eq. Pl. by Jeremy, 148, 149; Barton's Suit in Eq. 53, 54.

³ Mitf. Eq. Pl. by Jeremy, 51.

⁴ See *Mason v. Goodburne*, Rep. Temp. Finch, 391.

Bill is to perpetuate the evidence of witnesses to facts *in pais*, it is not sufficient to state generally, that they can give evidence as to certain facts ; but the Bill must state specially, what these facts are.¹

§ 301. In the next place, the Bill should also show, that the plaintiff has some interest in the subject-matter, which may be endangered, if the testimony in support of it is lost ; for, unless he has some interest, he is not entitled to maintain the Bill.² A mere expectancy, however strong, is not sufficient ; but the party must have a positive interest. For it has been well said ; “Put the case as high as possible ; that the party, seeking to perpetuate the testimony, is the next of kin of a lunatic ; that the lunatic is intestate ; that he is in the most helpless state, a moral and physical impossibility (though the law would not so regard it), that he should ever recover ; even if he were *in articulo mortis*, and the Bill was filed at that instant ; still, the plaintiff could not qualify himself to maintain it, as having any interest in the subject of the suit.”³ But if there be any vested interest, however slight or trifling in value, whether it be absolute or contingent, whether it be present, or remote and future in enjoyment, is wholly immaterial.⁴ Nay ; it has been said, that though the heir apparent, or next of kin, could not, in the case put, maintain a Bill ; yet, if they had entered into any contract with respect to their expectancies, and possibili-

¹ Knight v. Knight, 4 Madd. R. 8, 10.

² Cooper Eq. Pl. 52 ; Mason v. Goodburne, Rep. Temp. Finch, 391 ; 2 Story Comm. on Equity Jurisp. § 1511.

³ Dursley v. Fitzhardinge, 6 Ves. 260 ; Sackvill v. Ayleworth, 1 Vern. 105 ; S. C. 1 Eq. Abrid. 234 ; Smith v. Atty. Genl. cited 6 Ves. 260 ; 1 Fowler Exch. Pr. 384 ; and in 15 Ves. 136 ; Mitf. Eq. Pl. by Jeremy, 51 ; Cooper Eq. Pl. 52, 53, 54 ; Allan v. Allan, 15 Ves. 135, 136.

⁴ Allan v. Allan, 15 Ves. 135, 136.

ties, they might, upon the footing of that contract, maintain a Bill to perpetuate the evidence.¹ However; it is not every interest, which the Court will protect by perpetuating evidence; for if it be such an interest, as may be immediately barred by the party, against whom the Bill is brought, the Court will withhold its assistance; for it would be a fruitless exercise of power.²

§ 302. On the other hand, it seems equally indispensable to a Bill of this kind, that it should state, that the defendant has, or pretends to have a title, or that he claims an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony.³ For, unless the defendant has, or claims some such interest, it is utterly fruitless to perpetuate the testimony; since it can have no operation upon those, who are the real parties in interest. We have seen, however, that it will be sufficient to bind all the parties in interest to bring before the Court, those, who are judicially held to represent them all; as, for example, the first tenant in tail, who represents all subsequent interests.⁴

§ 303. In the next place, the Bill must show some ground of necessity for perpetuating the evidence; as that the facts, to which the testimony of the witnesses, proposed to be examined, relate, cannot be immediately investigated in a Court of law; or, if they can be so investigated, that the sole right of action belongs exclusively to the other party; or, that the other party has interposed some impediment (such as an injunction) to an immediate trial of the right in the suit at law; so that,

¹ *Dursley v. Fitzhardinge*, 6 Ves. 260, 261; *Cooper Eq. Pl.* 53, 54.

² *Dursley v. Fitzhardinge*, 6 Ves. 261, 262, 263; *Cooper Eq. Pl.* 53.

³ *Mitf. Eq. Pl.* by Jeremy, 53; *Dursley v. Fitzhardinge*, 6 Ves. 260, 261; *Cooper Eq. Pl.* 56; 1 *Mont. Eq. Pl.* 271.

⁴ *Ante* § 144, 145; *Cooper Eq. Pl.* 56.

before the investigation can take place, the evidence of a material witness is likely to be lost by his death or departure from the country.¹ In the former case, the

¹ Mitf. Eq. Pl. by Jeremy, 52; Id. 148, and note (y); North v. Gray, 1 Dick. 14; Cox v. Colley, 1 Dick R. 55; Dorset v. Girdle, Prec. Ch. 531. Lord Redesdale's language is general; "Or, that before the facts can be investigated in a Court of Law, the evidence of a material witness is likely to be lost by his death, or departure from the realm;" without the qualifications stated in the text. Upon this passage, Mr. Jeremy has given the following note. "According to the latter part of this proposition, the right of action may be either in the plaintiff or defendant in equity. With reference to the defendant, the time of bringing the action depending upon his will, the situation of the plaintiff would be similar to that intimated in the former part of the proposition in the text, 1 Sim. & Stu. 89; and with respect to the plaintiff, it must be understood to relate to the case of his not being able at present to sustain an action. Cox v. Colley, Dick. 55; 1 Sim & Stu. 114; for, if he should have such present right, his object could only be, what is technically termed an examination *de bene esse*, upon the ground of his having only one witness to a matter, on which his claim depends, or, if he has more, on the ground of their being aged, or too ill or infirm to attend in a Court of Law; and that he is therefore likely to lose their testimony before the time of trial, 1 Sim. & Stu. 90; in which case it seems, that it ought to be stated in the Bill, that the action was brought before the same was filed. Angell v. Angell, 1 Sim & Stu. 83. On the general subject, see the cases cited, 1 Sim. & Stu. 93, note, and Teale v. Teale, 1 Sim. & Stu. 385." In Cox v. Colley, (1 Dick. R. 55), the plaintiff had brought an ejectment at law. But the proceedings were stayed by an injunction, which was procured by the defendant at law; and the plaintiff brought his Bill in Equity, to perpetuate the testimony; and on demurrer the Bill was sustained. Sir John Leach, in Angell v. Angell, 1 Sim. & Stu. 83, stated very fully the grounds, upon which this sort of Bill is maintainable; and the distinction between it and a commission to take testimony *de bene esse*. His language was; "If it be possible, that the matter in question can, by the party, who files the Bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party, who files the Bill, can, by no means, bring the matter in question into present judicial investigation (which may happen, when his title is in remainder, or when he is himself in possession), there, Courts of Equity will entertain such a suit; for, otherwise, the only testimony, which could support the plaintiff's title, might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim, with a view to that event. It is, therefore, ground of demurrer to a Bill

Bill must allege, that the plaintiff is in possession of the property, or the right, without any disturbance by the other party, upon which an action at law can be founded.¹ In the latter case, the Bill must allege the specific facts, on which the plaintiff puts his case; and also, that the witnesses are old, or infirm, or in ill health, and not likely to live;² or that he has no present right to maintain an action; as if he have a title in remainder or reversion only after a present existing estate for life.³ Without such allegations, the Bill will be clearly demurrable; since, if the subject-matter is capable of being immediately investigated at law, there is no ground to perpetuate the testimony; but it will be the

to perpetuate testimony, generally, that it is not alleged by the plaintiff, that the matter in question cannot be made by him the subject of present judicial investigation. But Courts of Equity do not merely entertain a jurisdiction to take or preserve testimony generally, to be used on a future occasion, where no present action can be brought; but also, to take and preserve testimony, in special cases, in aid of a trial at law, where the subject admits of present investigation. At law, no commission to examine witnesses, who are abroad, for the purpose of being used at the trial, can go without the consent of the adverse party. Courts of Equity will, upon a Bill filed, grant such commission without the consent of the adverse party. So, Courts of Equity will entertain a Bill to preserve the testimony of aged and infirm witnesses, to be used at the trial at law, if they are likely to die before the time of trial can arrive; and will even entertain such a Bill to preserve the testimony of a witness who is neither aged nor infirm, if he happen to be the single witness to support the case.' In *Moodalay v. Morton* (2 Dick. R. 652; S. C. 1 Bro. Ch. R. 469), a Bill to perpetuate testimony was allowed, where there was a present right of action. But that case was founded in special circumstances, perfectly consistent with the general rule; for the object of the testimony was to ascertain against whom the action should be brought, as the plaintiff had no present means of knowing, who that party was.

¹ Cooper Eq. Pl. 53; Mitf. Eq. Pl. by Jeremy, 51, 52, 148, 149; Wyatt Pr. Reg. 74.

² Mitf. Eq. Pl. by Jeremy, 52; *Mason v. Goodburne*, Rep. Temp. Finch, 391.

³ *Dursley v. Fitzhardinge*, 6 Ves. 260, 261.

party's own laches not so to try his right. If an action be actually pending, the Bill should be of a different sort, a Bill *de bene esse*, to take the testimony of the witnesses.¹

§ 304. Where a Bill is framed on the ground, that the testimony of a witness may be lost by his death, or departure from the realm, before the case can be investigated in a Court of Law, it seems proper also, in order to avoid any objection, to annex to it an affidavit of the circumstances, by which the evidence, intended to be perpetuated, is in danger of being lost.² This practice is adopted in other cases of Bills, which have a tendency to change the jurisdiction of the subject-matter from a Court of Law to a Court of Equity.

§ 305. In the next place, the right, of which the Bill is brought to perpetuate the testimony, should be described with reasonable certainty in the Bill, so as to point the proper interrogatories on both sides to the true merits of the controversy. Thus, for example, where a Bill is brought to perpetuate the testimony of witnesses, touching a right of way, the Bill should state the *termini* of the way, the *per* and *trans*, as exactly as in a declaration; for a defect of this sort will make the Bill demurrable.³ Thus, where a Bill was brought to perpetuate the testimony of witnesses respecting a right of common and of way; and it alleged, that the tenants, owners and occupiers of the said messuage and lands, &c. in

¹ Angell v. Angell, 1 Sim. & Stu. 83; Dow v. Ciarke, 1 Sim. & Stu. 108; 2 Story's Comm. on Equity Jurisp. § 1507, § 1508; Parry v. Rogers, 1 Vern. 441; Brandlyn v. Ord, 1 Atk. 571; Cooper Eq. Pl. 55; Dursley v. Fitzhardinge, 6 Ves. 260.

² Mitf. Eq. Pl. by Jeremy, 52, 53; Phillips v. Carew, 1 P. Will. 117; Angell v. Angell, 1 Sim. & Stu. 83, 93; Shirley v. Earl Ferrers, 3 P. Will. 77.

³ Gell v. Hayward, 1 Vern. 312; Cooper Eq. Pl. 56.

right thereof, *or otherwise*, have from time, &c. and of right ought to have common of pasture in and upon a certain waste or common, called Brownbee, for their horses, &c. and also a way or road for themselves over, &c.; upon demurrer it was held (as we have already seen), that the charges were too general, and not sufficiently descriptive of any particular right.¹ So, where the Bill seeks to perpetuate the testimony of witnesses to a will, it is proper in the Bill to set forth the whole will in *hæc verba*.²

§ 306. The prayer of the Bill also requires attention. It should pray leave to examine witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated.³ It should also pray the proper process of *subpæna*. But it should not pray, that the defendant may abide such order and decree, as the Court shall think proper to make; for that will turn it into a Bill for relief, which is inconsistent with the nature of a Bill to perpetuate testimony.⁴ If the Bill should pray relief, it will of course be demurrable, and may be dismissed for this cause.⁵ Care should also be taken, not to mix up in the Bill other matters, which may re-

¹ *Cresset v. Mitton*, 1 Ves. jr. 449; S. C. 3 Bro. Ch. R. 481; Cooper Eq. Pl. 55; Ante § 244.

² Wyatt Pr. Reg. 74.

³ Mitf. Eq. Pl. by Jeremy, 51; Cooper Eq. Pl. 52.

⁴ Post § 312, § 314; *Rose v. Gannel*, 3 Atk. 439; *Vaughan v. Fitzgerald*, 1 Sch. & Lefr. 316; Cooper Eq. Pl. 52; Mitf. Eq. Pl. by Jeremy, note (u).

⁵ Ibid. *Dalton v. Thomson*, 1 Dick. R. 97. Where the Bill is to perpetuate testimony, and also for relief, the Court will frequently allow the plaintiff to amend his Bill by striking out the relief, even after the testimony has been taken under it, and thus give effect to it. *Vaughan v. Fitzgerald*, 1 Sch. & Lefr. 316. A Bill to perpetuate testimony is never brought to a hearing. Ibid. If the cause should improperly be brought to a hearing, it will be dismissed. But the depositions taken may still be used as evidence, even though the Bill is dismissed. *Hall v. Hoddesdon*, 2 P. Will. 162, 163; Anon. 2 Ves. 497; Anon. Amb. R. 237; *Ackland*

quire very different decretal orders, as to the publication of the testimony ;¹ otherwise it will be demurrable.

§ 307. Secondly, in regard to Bills to take testimony *de bene esse*. This species of Bill bears a close analogy to Bills to perpetuate testimony, and is often confounded with the latter. But it stands upon distinct considerations.² Bills to perpetuate testimony (as we have seen) can be maintained only, when no present suit can be brought at law by the party seeking the aid of the Court to try his right.³ Bills to take testimony *de bene esse*, on the other hand, are sustainable only in aid of a suit already depending.⁴ The latter may be brought by a person, who is in possession; or who is out of possession; and whether he is plaintiff, or he is defendant, in the action at law.

§ 308. The object of the Bill is to take the testimony of witnesses for the trial at law, where the testimony may otherwise be lost; as, for example, where the witnesses are aged or infirm, or are about to depart from the

v. Gaisford, 2 Madd. 37, note. One form of prayer given in Van Heyth. Eq. Drafts. is, "That the plaintiff may be at liberty to examine his witnesses to the several matters and things herein before mentioned, and particularly respecting the boundary (the point in controversy) between the said tenement called, &c.; and the said tenement called, &c.; and that the plaintiff may be at liberty on all future occasions, to read and make use of the same, as he shall be advised." The form of the prayer on a Bill to perpetuate the testimony of the subscribing witnesses to a will in the same work, is: "That your orator may be at liberty to examine his witnesses, with respect to the execution and attestation of the said will, and sanity of mind of the said A. B. at the making of the same, so that their testimony may be perpetuated and preserved." Van Heyth. Eq. Drafts. 318. See also Barton Suit in Eq. 54.

¹ *Dew v. Clarke*, 1 Sim. & Stu. 108.

² Ante § 303.

³ 2 Story Comm. on Eq. Jurisp. § 1513; Cooper Eq. Pl. 57.

⁴ *Angell v. Angell*, 1 Sim. & Stu. 83; ante § 303, note. The case of *Phillips v. Carew*, 1 P. Will. 117, seems the other way. But its authority has been questioned, and seems now overruled in *Angell v. Angell*, 1 Sim. & Stu. 83, 93; 2 Story Comm. on Eq. Jurisp. § 1813, note (3).

country.¹ So, if a witness is the only witness to the thing, to which he is to be examined, a Bill will lie on account of the general uncertainty of human life, to take his testimony *de bene esse*, notwithstanding he is not either aged or infirm.² In general, a witness is not treated as being aged in the sense of the rule, unless he is seventy years of age.³ But if he is infirm, or in ill health, to an extent likely to endanger or destroy his life, or to prevent his attendance at the trial, his testimony may be taken at any age.⁴ If a witness is going out of the jurisdiction of the Court, although only into a state or country under the same general sovereignty, his testimony may also be taken; as, for example, if he is going from England to Scotland; or in America if he is going from one State to another.⁵

§ 309. In framing the Bill, therefore, care should be taken to allege all the material facts, upon which the right to maintain the Bill depends, whether it is dependent upon the age, or the infirmity, of the witness, or upon his being about to depart from the country, or upon his being a single witness. And there should also be an affidavit annexed to the Bill of the circumstances, by which the evidence, intended to be perpetuated, is in danger of being lost, as by death, departure from the country, or otherwise.⁶ The reason assigned is the same, which has been already mentioned; that it has a tendency to

¹ Cooper Eq. Pl. 57. See *Dicker v. Power*, 1 Dick. R. 112; *Shelley v. —*, 13 Ves. 56; *Rowe v. —*, 13 Ves. 260.

² *Shirley v. Earl Ferrers*, 1 P. Will. 97; *Pearson v. Ward*, 2 Dick. R. 648.

³ Cooper Eq. Pl. 57; *Fitzhugh v. Lee*, Ambl. R. 65; *Shelley v. —*, 13 Ves. 56; *Rowe v. —*, 13 Ves. 261.

⁴ Ibid. *Phillips v. Carew*, 1 P. Will. 117.

⁵ *Botts v. Verelst*, 2 Dick. 454.

⁶ Cooper Eq. Pl. 57; Mitf Eq. Pl. by Jeremy, 52; *Angell v. Angell*, 1 Sim. & Stu. 83, 93; *Phillips v. Carew*, 1 P. Will. 117.

change the jurisdiction of the subject-matter from a Court of Law to a Court of Equity.¹ This reason is perhaps not quite satisfactory ; because the aim of the Bill is in no sort to change the forum, in which the merits of the case are to be heard and tried ; but merely to prevent the loss of the testimony at the trial. A better ground would seem to be, that the Bill has a tendency to create delays, and may be used as an instrument unduly to retard the trial ; and therefore an affidavit, that the Bill is well founded, is required.² The affidavit should be positive, as to the material facts. Thus, for example, if it relies upon the fact, that the witness is the only witness to a material fact, it will not be sufficient, that the affidavit states, that he is so *in the belief* of the party ; but it must be positively stated, that he is the only witness, who knows the fact.³

§ 310. In other respects, the general rules, already stated in regard to Bills to perpetuate testimony, are for the most part applicable to Bills to take testimony *de bene esse* ; and, therefore, it is unnecessary to repeat them in this place.

§ 311. Thirdly, in regard to the Bills of Discovery. It has been truly said, that every Bill for relief is in reality a Bill of Discovery, since it asks from the defendant an answer upon oath, as to all the matters charged in the Bill, and seeks from him a discovery of all such matters.⁴ But a Bill of Discovery, emphatically so called, of which we are now treating, is a Bill for the discovery of facts, resting in the knowledge of the defendant, or of deeds

¹ Cooper Eq. Pl. 57 ; Mitf. Eq. Pl. Jeremy, 52.

² See *Angell v. Angell*, 1 Sim. & Stu. 83, 92.

³ *Rowe v. —*, 13 Ves. 261.

⁴ Mitf. Eq. Pl. by Jeremy, 53 ; 2 Story on Eq. Jurisp. § 689, § 1483 ; Cooper Eq. Pl. 58.

or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray for the stay of proceedings at law, till the discovery is made.¹ The Bill is commonly used in aid of the jurisdiction of some Court of Law, to enable the party, who prosecutes, or defends an action at law, to obtain a discovery of the facts, which are material to the prosecution or defence thereof.² If it can be used in any other cases, they are very few, and under very special circumstances.³ It is a vexed question, upon which the authorities are contradictory, whether a Bill for discovery lies in aid of a suit or defence to a suit pending in a foreign Court.⁴ For the more full exposition of the circumstances, under which it lies, the learned reader is referred to other works which professedly treat upon this subject.⁵

§ 312. We have already suggested, that a Bill of Discovery, properly so called, never prays any relief. If a Bill, therefore, which is maintainable in Equity solely as a Bill for discovery, should contain a prayer for relief also, it will be open to a demurrer to the whole Bill; and the party will not be allowed to main-

¹ Mitf. Eq. Pl. by Jeremy, 53; 2 Story on Eq. Jurisp. § 1483.

² Mitf. Eq. Pl. by Jeremy, 53, 183, 225; Cooper Eq. Pl. 60; Hare on Discov. 119, 120.

³ See Hare on Discovery, 79, 110, 111; Cardale v. Watkins, 5 Madd. R. 18.

⁴ In Bent v. Young, 9 Sim. R. 180. The Vice Chancellor held, that a Bill of Discovery would not lie in aid of a defence to a suit in a foreign Court; and he stated that the case of Crowe v. Del Ris, cited in Mitf. Eq. Pl. by Jeremy, 186, note (q), did not support the doctrine. But in Mitchell v. Smith, (1 Paige R. 287), Mr. Chancellor Walworth held, that a Bill of Discovery would lie in aid of a prosecution or a defence in a foreign Court.

⁵ See 2 Story on Eq. Jurisp. ch. 41, § 1480 to 1504; Hare on Discovery, *passim*.

tain his Bill for the discovery only ; for he is bound to shape his Bill, according to what he has a right to pray.¹ But the defendant may, nevertheless, if he chooses, *demur to the relief only, and answer as to the [*254] discovery sought.² And if a Bill of Discovery is filed

¹ *Price v. James*, 2 Bro. Ch. R. 319 ; *Collis v. Swayne*, 4 Bro. Ch. R. 480 ; *Loker v. Rolle*, 3 Ves. R. 4, 7 ; *Hodgkin v. Langden*, 8 Ves. 3 ; *Gordon v. Simpkinson*, 11 Ves. 509 ; *Muckleston v. Brown*, 6 Ves. 3 ; *Todd v. Gee*, 17 Ves. 373 ; *Barker v. Dacie*, 6 Ves. 686, Mitf. Eq. Pl. by Jeremy, 183, 184 ; *Pitts v. Short*, 17 Ves. 213 ; *Jones v. Jones*, 3 Meriv. 161, 170 ; *Williams v. Steward*, 3 Meriv. R. 502 ; *Cooper Eq. Pl.* 58, 188 ; *Deare v. Attorney General*, 1 Y. & Coll. 205, 206 ; *Albrect v. Sussman*, 2 V. & Beam. 328. The rule formerly adopted in England was different. It was, that if the Bill was for discovery and relief, and it was good for discovery only, a general demurrer to the whole Bill was bad ; for though the party was not entitled to relief, he was not to be prejudiced for having asked too much. *Brandon v. Sands*, 2 Ves. jr. 514 ; *Sutton v. Scarborough*, 9 Ves. 75 ; *Atty. Genl. v. Brown*, 1 Swanst. 294 ; Mitf. Eq. Pl. by Jeremy, 183, 184. In New York the old English rule is adhered to ; and, indeed, it has much to commend it. See *Laight v. Morgan*, 1 John. Cas. 429 ; S. C. 2 Cain. Cas. in Err. 344 ; *Le Roy v. Veeder*, 1 John. Cas. 423 ; *Le Roy v. Servis*, 1 Cain. Cas. in Err. 1 ; S. C. 2 Cain. Cas. in Err. 175 ; *Kimberley v. Sells*, 4 John. Ch. R. 467 ; *Livingston v. Livingston*, 4 John. Ch. R. 296 ; *Higginbotham v. Burnet*, 5 John. Ch. R. 184. The proper course is held, in New York, to be, to demur to the relief, and to answer to the discovery. *Higginbotham v. Burnet*, 5 John. Ch. R. 184. See Ante § 306.

² *Hodgkin v. Langden*, 8 Ves. 3 ; *Cooper Eq. Pl.* 117 ; *Whitchurch v. Golding*, 2 P. Will. 541 ; S. C. 1 Eq. Abridg. 14 ; *Todd v. Gee*, 17 Ves. 273 ; *North v. Strafford*, 3 P. Will. 148. Where a Bill is for discovery and relief, a demurrer to the relief only, if sustained, generally defeats the discovery also ; for in such a case, the discovery is incidental to the relief ; *Price v. James*, 2 Bro. Ch. R. 319 ; *Sutton v. Scarborough*, 9 Ves. 71, 75. But there cannot be a demurrer to the discovery only, and not to the relief ; for that would be to demur, not to the thing required (the relief), but to the means by which it was to be obtained. *Morgan v. Harris*, 2 Bro. Ch. R. 123 ; *Waring v. Mackreth*, Forrester R. 129 ; *Cooper Eq. Pl.* 117 ; Mitf. Eq. Pl. by Jeremy, 110, 183, 184, 185 ; *Deare v. Atty. Genl.* 1 Y. & Coll. 197, 205, 206. Where the discovery sought is not a mere incident to the relief prayed, if the demurrer be to the latter only, it would seem doubtful, whether the demurrer would not be bad. See Hare on Discov. § 3, p. 6, 7, 8 ; Mitf. Eq. Pl. by Jeremy, 110, 183, and notes ; *Angell v.*

manifestly in aid of a defence at law, and a prayer for equitable relief is added, the defendant is not bound to give any discovery beyond what is incidental to that relief; for by mixing up the right to a discovery in aid of the defence at law with the equitable relief, he would get the discovery designed to aid the defence, without paying the costs in ordinary cases allowed upon a mere bill of discovery.¹

[*255] *§ 313. And hence it is, that whenever the jurisdiction of a Court of Equity is mainly founded on the right to a discovery, and the party goes on to seek relief, the Bill must contain allegations sufficient to entitle the Court to retain the Bill for relief, if the discovery should be effectual; otherwise it will be demurrable. Thus, for example, if a plaintiff should seek to obtain a discovery from the defendant of a bond lost or destroyed, and also relief consequent upon the discovery, he is required to make a suggestion in his Bill, that without such discovery he has not evidence sufficient to maintain a suit at law; and also to annex an affidavit of the loss or destruction of the bond; for if it is not lost or destroyed, or if he has other sufficient evidence to establish its contents in proof, his proper remedy is at law;

Angel, 1 Sim. R. 83, 93. In order to prevent the operation of the rule, that a demurrer to the relief, if good, is a bar to any discovery, it was formerly a practice to file a Bill at first for discovery only, and then after the discovery obtained, by amending the Bill, to try the title to relief. But this practice is now discountenanced, except in cases, where it is clear, that the proper relief is to be had in Equity; and then an amendment will be allowed. See Mitf. Eq. Pl. by Jeremy, 178, note (n); Hare on Discov. 22, 23, 24; *Butterworth v. Bailey*, 15 Ves. 363; *Whitworth v. Davis*, 1 Ves. & Beam. 23; *Lousada v. Templer*, 2 Russ. R. 564, 565; *Severn v. Fletcher*, 5 Sim. 457; *Frietas v. Don Santo*, 1 Y. & Jerv. 577; *Jackson v. Strong*, 13 Price. 494.

¹ *Desborough v. Curlewis*, 3 Younge & Coll. 175, 178.

and for want of such averments, his Bill would be demurrable.¹

§ 314. What constitutes, in the sense of the rule, a prayer for relief is a matter of some nicety; for there are some kinds of equitable relief, which may be sought by a Bill, whose main object is the discovery of evidence, and where the refusal of that relief would not be decisive against granting the discovery.² Lord Redesdale has said, that to administer to the ends of justice, without pronouncing any judgment, which may affect any rights, the Courts of Equity, in many cases, compel a discovery, which may enable other Courts to decide on the subject.³ This suggestion, perhaps, furnishes the means of defining the sort of relief, which is within * the contemplation of the rule. The Court [*256] cannot pronounce any judgment on the rights of the parties, except upon a hearing of the cause. It would seem, therefore, to follow, that if any exercise of the jurisdiction of the Court is prayed, which involves the necessity of a hearing, and a decree or a decretal order on those rights, the suit is thereby rendered a suit for relief, and is liable to all the incidents of that proceeding. On the other hand, if the assistance, which is prayed in addition to the discovery, be such as the Court will give without a hearing of the cause, and no decree or decretal order be necessary on any rights, as no judgment on any rights is required, the rule would seem to be inapplicable.⁴

¹ Mitf. Eq. Pl. by Jeremy, 124, 125; 1 Story on Equity Jurisp. § 81 to § 86; *Walmsley v. Child*, 1 Ves. 343, 345; *Whitfield v. Faussat*, 1 Ves. 392; Ante § 288; *Findley v. Hinde*, 1 Peters R. 244. But the objection will be waived by a general answer. Ibid. See Ante § 304.

² *Hare on Discovery*, 12, 13.

³ Mitf. Eq. Pl. by Jeremy, 148.

⁴ *Hare on Discovery*, 12; Ante § 17.

§ 315. This distinction may be illustrated by a few common examples. It is a natural, if not a necessary, incident to the usefulness of a Bill of discovery, that, in the meantime, and until the discovery is obtained, the proceedings in the suit at law should be stayed; for otherwise the discovery might be wholly fruitless. Hence, Bills of discovery usually contain a prayer for an injunction, until the discovery is obtained. In one sense, this is a prayer for relief. But it being relief, which is granted upon motion, without any hearing of the rights or merits involved in the cause, it does not fall within the scope of the rule.¹ So, a prayer for a commission to examine witnesses, infirm, or abroad, or to perpetuate the testimony of witnesses, may be added to a Bill of discovery, and does not make it a Bill for relief within the rule; for in neither of these cases is the cause ever brought to a hearing.² So, a prayer for [*257] *the production of deeds in Court, of which a discovery is sought, is not such a prayer for relief; for it is merely incidental to the discovery and may be obtained upon motion, where the Bill is for discovery only.³ Nor would a prayer, that the deeds or papers sought, to be discovered, when discovered, should be produced as evidence at the trial be deemed a prayer for relief; for it is a necessary part of the order of the Court upon Bills for discovery of deeds and papers in aid of a trial at law.⁴

§ 316. On the other hand, if a Bill of discovery con-

¹ Hare on Discov. 14; Eden on Injunct. 78, 79.

² Hare on Discov. 12, 13; Noble v. Garland, 19 Ves. 376; King v. Allan, 4 Madd. R. 247; Thorpe v. Macauley, 5 Madd. R. 218; Hall v. Hoddesden, 2 P. Will. 162; Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316; Angell v. Angell, 1 Sim. R. 83, 93. See Ante § 303.

³ Hare on Discov. 15; Parker v. Ray, 5 Madd. 65; Crow v. Tyrrell, 2 Madd. 408.

⁴ Hare on Discov. 16.

tains the formal prayer for general relief, that the plaintiff "may have such further and other relief, as the circumstances of the case may require, and to the Court may seem meet;" that would be construed to make it a Bill for relief.¹ So, a prayer, in praying process, that the defendant may abide such order and decree, as the Court shall think proper to make, has been held to be a prayer for relief; but this seems to be questionable in its principle.² So, any special prayer, that *will require the cause to be brought to a hear- [*258] ing, will be deemed a prayer for relief; as that the copy of a will may be decreed to be a true copy.³ But a prayer "to stand by and abide such order" as to the Court shall seem meet, without adding the word decree, would not be deemed a prayer for relief, but merely for such an order as is consistent with the general scope of the case made by the Bill.⁴ Why an equally liberal interpretation should not prevail, if the word decree be

¹ Cooper Eq. Pl. 58, 188; Hare on Discov. 16, 17, 18; Barton Suit in Eq. 55, note (1); Angell v. Westcombe, 6 Sim. R. 30. The authorities do not seem to be quite consistent on this subject. In Whitworth v. Goulding, 1 Eq. Abridg. 14; S. C. 2 P. Will. 541, the Bill was for a discovery, and contained a prayer for general relief; and on demurrer to the relief, the Court held the demurrer bad; because the Bill was a mere Bill for discovery. Brandon v. Sands, 2 Ves. jr. 514, seems to recognise the same doctrine. So does Rodgers v. Scott, 2 Molloy R. 436. The case of Rose v. Gannel, 3 Atk. 439, is the other way. So is Allan v. Copeland, 8 Price R. 522; and Ambury v. Jones, 1 Younge R. 199; and Angell v. Westcombe, 6 Sim. R. 30; and Mellish v. Richardson, 12 Price R. 534.

² Rose v. Gannel, 3 Atk. 439; Ambury v. Jones, 1 Younge R. 199; James v. Herriott, 6 Sim. R. 428; Contra Angell v. Westcombe, 6 Sim. R. 30. See Baker v. Bramat, 7 Simons R. 17; Schroepfel v. Redfield, 5 Paige R. 245; McIntire v. Trustees of Union College, 6 Paige R. 242, 243.

³ See Vaughan v. Fitzgerald, 1 Sch. & Lefr. 316.

⁴ Baker v. Bramat, 7 Simons R. 17. See also Schroepfel v. Redfield 5 Paige R. 245; McIntire v. Trustees of Union College, 6 Paige R. 242, 243.

added, and yet it is obvious, that the party seeks no other relief than what may properly be given upon a mere bill of discovery, it is not very easy to say.

§ 317. In regard to the frame of a Bill of Discovery, it may be generally stated, that it must clearly show, that it is brought by persons, and for objects, and under circumstances, entitling it to be maintained by the Court. One of the fundamental rules of this branch of Equity Jurisprudence is, that the plaintiff is entitled only to a discovery of what is necessary to maintain his own title; as, for example, deeds under which he claims. But he is not entitled to have a discovery of the title of the other party, from whom he seeks the discovery.¹ Hence it may be stated, as a general rule, that the Bill must show such a case, as renders the discovery material to the plaintiff in the Bill, to support or defend a suit.²

§ 318. In the next place, the Bill should show, that the plaintiff has a title and interest, and what that title and interest are, in the subject-matter, respecting which the discovery is sought; for a mere stranger cannot maintain a Bill for the discovery of another's title.³ So the title and interest must be shown to be present and

¹ Cooper Eq. Pl. 58; Mitf. Eq. Pl. by Jeremy, 190, 191; 2 Story on Eq. Jurisp. § 1490. Mr. Wigram, in his work on Points in the Law of Discovery (p. 15, 2d edit.), states the proposition thus: "It is the right, as a general rule, of a plaintiff in equity, to exact from the defendant a discovery upon oath as to all matters of fact, which, being well pleaded in a Bill, are material to the plaintiff's case, about to come on for trial, and which the defendant does not by his form of pleading admit." He adds, (p. 15, and p. 261, 2d edit.), "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts, as relate to the plaintiff's case; and does not extend to a discovery of the manner, in which the defendant's case is to be exclusively established, or to evidence, which relates exclusively to his case."

² 1 Mont. Eq. Pl. 259.

³ Cooper Eq. Pl. 58; Mitf. Eq. Pl. by Jeremy, 154, 155, 156, 157, 187.

vested; for, where the plaintiff in his Bill shows only the probability of a future title or interest upon an event, which may never happen, he has no right to institute any suit concerning it, either for discovery or for relief.¹ But if the plaintiff shows a complete title or interest, though it is, or may be litigated, that will be sufficient; for its validity cannot be ascertained, until the litigation is determined.²

§ 319. In the next place, the Bill must not only show an interest in the plaintiff in the subject-matter, to which the required discovery relates; and such an interest as entitles him to call on the defendant for the discovery; but it must also state a case, which will constitute a just ground for a suit or a defence at law.³ The object of the Court in compelling a discovery is, to enable some other Court to decide on matters in dispute between the parties, the discovery of which is material. If the Bill does not show such a case, as renders the discovery material to support or defend a suit, it is plainly not a case for the interposition of the Court.⁴ Therefore, where a plaintiff filed a Bill for a discovery merely to support an action, which, he alleged by his Bill, he intended to commence in a Court of Common Law; although by this allegation he brought his case within

¹ Mitf. Eq. Pl. by Jeremy, 156, 157; *Sackville v. Ayleworth*, 1 Vern. 105; Ante § 301.

² Mitf. Eq. Pl. by Jeremy, 157.

³ Mitford Eq. Pl. by Jeremy, 187; *Hare on Discovery*, 43; *McIntyre v. Mancius*, 3 John. Ch. R. 47.

⁴ Mitf. Eq. Pl. by Jeremy, 191, 192; *Leggett v. Postley*, 2 Paige R. 601; 2 Story on Eq. Jurisp. § 1497; *Bishop of London v. Fytche*, 1 Bro. Ch. R. 96; *Selby v. Crew*, 2 Anst. 504. Therefore, if it appears on the face of the Bill, that the plaintiff is entitled to no remedy at law, a discovery will not be granted; for it would be purely impertinent. *Rondeau v. Wyatt*, 3 Bro. Ch. R. 155; *Cholmondeley v. Clinton*, 1 Turn. & Russ. 107.

the jurisdiction of a Court of Equity to compel a discovery ; yet the Court being of opinion, that the case stated by the Bill was not such, as would support an action at law, a demurrer was allowed. For, unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a Court of Equity, to obtain from the confession of the defendant evidence of the truth of the case.¹ So, where, upon a Bill filed by a creditor, alleging, that he had obtained judgment against his debtor, and that the defendant, to deprive him of the benefit of his judgment, had got into his hands goods of the debtor under pretence of a debt due to himself, and praying a discovery of the goods, the defendant demurred ; because the plaintiff had not alleged, that he had sued out execution ; and until he had so done, the goods were not bound by the judgment, and consequently the plaintiff had no title to the discovery ; and the demurrer was allowed.²

¹ *Debbieg v. Lord Howe*, in Chancery, Hilary Term 1782, cited in *Misf. Eq. Pl.* by Jeremy, 4th edit. p. 187, note (x) ; and in 3 Bro. Ch. R. 155 ; *Wallis v. Duke of Portland*, 3 Ves. 494 ; *Lord Kensington v. Mansell*, 13 Ves. 240 ; Ante, § 257, a ; Post § 558, § 559 ; *Neate v. The Duke of Marlborough*, 3 Mylne & Craig, 407, 416, 517 ; Ante § 257, a.

² *Misf. Eq. Pl.* by Jeremy, 187, 188. Id. 126. It is laid down in *Leggett v. Postley* (2 Paige R. 601), that when a party asks the interposition of a Court of Equity to stay a proceeding at law, either by a temporary injunction or otherwise, on the ground, that a discovery is necessary to aid him in his defence, he must not only show, that the facts, as to which a discovery is sought, are material ; but he must show affirmatively in his Bill, that his right or defence cannot be established at law by the testimony of witnesses, or without the aid of the discovery he seeks. The same doctrine is stated in *Gelston v. Hoyt*, 1 John. Ch. R. 545, 548 (2 Story Eq. Jurisp. § 1495, note S. C.), and *Seymour v. Seymour*, 4 John. Ch. R. 411. But it is material to state, that both of these last cases were Bills seeking relief, as well as for discovery ; and therefore fall within the principle of *Russell v. Clarke's Ex'rs.* 7 Cranch, 89, which decides, that

§ 320. The Bill must also set forth with reasonable certainty the title of the plaintiff; and, if it seeks the discovery of deeds and accounts, it must also describe them with reasonable certainty. Therefore (as we have seen), where a Bill stated generally, that under some deeds of settlement in the custody of the defendant, the plaintiff was entitled to some estates, either in fee or absolutely, or as tenant for life, or in tail in possession, or in some other manner, as by the deeds in the custody or power of the defendant would appear, and prayed a discovery thereof; upon demurrer the Bill was held bad for vagueness and uncertainty, and was to be treated as a mere fishing Bill.¹

§ 321. The Bill must also state, that the discovery is asked for the purpose of some suit brought, or intended to be brought; for otherwise it will not be maintained, as Courts of Equity do not grant a discovery to gratify mere curiosity, but to aid some legal proceeding.² It must also set forth, with reasonable certainty the nature of the suit, which is brought, or if not brought, the nature of

if a party seeks to withdraw the suit from a Court of Law to Equity, upon the ground of a discovery, that discovery must be established by the answer, in order to entitle the Court to maintain the Bill for relief. But this by no means establishes the doctrine, that, if the Bill is for discovery only, it is necessary to aver, that the party cannot otherwise establish his defence at law. There does not appear to be any such doctrine in the English Courts of Equity. On the contrary, it is laid down, that a party may maintain a Bill of discovery, not only when he is destitute of other evidence to establish his case, but also to aid such evidence, or to render it unnecessary. See *Hare on Discovery*, 1, 110; *Montague v. Dudman*, 2 Ves. 398; *Wigram on Discov.* 4, 5, 25; *Brereton v. Gamul*, 2 Atk. 241; *Finch v. Finch*, 2 Ves. 442. Lord Redesdale lays it down, that "the plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof and to avoid expense." *Mitford Eq. Pl. by Jeremy*, 307.

¹ *Ryves v. Ryves*, 3 Ves. jr. 343. Ante § 245.

² *Cardale v. Watkins*, 5 Madd. 18.

the claim or right, to support which the suit is intended to be brought, and against whom, in particular, it is to be brought. If, for example, a claim for duties is made, it ought to be stated how, and in what right, they are claimed. Lord Eldon has spoken in an emphatic manner upon this subject. "That, where the Bill" (said [*262] *he) "avers, that an action is brought, or, where the necessary effect in law of the case stated by the Bill appears to be, that the plaintiff has a right to bring an action, he has a right to a discovery, to aid that action, so alleged to be brought, or which he appears to have a right and an intention to bring, cannot be disputed. But it has never yet been, nor can it be, laid down, that you can file a Bill, not venturing to state, who are the persons, against whom the action is to be brought; not stating such circumstances as may enable the Court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge; but stating circumstances; and averring, that you have a right to an action against the defendants, or some of them. That of necessity admits, that some of the defendants may be only witnesses; and against them there is no right to file such a Bill. The fraud (in this case) is not charged as against the third partner. If you had said, that by reason of the combination it was so managed, that you could not bring an action, and therefore there ought to be an account of the fees in this Court, it might have been so shaped. So, you might allege, perhaps, that the person entering goods of an alien in the name of a natural subject, would be liable at law to pay the alien duty: or you might state, that an individual enters goods in his own name; knowing them to be the goods of an alien; and who therefore is liable to an account. But you must state, who the individual is; for you have no right to a discovery

except against the person, against whom you aver, that you mean to bring the action.”¹

§ 322. In regard to the nature of the suit also, the ground is equally clear; for there are certain sorts of *suits, in respect to which a Court of Equity [*263] will not interfere, or give aid by way of discovery; as, for example, a suit for a penalty, or a forfeiture, or in aid of a writ of *mandamus*, or of a criminal prosecution.² Where the Bill is brought before any action, it is usual to aver in the Bill, that the discovery of the facts is necessary to enable the party to commence his suit right.³

§ 323. In the next place, the Bill must generally show, that the defendant has some interest in the subject-matter of the discovery; for, if he is a mere witness, the Bill cannot ordinarily be maintained against him.⁴ But if the Bill alleges, that the defendant has a claim to such an interest, and states it, that will be sufficient to prevent a demurrer, although in fact the defendant has no interest. But, then, he may avail himself of the objection in another form.⁵

§ 324. And it will not in all cases be sufficient to show by the Bill, that both the plaintiff and defendant have an interest in the subject-matter of the suit. But if the right to discovery arises from any privity of title between them, there must be an averment in the Bill, of

¹ *Mayor of London v. Levy*, 8 Ves. 398.

² 2 Story on Eq. Jurisp. § 1494; *Montague v. Dudman*, 2 Ves. 398; *Leggett v. Postley*, 2 Paige, 599.

³ *Moodelay v. Morton*, 1 Br. Ch. R. 470, 471; S. C. 2 Dick. 652. See Hare on Discov. 51, 110.

⁴ *Mayor of London v. Levy*, 8 Ves. 404, 405; *Dineley v. Dineley*, 2 Atk. 394; *Whitworth v. Davis*, 1 Ves. & B. 550.

⁵ Mitf. Eq. Pl. by Jeremy, 181; 2 Story Eq. Jurisp. § 1499.

that privity, and what its true nature and character are, with reasonable certainty.¹

§ 325. In the next place, the Bill should set forth in particular the matters, to which the discovery is sought; for the other party is not bound to make answer to [*264] *vague and loose surmises. On this account, where a Bill of discovery was brought by an executrix, stating generally, that a demand had been made upon her, as executrix, by the defendant, which she had refused to pay, and he had sued her therefor; and that the executrix knew nothing of the demand of her own knowledge; but believed it to be unjust, because the defendant took no measures to liquidate it in the testator's lifetime, and did not produce any vouchers; and that she could not, without a discovery of all the facts, safely proceed to a trial at law in the suit; and prayed a discovery; it was held, that the Bill was bad, and was a mere fishing Bill, amounting only to a statement, that the executrix was sued at law, and did not show for what, and therefore asked a discovery beforehand, although she had reason to conclude, that the suit was upon some groundless pretence. It set forth no facts, material to a defence at law, and merely sought a discovery of the grounds of the suit at law.²

¹ Mitf. Eq. Pl. by Jeremy, 189, 190.

² Newkirk v. Willett, 2 Cain. Cas. Err. 296. See also Frietas v. Don Santos, 1 Y. & Jerv. 577.

CHAPTER VIII.

BILLS NOT ORIGINAL.

§ 326. **BILLS** not original, as we have seen, presuppose a suit to have been already commenced and litigated between the same parties in regard to the same subject-matter, and they are properly of two classes. (1.) Such as are an addition to, or a continuance, or a dependency, of the original Bill.¹ Or (2.) Such as are brought for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or of carrying it into execution.² The former class furnishes the means of supplying the defects of a suit, of continuing it, if abated, and of obtaining the benefit of it. These means are: (1.) By a Supplemental Bill. (2.) By an original Bill, in the nature of a Supplemental Bill. (3.) By a Bill of Revivor. (4.) By an original Bill in the nature of a Bill of Revivor. (5.) By a Bill of Revivor and Supplement. The second class includes; (1.) A Cross Bill. (2.) A Bill of Review. (3.) A Bill to impeach a decree upon the ground of fraud. (4.) A Bill to suspend the operation of a decree. (5.) A Bill to carry a former decree into execution. (6.) A Bill partaking in some measure of the character of some one or more of both of these classes of Bills; such as a Bill in the nature of a Supplemental Bill, or in the nature of a Bill of Revivor, or in the nature of a Bill of Review, and other of a kindred char-

¹ Ante § 16, § 20.

² Ante § 16, § 20. Post § 332 to 388.

acter.¹ It may be proper to give a sketch of the frame and objects of each of these classes and varieties.

§ 327. Before, however, entering upon the consideration of these different sorts of Bills, it may be useful to make some preliminary statements, which will serve more fully to unfold their nature and character; and in this, and, indeed, in all the subsequent explanations of these varieties of Bills, recourse must be almost exclusively had to the admirable treatise of Lord Redesdale.²

[*266] *§ 328. A suit may be defective in its original structure, either from the want of a full statement of the material facts, or from the want of proper parties, or from the want of asking suitable discoveries, or from other like defects, where no event has occurred subsequent to the institution of the suit, affecting the rights or interests of the parties. In such a case, as we shall presently see, the defect may be cured either by an amendment of the Bill, or by a supplemental Bill, under the circumstances, which will be hereafter stated.³ On the other hand, a suit may be perfect in its institution; and yet, by some event, subsequent to the filing of the original Bill, it may become *defective*, so that no proceeding can be had, either as to the whole, or as to some part thereof, with effect; or it may become *abated*, so that there can be no proceeding at all, either as to

¹ Ante § 20, § 21. Post § 388 to 432.

² A very large portion of the following remarks, as to these different kinds of Bills, is borrowed from Lord Redesdale's Treatise, with little more than an occasional verbal alteration. I have not the presumption to suppose, that upon so complicated a subject I could add any thing to the remarks of this great Master in Equity, upon whose work the highest eulogy was pronounced by Lord Eldon, in *Lloyd v. Johnes*, 9 Ves. 54. Occasionally I have copied from Mr. Cooper, where his explanations were more full and satisfactory.

³ Mitf. Eq. Pl. by Jeremy, 55, 61. Post § 332 to § 335.

the whole, or as to a part thereof.¹ The first is the case, when, although the parties to the suit remain before the Court, some event, subsequent to the institution of the suit, has either made such a change in the interest of those parties, or given to some other person such an interest in the matters in litigation, that the proceedings, as they stand, cannot have their full effect.² The other is the case, when by some subsequent event there is no person before the Court, by whom or against whom, the suit in the whole or in part can be prosecuted.³

§ 329. It is not very accurately ascertained in the books of practice, or in the reports, in what cases a suit becomes defective without being absolutely abated; and in what cases it abates, as well as becomes defective.⁴ But upon the whole it may be collected, that if by any means any interest of a party to the suit in *the matter in litigation becomes vested in [267*] another, the proceedings are rendered defective in proportion, as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained.⁵ And if such a change of interest is occasioned by, or is the consequence of, the death of a party, whose interest is not determined by his death, or by the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole. For, as far as the interest of a party dying extends, there is no longer any person before the Court, by whom or against whom the suit can be prosecuted; and a married woman is incapable by herself of prosecuting a suit.⁶

¹ Mitf. Eq. Pl. by Jeremy, 56. Post § 334, 337.

² Ibid.

³ Ibid.

⁴ Mitf. Eq. Pl. by Jeremy, 56, 57, and the cases there cited; Gilb. For. Rom. 176.

⁵ Ibid.

⁶ Ibid.

§ 330. There is the same want of accuracy in the books in ascertaining the manner, in which the benefit of a suit may be obtained, after it has become defective, or abated, by an event subsequent to its institution, as there is in the distinction between the cases, where a suit becomes defective merely, and where it likewise abates.¹ It seems, however, clear, that if any property or right in litigation, vested in a plaintiff, is transmitted to another, the person, to whom it is transmitted, is entitled to supply the defects of the suit, if it has become defective merely; and to continue it, or at least to have the benefit of it, if it is abated.² It seems also clear, that if any property or right, before vested in a defendant, becomes transmitted to another person, the plaintiff is entitled to render the suit perfect, if it has become defective, or to continue it, if it is abated, against the person, to whom that property or right is transmitted.³

[*268] *§ 331. With these explanations, let us now enter upon the examination of the varieties of Bills already enumerated, whose object it is to meet, and to overcome these difficulties, arising from a suit's becoming defective, or from its becoming abated, or from both. When a suit is abated, it cannot be proceeded in, until there is (according to the technical phrase) a revivor of it. When it is merely defective, it may be proceeded in without such a technical revivor, upon the mere supply of the defective facts, or defective parties.⁴

¹ Mitf. Eq. Pl. by Jeremy, 60, 61, and cases there cited. Post § 332 to § 342.

² Ibid.

³ Ibid.

⁴ See *Randall v. Mumford*, 18 Ves. 427, 428; *Lloyd v. Johnes*, 9 Ves. 54, 55; *Harrison v. Ridley*, Com. R. 589; *Anon.* 1 Atk. 88; *Russell v. Sharp*, 1 Ves. & B. 500. In all these cases, when the suit has become abated, as well as defective, the Bill is commonly termed a supplemental Bill in the nature of a Bill of revivor, as it has the effect of a Bill of revivor in continuing the suit. Mitf. Eq. Pl. by Jeremy, 68, 69.

§ 332. And first of a supplemental Bill, which is merely an addition to the original Bill, in order to supply some defect in its original frame or structure.¹ In many cases, an imperfection in the frame of the original Bill, may be remedied by an amendment.² But the imperfection may remain undiscovered, while the proceedings are in such a state, that an amendment can be permitted according to the practice of the Court;³ or it may be of such a nature, having occurred after the suit is brought, as may not properly be the subject of an amendment.⁴ By the practice of the Court, no amendment is generally allowable, after the parties are at issue upon the points of the original Bill, and witnesses have been examined.⁵

¹ Ante § 20; Mitf. Eq. Pl. by Jeremy, 34, 55; Hinde's Pract. 42 to 45.

² Wyatt Pr. Reg. 88; Hinde's Pr. 42.

³ Mitf. Eq. Pl. by Jeremy, 55; *Rowe v. Wood*, 1 Jac. & Walk. 339; Hinde's Pract. 42, 43.

⁴ If it appears upon the face of a supplemental Bill, that all the matters alleged therein arose previous to the commencement of the suit, and might have been inserted by way of amendment in the original Bill, the defendant may demur to the supplemental Bill. *Stafford v. Howlett*, 1 Paige R. 200.

⁵ Mitf. Eq. Pl. by Jeremy, 55, 325; 3 Woodes. Lect. 55, p. 374; Wyatt Pract. Register, 88, 90; Cooper Eq. Pl. 333; *Goodwin v. Goodwin*, 3 Atk. 370; *Jones v. Jones*, 3 Atk. 110, 111; *Stafford v. Howlett*, 1 Paige R. 200. Mr. Woodeson says, that an amendment is not allowed after breaking open the seals of the depositions, which is called passing publication (3 Woodes. Lect. 374). But the general rule is, as stated by Lord Redesdale. However, in special cases, an amendment will be allowed after witnesses have been examined before publication, and even after publication, if no witnesses have been examined. See Mitf. Eq. Pl. by Jeremy, 55, and note. Id. 325, and note (c). See also *Wright v. Howard*, 6 Madd. R. 106. In *Colclough v. Evans*, 4 Sim. R. 76, the Vice Chancellor said, that the rule (before the late orders) was not to allow an amendment without special leave, after the cause is at issue. The same rule is laid down in note (m) to Mitf. Eq. Pl. by Jeremy, 55, 56, where it is added, that after the cause is at issue the Court will not give the plaintiff leave to amend, unless he shows not only the materiality of the proposed alteration, but also that he was not in a condition to have made it earlier. The object of this qualification is to prevent delays. See also

Nor is it generally allowable to introduce into the Bill by amendment any matter, which has happened since the filing of the Bill.¹ In such cases, a supplemental Bill is the appropriate remedy.² And such a supplemental Bill may not only be for the purpose of putting in issue new matter, which may vary the relief prayed in the original Bill ; but also for the purpose of putting in issue matter, which may prove the plaintiff's right to the relief, originally prayed.³ Whenever a supplemental Bill is not a supplemental suit, but only introduces supplementary matter, the whole record constitutes but one cause ; and one replication and one cause are to be set down for the hearing.⁴

§ 333. A supplemental Bill (strictly so called), in the first place, is proper, whenever the imperfection in the original Bill arises from the omission of some material [*270] *fact, which existed before the filing of the Bill, but the time has passed, in which it can be introduced into the Bill by an amendment.⁵ This may arise either from the importance of the fact not being understood in the preceding stages of the cause, and therefore not being put in issue ; or from the fact itself not having come to the knowledge of the party, until after the Bill was filed.

to the same point, *Longman v. Colliford*, 3 Anst. 807 ; *Kilcourny v. Lee*, 4 Madd. R. 212, and the other cases cited in *Mitf. Eq. Pl. by Jeremy*, 55, 56, note (m).

¹ *Cooper Eq. Pl. 333* ; *Candler v. Pettit*, 1 Paige R. 165 ; *Brown v. Higdon*, 1 Atk. R. 291 ; Post § 333.

² *Wray v. Hutchinson*, 5 Mylne & Keen R. 235 ; *Crompton v. Wombwell*, 4 Simons R. 628 ; *Barfield v. Kelly*, 4 Russ. R. 355 ; Post § 352.

³ *Crompton v. Wombwell*, 4 Sim. R. 628 ; Post § 335, 337, 393, 412, 413, 421, 422, 423.

⁴ *Catton v. Carlisle*, 5 Madd. R. 427. See *Greenwood v. Atkinson*, 5 Sim. R. 628.

⁵ *Mitf. Eq. Pl. by Jeremy*, 55, 61, 325 ; *Wyatt Pr. Reg.* 88, 89 ; *Hinde's Pract.* 42, 43, C. Ante § 332.

In either case, the filing of a supplemental Bill is not always a matter of course ; but sometimes special leave must be asked of the Court ; as, for example, when it seeks to change the original structure of the Bill, and to introduce a new and different case.¹ It may be added,

¹ Colclough v. Evans, 4 Sim. R. 76 ; Jones v. Jones, 3 Atk. 110 ; Crompton v. Wombwell, 4 Sim. R. 628. It is not of course, in many other cases, to allow a supplemental Bill to be filed at any time. On the contrary, the plaintiff must show, that he could not have availed himself of the opportunity of introducing the new facts at any antecedent stage of the cause by way of amendment ; or that they were of a nature not proper to be introduced by an amendment ; as for example, events, which had occurred since the filing of the Bill. Therefore, where a supplemental Bill was filed after the hearing of the original Bill, stating additional facts, which arose, and were known to the plaintiff, before he filed his original Bill, and praying, that other matters might be taken into the account ordered to be taken before the Master in the cause ; the Court held, that the Bill was demurrable, and that it came in too late a stage of the proceedings. The plaintiff should either have amended his Bill on the defendant's answering it, or at least he should have applied to the Court for leave to amend, or to file a supplemental Bill in an earlier stage of the proceedings. Swan v. Swan, 8 Price R. 518, 522 ; Gilb. For. Roman. 109 ; Colclough v. Evans, 4 Sim. R. 76 ; Dias v. Merle, 4 Paige R. 259. But although the party has not under circumstances of this sort a right to file a supplemental Bill ; yet the Court will sometimes *ex mero motu* direct such a Bill to be filed, if upon the hearing, the justice of the case, in its own opinion, requires it to be done. Mutter v. Chauvel, 5 Russ. R. 42. See Wood v. Mann, 2 Sumner R. 316. Where a supplemental Bill is brought after publication in the original cause, witnesses cannot be examined to any matter, which was in issue, and not proved in the original cause. And if such proofs are taken, they will not be allowed to be read. Hinde Ch. Prac, 45 ; Bagnal v. Bagnal, Vin. Abridg. Chancery, 439, pl. 8 ; Cockburne v. Hussey, 1 Ridg. Par. C. 504. In Gilbert's For. Roman. 108, 109, the Chancery Practice on this subject is shown to have had its origin in the Civil Law. His remarks are also important to the more full exposition of the reasons and restrictions of the Chancery Practice. "According to the civil law" (says he), "the plaintiff, by leave of the Court, might add any new position before replication ; for the replication was the contestation of the answer ; and therefore after the answer was contested, there could be no positions, but they went on to their proofs. But if any new matter was discovered after replication, they might, by leave of the Court, file a supplemental Bill, touching any matter of fact, that was discovered after such replication ; for the supple-

that a supplemental Bill will not be permitted to be filed, whenever the same end may be obtained by an amendment.¹

§ 334. A supplemental Bill may also be proper, in [*272] *order to bring before the Court some party, who is a necessary party to the proceedings, and who has been omitted to be introduced at the stage of the cause, in which an amendment for this purpose may be made.² In such a case, the original defendants need not be made parties to the supplemental Bill, unless they have an interest in the supplemental matter.³

mental Bill was in the nature of a new cause, which might be brought, by leave of the Court, after the *contestatio litis* in the former cause ; and the Court might lengthen the time for publication, after such supplemental Bill and answer came in ; because the prolongation of the probatory term was very much in the breast of the Court. But if the supplemental Bill be moved for after publication, the Court never gives them leave to examine any thing, that was in issue in the former cause, by reason of the manifest danger of subornation of perjury, where they have a sight of the examinations of the witnesses. But for matter of account, there may be a supplemental Bill after publication, because they examine to such matters of account before the master or deputy after publication. And this is from the necessity of the thing, because the charge or discharge must be made up privately before the master or deputy, and therefore they being in charge and discharge, the particulars of which must be proved, such accounts being now kept by books or notes, and formerly by scores or tallies one against another. And therefore a supplemental Bill in matters of account is seldom refused. So, likewise, a supplemental Bill may be for any fact discovered after publication passed, that was not in issue in the same cause, and where such fact might vary the decree. But after the decree is pronounced and enrolled, it must be by Bill of review and reversal."

¹ Mitf. Eq. Pl. by Jeremy, 62. It is not any objection to a supplemental Bill, which by the former practice of the Court was necessary in order to obtain the object, that the same purpose may now be attained by a petition ; for this only gives the plaintiff an election, and does not deprive him of the right to file a supplemental Bill. *Davies v. Williams*, 1 Sim. R. 5.

² Mitf. Eq. Pl. by Jeremy, 61, 62.

³ *Bignall v. Atkins*, 6 Madd. R. 369 ; *Ensworth v. Lambert*, 4 John. Ch. R. 605 ; *Jones v. Jones*, 3 Atk. 217 ; *Holdsworth v. Holdsworth*, 2 Dick. R. 799.

§ 335. Lord Redesdale, in speaking upon the subject of the necessity of supplemental Bills, has remarked; "This is particularly the case, where, after the Court has decided upon the suit as framed, it appears necessary to bring some other matter before the Court to obtain the full effect of the decision; or, before a decision has been obtained, but after the parties are at issue upon the points in the original Bill, and witnesses have been examined (in which case, the practice of the Court will not generally permit an amendment of the original Bill), some other point appears necessary to be made, or some additional discovery is found requisite."¹ Thus, for example, if new charges are required to be made, in order to obtain a further discovery, or a material fact is required to be put in issue, which was not in the cause before, such as a charge of fraud, or a new title, the object cannot be obtained but by a supplemental Bill.² So, new parties, when necessary, may be added by a supplemental Bill, where the proceedings are * in a state, in which the object cannot be ob- [* 273] tained in any other way.³

§ 336. In the next place, when new events or new matters have occurred since the filing of the Bill, a supplemental Bill is, in many cases, the proper mode of bringing them before the Court; for, generally, such facts cannot be introduced by way of amendment to the Bill.⁴ But, here, we are to understand, that such new

¹ Mitf. Eq. Pl. by Jeremy, 55, 56, and the cases there cited.

² Jones v. Jones, 3 Atk. 110; Goodwin v. Goodwin, 3 Atk. 370; Mitf. Eq. Pl. by Jeremy, 62; Cooper Eq. Pl. 73, 74; Gilb. For. Rom. 108, 109; Stafford v. Howlett, 1 Paige R. 200.

³ Jones v. Jones, 3 Atk. 110, and the cases before cited.

⁴ Cooper Eq. Pl. 74; Mitf. Eq. Pl. by Jeremy, 61, note (e); Hinde's Pract. 42, 43; 3 Woodes. Lect. 33, p. 375; Gilb. For. Rom. 109; Crompt-

events or new matters, do not change the rights or interests of the parties before the Court (for then, properly speaking, the Bill is not simply a supplemental Bill), but they merely refer to and support the rights and interests already in the Bill.

§ 337. In regard to supplemental Bills, if they are brought after publication in the original cause, to bring before the Court facts and circumstances, which have since occurred, they must be such facts and circumstances, as are material and beneficial to the merits of the original cause, and not merely such, as bear as evidence upon the facts in issue in the original cause. For, if the new facts and circumstances are relied on as evidence only, to establish the facts in issue in the [*274] *original cause, they should not be brought forward by a supplemental Bill, for they are not properly supplemental matter. But they should be brought forward in another form, upon an application to the Court to take the examination of the witnesses, or if discovery is required, by filing a Bill of discovery for the purpose.¹

ton v. Wombwell, 4 Sim. R. 628; Wyatt Pr. Reg. 88, 89; Boeve v. Skipwith, 2 Ch. R. 142; Barfield v. Kelly, 4 Russ. R. 355; Greenleaf v. Queen, 1 Peters R. 148; Candler v. Pettit, 1 Paige R. 168; Stafford v. Howlett, 1 Paige R. 200. In Crompton v. Wombwell (4 Sim. R. 628), the Vice Chancellor said; "It has been admitted, that when a cause is in such a state, that the Bill cannot be amended, a supplemental Bill may be filed. Mr. Pepeys thinks, that that cannot be done, except when the new matter will vary the relief prayed by the original Bill. But that is not the only case, in which such a proceeding may be taken; for the new matter to be introduced may either be such, as will vary the relief prayed, or such, as will tend to prove the plaintiff's right to that relief."—Post § 352.

¹ Milner v. Harewood, 17 Ves. 145, 148, 149. This seems to be the result of Lord Eldon's reasoning in this case, although the language is somewhat indeterminate. On this occasion his Lordship said; "This is a case of the first impression. Suppose, after a Bill filed, the plaintiff and defendant met; and the defendant expressly stated circumstances, as

§ 337. *a.* Hitherto we have chiefly considered supplemental Bills on the part of the plaintiff. But they may also be brought on behalf of the defendant in the suit. Where the matter is newly discovered evidence on the part of the defendant, after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental Bill, obtain relief, and an order allowing him to introduce the new evidence, either by putting the new matter at issue, or by enlarging publication, or by a rehearing, as the particular stage of the cause at which the discovery is made may require.¹

facts; or that the plaintiff had such a title; and that no other person was present: though that happened after the Bill filed, there must be some mode of establishing the fact; and liberty to file a Bill of discovery, with a view to obtain an admission from the defendant. Suppose a witness had been present, and the defendant, by answer, denies the conversation: the plaintiff must in some way have the benefit of that evidence. Yet I do not recollect an instance, where the discovery of a circumstance, that took place after the replication, as in this case, was considered so material as to furnish any information with regard to the mode of obtaining that benefit." Afterwards, when he pronounced his final judgment upon the two points stated in the argument, viz.: (1.) That the matter stated was not proper for a supplemental Bill. (2.) If it was proper, that it was not material, he added; "There is no recollection of a supplemental Bill of this kind; and, if a new practice is to be settled, the strong inclination of my opinion is, that, when the particular case arises, where either conversation, or admission of the defendant, becomes material after answer or replication; or, as in this instance, after examination of witnesses in the original cause; or, if a new fact happens after publication, which it is material to have before the Court in evidence, when the original cause is heard; it is much better, that the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing; or, if discovery is required, that the party should file a Bill for that purpose merely; and, if relief is required, that the answer, comprehending the discovery, should be read at the hearing of the original cause." Post § 352.

¹ *Baker and Wife v. Whiting*, Circuit Court Maine, May Term, 1840; *Barrington v. O'Brien*, 2 Ball & Beatt. 140; *Standish v. Radley*, 2 Atk. R. 177; *Gould v. Tancred*, 2 Atk. R. 533; Ante § 332, § 335; Post § 393, § 412, § 413, § 421, § 422, § 423, § 890.

§ 338. In the next place, a supplemental Bill may also be filed, as well after, as before a decree; and the Bill, if after a decree, may be, either in aid of the decree, that it may be carried fully into execution; or that [*275] *proper directions may be given upon some matter omitted in the original Bill, or not put in issue by it, or by the defence made to it; or to bring forward parties before the Court; or it may be used to impeach the decree, which is the peculiar case of a supplemental Bill, in the nature of a Bill of review, of which we shall treat hereafter.¹

§ 338. *a.* But in whatever manner a supplemental Bill is brought forward, if it is for new discovered matter, it ought to be filed as soon as practicable, after the matter is discovered. For, as we shall presently see, if the party proceeds to a decree after a discovery of the facts, upon which his new claim is founded, he will not be permitted afterwards to file a supplemental Bill, in the nature of a Bill of review, founded on such facts.² On the other hand, if an objection is meant to be taken by the defendant, that a supplemental Bill brings forward matters, which might have been introduced by way of amendment, or at an earlier period of the cause, he should do it by way of demurrer, or plea, or answer, to the supplemental Bill. It will be too late to take the objection at the hearing.³

§ 339. To entitle a plaintiff to file a supplemental Bill, and thereby to obtain the benefit of the former

¹ Mitf. Eq. Pl. by Jeremy, 62; Wyatt Pr. Reg. 88, 89; Hinde's Pract. 43. Post § 412 to § 428.

² Pendleton v. Fay, 3 Paige R. 294. Post § 423. See *Dias v. Merle*, 4 Paige R. 259. *Fulton Bank v. New York and Sharon Canal Co.* 4 Paige R. 127.

³ *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige R. 127.

proceedings, it must be in respect to the same title, in the same person, as stated in the original Bill.¹ Thus, if a person should file an original Bill, as heir at law of the mortgagor, to redeem; and it should turn out, upon an issue and hearing of the cause, that he is not the heir at law, and he afterwards purchases the title of the true heir at law; he cannot file a supplemental Bill to have the benefit of the former proceedings; for he claims by a different title from that asserted in the original Bill. His true course would be to file an original Bill.²

§ 340. If the interest of a *plaintiff, suing in autre droit*, entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of new assignees under a commission of bankruptcy, upon the death or removal of former assignees, or in the case of an executor or administrator, upon the determination of an administration *durante minori etate*, or *pendente lite*, the suit may be likewise added to and continued by a supplemental Bill.³ For, in these cases, there is no change of interest, which can affect the questions be-

¹ Ante § 336. Post § 345, § 346.

² *Tonkin v. Lethbridge*, Coop. Eq. R. 33; *Oldham v. Eboral*, 1 Coop. Sel. Cas. 27; *Rylands v. La Touche*, 2 Bligh R. 586; *Pilkington v. Wignall*, 2 Madd. R. 240.

³ *Mitford Eq. Pl. by Jeremy*, 4th edit. p. 64. Lord Redesdale seems to take a distinction between the case of the determination of the interest of a plaintiff suing *in autre droit*, (as in the cases stated in the text), and the case of the determination of the interest of a plaintiff suing *in his own right*, (as in the case of bankruptcy of a plaintiff,) holding, that in the former case, the party succeeding to his rights, must sue by a mere supplemental Bill; and in the latter case by an original Bill, in the nature of a supplemental Bill. Post § 349. *Mitford Eq. Pl. by Jeremy*, 4th edit. 65, 67, 72, 98. It does not seem to me, that there is any well founded distinction between the cases. In each case it would seem, that the Bill should be an original Bill in the nature of a supplemental Bill, for it brings forward new interests by new parties. And I cannot but think, that some

tween the parties, but only a change of the person in whose name the suit must be prosecuted.¹ And if there has been no decree, the suit may proceed, after the supplemental Bill has been filed, in the same manner as if the original plaintiff had continued such; except that the defendants must answer the supplemental Bill, and either admit or put in issue the title of the new plaintiff.² But if a decree has been obtained before the event, on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree on the supplemental Bill, declaring, that the plaintiff in that Bill is entitled to stand in the place of the plaintiff in the original Bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual.³

§ 340. *a.* So if a suit should be brought by church wardens of a parish church, to restrain a person from pulling down the churchyard wall, and their office should cease while the suit is pending, and successors in office are appointed in their stead, they may file a supplemental Bill, for the purpose of stating facts, which have occurred since the filing of the Bill, and may join their successors with them as to plaintiffs.⁴

confusion on the subject has arisen, from the authorities not nicely distinguishing, in their language, a mere supplemental Bill from an original Bill in the nature of a supplemental Bill, but calling each by the generic name of a supplemental Bill. Mr. Cooper (Coop. Eq. Pl. 76. Post § 349, note 4), insists, that there is no distinction between the cases, where the plaintiff sues in his own right, or *in autre droit*. However, in deference to Lord Redesdale, I have left the text as it stands, according to the very language used by him. Post § 349, note; § 350, note. See Coop. Eq. Pl. 75, 76.

¹ Mitf. Eq. Pl. by Jeremy, 4th ed. p. 64.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 64, 65; Cooper Eq. Pl. 76; Gilb. For. Rom. 176; Anon. 1 Atk. 88; Brown v. Martin, 3 Atk. 218.

⁴ Marriott v. Tarpley, 9 Simons R. 279.

§ 341. So, where a decree directed the Master to approve of a settlement on a wife and her children ; but before the report the wife died ; it was held, that the children had, by a supplemental Bill, a right to a provision out of the property.¹

§ 342. So, if the interest of a *defendant* is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the suit may be supplied by supplemental Bill, whether the suit is become defective merely, or abated, as well as become defective.² For in these cases, the new party comes before the

¹ *Lady Elibank v. Montolieu*, 5 Ves. 737 ; S. C. 10 Ves. 84 ; *Cooper Eq. Pl.* 74.

² *Mitf. Eq. Pl. by Jeremy*, 68 ; *Sedgwick v. Cleveland*, 7 Paige, 290. On this occasion, Mr. Chancellor Walworth stated the distinction between a voluntary alienation of a defendant *pendente lite*, and an involuntary alienation by insolvency or bankruptcy, by operation of law. "In the case of the defendants," (said he), "whose interest in the subject matter of the litigation becomes vested in others, *pendente lite*, without an actual abatement of the suit, a distinction is very properly made between the transfer of that interest by the mere voluntary act of the defendant, as in the case of a sale or assignment in the ordinary course of business, and a transfer of that interest by operation of law, as upon an assignment in bankruptcy or under our insolvent acts. In the first case the complainant is not bound to make the assignee a party, although he may do so, if he deems it essential to the relief, to which he may be entitled against such assignee. But in the last case the assignee, who has become such by operation of law, has a right to be heard, and must be made a party before the suit can be further proceeded in. The reason of the distinction is obvious. In the first case the assignee, who is a mere voluntary purchaser, *pendente lite*, cannot defeat the complainant's rights or delay his proceedings by such purchase ; for if he could do so, the litigation, by successive assignments, might be rendered interminable. He, therefore, has no right to be heard, unless he brings himself before the Court by a supplemental Bill, in the nature of a cross Bill ; which he may sometimes do to protect his rights as such assignee. And the decree in the original suit, to which such assignee was not a party, will bind the assigned property in his hands. Neither can the defendant, who has made such

Court exactly in the same plight and condition, as the former party; is bound by his acts; and may be subject to all the costs of the proceedings from the beginning of the suit.¹ But the distinction is constantly to be borne in mind, between cases of voluntary alienation and cases of involuntary alienation, as by insolvency or bankruptcy by the defendant. In the latter cases the assignee must be made a party; in the former he may or may not at the election of the plaintiff.²

voluntary assignment subsequent to the commencement of the suit, urge that as a reason, why the suit should not proceed against him in the same manner, as if no such transfer had been made. In the other case the assignee, upon whom the interest of the defendant has been cast by operation of law for the benefit of others, has a right to be heard for the protection of that interest. And the whole legal and equitable interest therein, which formerly belonged to the defendant, being vested in such assignee by the mere operation of the law itself, he will not be legally or equitably bound by a decree, to which he is not a party (*Deas v. Thorne*; 3 John. Rep. 544.) The reasons for this difference between the two cases do not exist in relation to the transfer of the interest of the complainant; and where the adverse party makes the objection to his proceeding in his own name without bringing the assignee before the Court. The party, whose interest in the subject matter of the suit has become divested *pendente lite*, can only object to the proceedings of his adversary in the suit, where such interest has become vested in another by operation of law, and not by his own mere voluntary act. But where the party, who has assigned the whole or a part of his interest in the subject matter of the suit, attempts to take any active proceeding therein, the adverse party may object to such proceeding; on the ground, that the suit has become abated or defective as to such assignor, so that the same cannot be proceeded in, until the assignee is made a party. Perhaps, there may be some exceptions to this rule, particularly where the adverse party, after he becomes acquainted with the fact of such assignment, does some act, or takes some proceeding in the cause, on his part, which amounts to a legal waiver of his right to urge the objection, that the suit had abated or become defective by reason of the transfer of interest."

¹ Mitf. Eq. Pl. by Jeremy, 68; *Whitcomb v. Minchin*, 5 Madd. R. 91; *Foster v. Deacon*, 6 Madd. R. 59; *Wyatt Pr. Reg.* 91; *Sedgwick v. Cleaveland*, 7 Paige R. 290 to 292.

² *Sedgwick v. Cleaveland*, 7 Paige R. 290, 291; *Supra* note (2); *Ante* § 136, § 340, and note (3); *Post* § 351; 2 Story Eq. Jurisp. § 908.

§ 343. Having thus considered, in a brief manner, the proper cases for a supplemental Bill, correctly so called, let us now proceed to a statement of the true frame and structure thereof. A supplemental Bill must state the original Bill, and the proceedings thereon; and if the supplemental Bill is occasioned by an event subsequent to the original Bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental Bill must pray, that all the defendants may appear and answer to the charges it contains.¹ For, if the supplemental Bill is not for a discovery merely, the cause must be heard upon the supplemental Bill at the same time, that it is heard upon the original Bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter.² If, indeed, the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental Bill may be exhibited by the plaintiff in the original suit, against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of the other defendants may be affected by that decree.³ But it is not necessary for the plaintiff, when he files a supplemental Bill, to state in it all the circumstances of the case at length. All, that is requisite, is, that he should state so much of the case as shows that there was an equity in it.⁴ Where a supplemental Bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties defendants to the original Bill need

¹ Mitf. Eq. Pl. by Jeremy, 76.

² Ibid.

³ Ibid.

⁴ *Vigers v. Lord Audley*, 9 Simons R. 72, 77.

not in general be made parties to the supplemental Bill.¹ And, in general, if new parties are brought before the Court upon a supplemental Bill, the original defendants need not be made parties to the supplemental Bill, unless they have an interest in the supplemental matter.² The facts, too, brought forward by the supplemental Bill should be material to the matters in controversy ; for if they are not, a demurrer will lie to the supplemental Bill.³

§ 344. If a supplemental Bill to a Bill to perpetuate testimony is filed after the examination of the witnesses, under the original Bill, has been completed and the commission is closed, for the purpose of the further examination of witnesses, upon the ground, that new material facts have been discovered since the filing of the former Bill, it will not be sufficient to make such an allegation in general terms, but the supplemental Bill must state, what such new material facts are, as is done upon original Bills in such cases.⁴

§ 345. Secondly, an original Bill in the nature of a supplemental Bill. This division is founded rather upon formal technical principles, than upon any substantial difference from a supplemental Bill, properly so called. Indeed, in the books they are usually confounded to-

¹ Mitf. Eq. Pl. by Jeremy, 75, 76, and cases there cited ; Cooper Eq. Pl. 83, 84. See the forms in Vanheyth. Eq. Drafts. 338 to 340 ; Hinde's Pract. 43, 44 ; Bignall v. Atkins, 6 Madd. R. 369 ; Brown v. Martin, 3 Atk. 217.

² Bignall v. Atkins, 6 Madd. R. 360 ; Ensworth v. Lambert, 4 John. Ch. R. 605 ; Ante § 334.

³ Milner v. Harewood, 17 Ves. 144 ; Adams v. Dowding, 2 Madd. R. 53.

⁴ Knight v. Knight, 4 Madd. R. 1. If new evidence has been discovered since the commission was closed, as to the facts stated in the original Bill, the proper course would be, not to file a supplemental Bill, but to apply to the Court for permission to examine the new witnesses. Ibid.

gether.¹ The most prominent distinction between them, however, seems to be, that a supplemental Bill is properly applicable to such cases only, where the same parties, or the same interests remain before the Court; whereas, an original Bill, in the nature of a supplemental Bill, is properly applicable, when new parties, with new interests, arising from events since the institution of the suit, are brought before the Court.²

§ 346. Thus, for example, when any event happens subsequent to the time of filing an original Bill, which gives a new interest in the matter in dispute to any person not a party to the Bill, as the birth of a tenant in tail; or which gives a new interest to a party, as the happening of some other contingency; the defect may be supplied by a Bill, which is usually called a supplemental Bill, and is in fact merely so with respect to the rest of the suit, though with respect to its immediate object, and against any new party, it has in some degree the effect of an original Bill.³ If any event happens, which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or, if a plaintiff, suing in his own right, is entirely deprived of his interest, but he is not the sole plaintiff; the defect arising from either event may be supplied by a Bill of the same kind, which is

¹ Mr. Cooper treats of both of them under the same head; Cooper Eq. Pl. 62; and although Lord Redesdale has made a formal division of them; yet in discussing them, he has mixed the cases together without any attempt to arrange them into separate heads. Mitf. Eq. Pl. by Jeremy, 61 to 76. See also *Russell v. Sharp*, 1 Ves. & B. 500; *Randall v. Munford*, 18 Ves. 424.

² Cooper Eq. Pl. 75, 76; Ante § 336, § 339.

³ Mitf. Eq. Pl. by Jeremy, 63.

likewise commonly termed, and is, in some respects a supplemental Bill merely, though in other respects, and especially against any new party, it has also in some degree the effect of an original Bill.¹ In all these cases, the parties to the suit are able to proceed in it to a certain extent, though from the defect arising from the event, subsequent to the filing of the original Bill, the proceedings are not sufficient to attain their full object.² The Bill here spoken of, is properly called an original Bill, in the nature of a supplemental Bill; because it is original, as to the new parties and new interests; and it is in some sort supplemental also, as

¹ Mitf. Eq. Pl. by Jeremy, 63.

² Mitf. Eq. Pl. by Jeremy, 63, 64, 72, 98. Sir Thomas Plumer, in commenting on this passage, in *Adams v. Dowding*, 2 Madd. R. 53, used the following language; "If merely relevant events, happening subsequent to the filing of a Bill, makes a supplemental Bill necessary, it is necessary in this case; but it is not all relevant events posterior to a Bill, that render a supplemental Bill necessary. It can seldom be necessary, where the Bill is for an account. When a Bill is filed for an account of tithes, an account is taken of the receipts posterior to the original Bill; and it never was supposed, that a supplemental Bill was necessary, because tithable matter had been received subsequent to the filing of the original Bill. It may be asked, what limit is there? When is a supplemental Bill necessary? Lord Redesdale has clearly shown, that it is not merely, because an event has happened posterior to the original Bill, that a supplemental Bill becomes necessary. He says; 'When any event happens subsequent to the time of filing an original Bill, which gives a new interest in the matter in dispute to any person, not a party to the Bill; as the birth of a tenant in tail,' &c., a supplemental Bill may be filed. The proposition is qualified by the words, 'gives a new interest.' And in another passage, he says; 'A supplemental Bill must state the original Bill and the proceedings thereon; and if the supplemental Bill is occasioned by an event subsequent to the original Bill, it must state that event, and the consequent alteration with respect to the parties.' Are there any new parties brought forward by this supplemental Bill? None. If a supplemental Bill is filed before a decree on the original Bill, both Bills are heard together; if after a decree, then the cause is heard upon the supplemental Bill only. If this supplemental Bill had been filed after a decree, what other decree could have been made, except what had already been made in the original suit?" See also Gilb. For. Rom. 109.

being an appendage to the former Bill, as to the old parties and the old interests.¹

§ 347. Upon the same ground, where a husband and wife are defendants to a Bill, if by the death of the husband a new interest arises to the wife, the suit becomes defective; and an original Bill in the nature of a supplemental Bill becomes necessary to bring that interest before the Court; for she is not bound by the answer put in during her *coverture*.²

§ 348. Upon the same ground, if a person becomes assignee of the interest of a party in the suit, and wishes to be admitted to take part in it, he must bring forward his claim by an original Bill, in the nature of a supplemental Bill.³

§ 349. So, if a sole *plaintiff*, *suing in his own right*, is deprived of his whole interest in the matters in question, by an event subsequent to the institution of a suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees; or in case such a plaintiff assigns his whole interest to another; the plaintiff in either case being no longer able to prosecute the suit for want of interest, and his assignees claiming by a title, which may be litigated, the benefit of the proceedings cannot be obtained by a mere supplemental Bill; but it must be sought by an original Bill in the nature of a supplemental Bill.⁴

¹ Cooper Eq. Pl. 75, 76; Mitf. Eq. Pl. by Jeremy, 99; Hinde's Prac. 44; Ante § 340, and note.

² Mole v. Smith, 1 Jac. & Walk. 645.

³ Foster v. Deacon, 6 Madd. R. 59.

⁴ Mitf. Eq. Pl. by Jeremy, 65, 67, 72, 98. See also Anon. 1 Atk. 88; Wyatt Pr. Reg. 89; Sedgwick v. Cleveland, 7 Paige R. 287, 290. On this occasion, Mr. Chancellor Walworth examined the doctrine at large, and said; "If this had been the case of an assignment by the complainant under the insolvent acts, there could have been no possible doubt, that

§ 350. And if by any event the whole interest of a defendant is entirely determined, and the same interest

the suit had abated ; or rather, that it had become so defective, that the complainant could not proceed any further in his own name against the defendant, if the latter had thought proper to raise the objection. This Court requires the real parties in interest to bring the suit, except in certain cases, where the complainant represents the rights of those, for whom the suit is brought, both legally and equitably, as in the case of executors, or of trustees, or assignees under the insolvent acts. And where the sole complainant, who originally brought the suit in his own name and not in *autre droit*, is discharged under the insolvent acts, and makes an assignment of his property for the benefit of his creditors, the assignee must be made a party before the suit can be further proceeded in. (*Williams v. Kinder*, 4 Ves. Rep. 387.) The proper course for the defendant, in such a case, if he wishes to have the suit proceeded in, or put an end to, is to apply to the Court for an order, that the assignee file a supplemental Bill, in the nature of a Bill of revivor, within such time as shall be prescribed by the Court for that purpose, or that the complainant's Bill be dismissed. And notice of such application should be served upon the assignee, as well as upon the complainant in the original suit. (*Porter v. Cox*, 5 Mad. Rep. 80.) This proceeding is in analogy also to the statutory direction in case of the abatement of a suit by the death of the sole complainant, where his representatives neglect to revive the suit. (2 R. S. 185, § [118] 124.) From the report of the case of *Massey v. Gillelan* (1 Paige R. 644), it would seem to have been decided, that the suit might be continued, as at law, in the name of the original complainant, upon his giving security for costs. The question, however, as to the right of the complainant to proceed without bringing the assignees before the Court by a supplemental Bill, was neither raised nor considered, in that case ; as the defendant merely asked, that the suit should not be permitted to proceed in the name of the insolvent debtor, unless security for costs was filed. But in the subsequent case, of *Garr v. Gomez*, in the Court for the correction of errors (9 Wend. R. 649), the principle, that the suit becomes defective in such a case, and cannot be proceeded in, if objected to, by the defendant, until the assignees are brought before the Court, is distinctly recognised. It is proper also to remark, that in the case of an assignment under the bankrupt or insolvent acts, the suit is not strictly abated, even as to the complainant ; but is merely become so defective, that he cannot proceed therein, until the assignee is brought before the Court. And the assignee becomes so far the legal and equitable representative of the rights of the complainant, that upon a new and supplemental Bill in the nature of a Bill of revivor and supplement being filed by the assignee, to continue the proceedings in his own name, it is not necessary to make the former complainant a party thereto ; which would be necessary in the case of an

is become vested in another, by a title not derived from the former party, as in the case of a succession to a

assignment of only a part of the interest of the complainant in the subject-matter of the suit. The complainant, however, who has still an interest in having his debts paid out of the assigned property, or at least has an interest in the surplus, if there should be any, is not obliged to abandon the suit absolutely, if the suit is necessary for his protection; although the assignee refuses to proceed therein, without making any compromise of the suit with the defendant. In that case the complainant may proceed in his own name; but as the assignee has become a necessary party as to all subsequent proceedings in the suit, the complainant must bring him before the Court by a supplemental Bill. (Mitford's Equity Plead. 66, 4th Lond. edit.; Story's Eq. Pl. 282, n.; 2 John. Ch. Rep. 18). In such a case, however, the complainant might be required to file security for costs, as directed by the third subdivision of the first section of the title of the revised statutes relative to security for the payment of costs (2 R. S. 620)." See ante § 156, § 342; Mills v. Hoag, 7 Paige R. 18; Binks v. Binks, 2 Bligh R. 593. Mr. Cooper insists, that there is no difference between the case of a plaintiff suing *in autre droit*, and that of a plaintiff suing in his own right, as to the right to maintain a supplemental Bill. His language is: "And although Lord Redesdale, in his Treatise, takes a distinction between a sole plaintiff suing *in autre droit*, and a sole plaintiff suing in his own right, laying it down, that, in the first case, if the interest determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as new assignees of a bankrupt, that the suit may be continued by a supplemental Bill; but that in the other case of a sole plaintiff suing in his own right, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees, the benefit of the proceedings cannot be had by or against the assignees by a supplemental Bill, but must be sought by an original Bill; yet, with great deference to so high an authority, I must observe, that this distinction certainly is, in the case of bankruptcy, and some others, now disregarded in practice, and which practice seems sanctioned by the later authorities." Cooper's Eq. Pl. 76; Ante § 340, note. Whether a suit in Equity is abated by the bankruptcy of the plaintiff, as well as defective, has been a matter of doubt. But it seems now thought, that the weight of authority is, that it is defective merely, and that the assignees may be brought forward by a supplemental Bill. See Cooper Eq. Pl. 76, 77; Mitf. Eq. Pl. by Jeremy, 65, and note (1); Id. 66, and notes; Id. 67. Lord Redesdale's language is: "If a commission of bankrupt issues against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject is, unless he is a mere trustee, generally transferred to his

bishopric or benefice, or in the case of the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person, becoming entitled by the event described, must also be obtained by an original Bill in the nature of a supplemental Bill; though, if the defendant, whose interest has thus determined, is not the sole defendant, the new Bill is supplemental to the rest of the suit, and is so termed and considered.¹

assignees; and to bring them before the Court a supplemental Bill is necessary; to which the bankrupt or insolvent debtor is not usually required to be a party, although a bankrupt may dispute the validity of the commission issued against him. But, if plaintiff, a bankrupt may proceed himself in the suit, if he disputes the validity of the commission; or a bankrupt or insolvent may proceed, if the suit is necessary for his protection; or if his assignees do not think fit to prosecute the suit, and he conceives, that it is for his advantage to prosecute it. Under those circumstances, however, he must bring the assignees before the Court by supplemental Bill, as any benefit, which may be derived from the suit, must be subject to the demands of the assignees, unless he seeks his personal protection only against a demand, which cannot be proved, or which the person making the demand may not think fit to prove, under the commission issued against the bankrupt, or from which the insolvent debtor may not be discharged." Lord Eldon, in alluding to cases of bankruptcy, used the following language in *Randall v. Munford* (18 Ves. 427, 428)—"This Court, however, without saying, whether bankruptcy is or is not strictly an abatement, has said, that according to the course of the Court, the suit has become as defective, as if it was abated; and as the assignees will have the benefit of the suit, and assuming in practice, that he, who is a bankrupt, will continue so, the course, which the Court has taken, is to require him to bring his assignees before it by Bill of revivor, or supplemental Bill in the nature of a Bill of revivor, or by whatever name it is called. And the Court supposing, that the bankrupt will find the means of giving the assignees notice, and not troubling itself with that difficulty, dissolves the injunction, frequently with great injustice, if they do not come here." In *Harrison v. Ridley*, Com. R. 589, a Bill by the assignees of an insolvent debtor was called an original Bill in the nature of a Bill of revivor.

¹ *Mif. Eq. Pl.* by Jeremy, 67, 68, 72. See *Foster v. Deacon*, 6 Madd. R. 59; *Lloyd v. Johnes*, 9 Ves. 54.; *Oldham v. Eboral*, 1 Coop. Sel. Cas. 27. Lord Redesdale has in another passage repeated the doctrine stated

§ 351. The voluntary alienation of property, pending a suit, by any party to it, is not permitted to affect the

in this and the preceding section, with some additional explanations. He says—"If the interest of plaintiff or a defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming entitled upon the death of a prior tenant under the same settlement, the suit cannot be continued by Bill of revivor, nor can its defects be supplied by a supplemental Bill. For though the successor in the first case, and the remainder-man in the second, have the same property, which the predecessor, or prior tenant, enjoyed; yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But, in general, by an original Bill in the nature of a supplemental Bill, the benefit of the former proceedings may be obtained. If the party, whose interest is thus determined, was not the sole plaintiff or defendant, or if the property, which occasions a Bill of this nature, affects only a part of the suit, the Bill as to the other parties, and the rest of the suit, is, as has been before observed, supplemental only. There seems to be this difference between an original Bill in the nature of a Bill of revivor, and an original Bill in the nature of a supplemental Bill. Upon the first the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner, as if filed, or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second. But in the other case a new defence may be made; the pleadings and depositions cannot be used in the same manner, as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the Court to make a similar decree." Mitf. Eq. Pl. by Jeremy, 72, 73. Lord Eldon, in commenting on this passage, in *Lloyd v. Johns*, 9 Ves. 54, 55, used the following language:—"With respect to the passage, in which it is supposed there is some obscurity, I may say upon the authority of Lord Redesdale himself, it is not very easily to be removed; nor capable of being removed by stating any judgment authorizing that passage. The proposition, that *in general*, by an original Bill in the nature of a supplemental Bill, the benefit of the former proceedings may be obtained, is properly so restrained. It cannot be always; for undoubtedly the Equities, as against one tenant in tail and another, not applying to the case of contract with the former, may have very different effects with reference to the interest derived out of that *donum*, out of which both estates tail are derived. In the distinction stated between an original Bill in the nature of a Bill of revivor, and an original Bill in the nature of a supplemental Bill, Lord Redesdale does not say, that in the

rights of the other parties, if the suit proceeds without a disclosure of the fact, except so far as the alienation may

latter the pleadings and depositions in the first cause cannot be used ; but that they cannot be used in the same manner. And the difficulty arises upon the negative proposition, without explaining, what is the precise idea, that belongs to it. These passages do not determine the sense of the words, '*the proceedings upon the former Bill.*' You must endeavor to determine, to what stage the cause must have gone, to entitle you to say, there are proceedings, the advantage of which the second Bill may draw to itself; as Lord Redesdale expresses it. But the proposition so put comprehends every stage of the cause, as furnishing the question, between the answer and the final decree obtained and executed. And general doctrine of this sort does not enable you to say, what the Court is to do in every intermediate case between the first and the last stages of the cause, where the interest of the plaintiff or defendant is absolutely gone, and where a person succeeding as second tenant in tail, or the first coming into existence after the suit instituted, can obtain the benefit, and what benefit." He added—"It is difficult to say, what the Court has done, or ought to do, embracing the case of answer only : the case of answer replied to, and witnesses examined *de bene esse* ; witnesses examined in the cause, and dying before the hearing : an issue directed : a trial ordered and not had : an application for a third new trial : decree not obtained : decree obtained, and not executed : accounts taken, that the Court may know what decree to make ; including also the questions, whether, if the former Bill contained a bad statement for this plaintiff, he would have been bound ; and, if not bound, whether he would have been affected by it. I apprehend, a Court of Equity would in many cases, not all, admit a plea of dismissal upon the merits to bar a remainder-man in tail of a new estate tail under the same gift, as well as a person claiming the same estate. I admit, there is no judgment in point. But the justice of the Court furnishes this as a principle ; that it is of absolute necessity, when once it is said, the tenant in tail shall represent the inheritance, that those, who are entitled to the inheritance, shall in this Court have the benefit and the disadvantage of a proceeding by him. But it has been always thought competent to add this qualification : liberty to apply special circumstances, under which the estate is held, as a ground for saying, they ought not to have that benefit, or suffer that disadvantage. They have in general put in new answers. Consider the inconvenience. If the Bill claims a charge upon the whole inheritance, and created by the author of all the gifts, comprising the inheritance, an estate for life, with remainders to the first and other sons in tail ; and the first tenant in tail in being is made a party, and he dies without issue ; according to the constant practice all the proceedings are had against the second son, as if he had been originally a party. And if I am not mis-

disable the party from performing the decree of the Court.¹ Thus, if, pending a suit by a mortgagee to fore-

led by the authority of Lord Redesdale, provoked, I may say, to accuracy upon this subject, those proceedings would be carried on by a bill, not stating the facts in the original Bill, but stating, that the original Bill had represented the facts, as there represented. And practice will sanction the declaration, that this form would sustain the suit against the second son, as a due mode of putting in issue the facts, that had been put in issue against the eldest. Suppose the witnesses examined, not only in chief, but *de bene esse*; and consider the inconvenience, if a Court of Justice says, the plaintiff need bring no one before the Court but the first tenant in tail; that the suit so instituted is perfect; that first tenant in tail representing the whole inheritance, all subsequent to him, either for their benefit or otherwise; supposing the merits to depend upon the testimony of one or two old infirm individuals, whom the tenant in tail is desirous to examine *de bene esse*; whose evidence would entitle him to a decree of dismissal: it would be the grossest injustice, if, by the accident of his death, the cause perhaps delayed, because containing such matter, the subsequent tenant in tail is to begin an original suit, in which he cannot have the benefit of those depositions; and the enjoyment of the estate is to depend upon the accident; as he was not permitted to be a party to a suit, in which he might have had the same evidence; and it is not competent to him in any manner to protect his estate upon the truth and fact of the case. I cannot hold that a good judgment, which determines, that one tenant in tail only need be a defendant; but that the proceedings, had against him for all, shall not be for the benefit of all. The case of witnesses examined in chief admits the same consideration. So, where tenant in tail files a Bill, as a person representing the whole inheritance, and against an individual, who states by his answer a case entitling the plaintiff to a decree. If he dies before the hearing, it is extraordinary to say, that if that tenant in tail, at whom the Court looks, as supporting the whole interest in the inheritance, had lived, he should have been able to obtain a decree protecting him and all: yet by the accident of his death, before the right of the others commenced, the benefit of that shall be lost. In the very ordinary case, where the Bill is filed for the purpose of raising a charge against the inheritance, divided into estates tail, against a remote remainder-man; those intermediate not being yet *in esse*; if the cause has proceeded a certain length, an intermediate remainder-man coming *in esse*, you go on to state the former proceedings; and that is

¹ Mitf. Eq. Pl. by Jeremy, 73. See Ante § 156, § 342, note. The distinction between cases of voluntary alienation *pendente lite*, and involuntary alienation by operation of law, as insolvency or bankruptcy, is fully discussed in *Sedgwick v. Cleaveland*, 7 Paige R. 290 to 292. Ante § 342, note.

close the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, [*287] *an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity of redemption, who can only have the benefit of a title so gained by filing a Bill for that purpose.' But upon a Bill by a mortgagor to redeem, if the mortgagee assigns, *pendente lite*, the assignee must be brought before the Court by the mortgagor, who cannot otherwise have a reconveyance of the mortgaged property.² The Bill, which is necessary in the latter case, is merely supplementary; but in the former case, the Bill must be an original Bill in the nature of a cross-bill, to redeem the mortgaged property.³ If the party aliening be the plaintiff in the suit, and the alienation does not extend to his whole interest, he may also bring the alienee before the Court by a Bill, which, though in the nature of an original Bill against the alienee, will be supplemental against the par-

held allegation sufficient to put the facts in issue with regard to that sort of defendant. But I admit the general opinion, that, if in such a case, witnesses have been examined against the former defendant, yet upon the other's coming into existence, the plaintiff must examine again. It is so said. I doubt it; and am of opinion, that, whenever the case shall arise, if the witnesses should die, this Court, upon its own principles, may hold the subsequent defendant entitled to the benefit of that testimony. So, I should also say, this sort of principle, arising out of what the Court does for the convenience of justice, must be applied both for and against the tenant in tail; subject always to this, that, where the tenant in tail takes a different interest, or rather a similar interest, not affected by the same circumstances, it is competent both for and against him, to bring forward the equities belonging to those different circumstances, as contradistinguishing his case. And that is the result of the passage in Lord Redesdale's book, which so stated, I think right, that the difference between the issue in tail, heir, or devisee, and a remainderman claiming by force of a new limitation is, that in the latter case the party is not bound by the shape of the defence." See also Cooper Eq. Pl. 80, 81, 82; Mitf. Eq. Pl. by Jeremy, 98; Oldham v. Eboral, 1 Coop. Sel. Cas. 27; Mechanics Bank of Alexandria v. Setons, 1 Peters R. 310.

¹ Mitf. Eq. Pl. by Jeremy, 73.

² Ibid.

³ Ibid.

ties to the original suit ; and they will be necessary parties to the supplemental suit, only so far as their interests may be affected by the alienation.¹ Generally, in cases of alienation, *pendente lite*, the alienee is bound by the proceedings in the suit after the alienation, and before the alienee becomes a party to it ; and depositions of witnesses, taken after the alienation, but before the alienee became a party to the suit, may be used by the other parties against the alienee, as they might have been used against the party, under whom he claims.²

§ 351. *a.* The same rule would prevail, where a vendee should file a Bill for a specific performance of a contract for the purchase of land against the vendor, and pending the suit, he, (the vendee,) should sell to one or more sub-purchasers. In such a case the sub-purchasers need not be made parties ; and they would be bound by the decree in the suit. Indeed, they would have a right to insist, that their immediate vendor should proceed in the original suit for their benefit and at their charge, upon the ground, that by the sub-sale, he had in effect become their trustee of all the rights under the original contract.³ But, if the original vendee had entered into a contract with the sub-purchasers, not that he, but that the original vendor should convey to them, the sub-purchasers, if they purchased before any suit brought, might then have been necessary and proper parties to a suit for a specific performance against the original vendor by the original vendee.⁴

¹ Mitf. Eq. Pl. by Jeremy, 73, 74, and cases there cited ; Cooper Eq. Pl. 77.

² Ibid.

³ Wood v. Griffith, 1 Swanst. R. 55, 56 ; 2 Sugden on Vendors, ch. 8, § 2, art. 39, p. 45, 46, 10th edit. 1839 ; — v. Walford, 4 Russ. R. 372 ; 1 Daniell. Ch. Pract. 375 ; 2 Story Eq. Jurisp. § 1050, § 1051.

⁴ — v. Walford, 4 Russ. R. 372 ; 1 Daniell. Ch. Pract. 375.

§ 352. A supplemental Bill, or an original Bill in the nature of a supplemental Bill, is not in all cases either proper, or necessary, merely because new events have occurred since the original Bill. But (as we have seen) the facts must be material to the original cause, or be such, [*288] *as could not, in that stage of the original cause, be brought into it without such a Bill.¹ For, where there is no alteration in the interest of the parties, nor any particular circumstance requiring further discovery ; but where a fact only has occurred, which might be proved under the proceedings in the original Bill, as in taking an account before the Master under the prayer of the original Bill, and the relief is not varied by the supplemental matter, but the plaintiff may have the relief prayed for by such supplemental Bill under the original Bill, the supplemental Bill is improper.²

§ 353. Having thus stated these particulars in relation to the general nature of an original Bill in the nature of a supplemental Bill, it remains to state, what the proper frame of such a Bill should be. A Bill for this purpose must state the original Bill, the proceedings upon it, the event, which has determined the interest of the party, by or against whom the former Bill was exhibited, and the manner, in which the property has vested in the person who has become entitled. It must then show the ground, upon which the Court ought to grant the benefit of the former suit to or against the person, who has become so entitled ; and it must pray the decree of the Court adapted to the case of the plaintiff in the new Bill.³ This Bill, though partaking of the nature of a supplemental Bill,

¹ Ante § 332, 333, 335, 336, 337.

² *Adams v. Dowding*, 2 Madd, R. 55. See Gilb. For. Rom. 109.

³ *Mitf. Eq. Pl. by Jeremy*, 99.

is not an addition to the original Bill, but another original Bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former Bill.¹

* § 354. Thirdly ; a Bill of revivor, strictly so [*289] called. This is the usual mode of reviving and continuing the proceedings, whenever there is an abatement of the suit before its final consummation. An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended.² But, in the sense of Courts of Equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But, in Equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation ; and it may be revived. The death, or marriage, of one of the original parties to the suit, is the most common, if not the sole cause, of the abatement of a suit in Equity. As the interest of a plaintiff usually extends to the whole suit, therefore, in general, upon the death of a plaintiff, or the marriage of a female plaintiff, all proceedings become abated.³ Upon the death of a defendant, likewise, all proceedings become abated as to that defend-

¹ Mitf. Eq. Pl. by Jeremy, 98, 99, and cases there cited ; *Phelps v. Sproule*, 4 Sim. R. 318 ; *Vigers v. Lord Audley*, 9 Simons R. 75. The following is the common prayer of an original Bill in the nature of a supplemental Bill, in the case of the bankruptcy of the defendant pending the suit. "And that the plaintiffs may have the benefit of the said suit and proceedings against the said D, (the assignee), and may have the same relief against him, that he might have had against the said B, (the bankrupt) in case he had not become bankrupt, and for further and other relief." Van Heyth. Eq. Drafts. 339.

² 3 Black. Comm. 168.

³ Mitf. Eq. Pl. by Jeremy, 57.

ant.¹ But upon the marriage of a female defendant the proceedings do not abate, though her husband ought to be named in the subsequent proceedings.²

§ 354. *a.* A Bill of revivor, properly so called, lies only by or against the persons, who are the proper representatives of the deceased party. If the suit respects the personal assets only of the deceased party, his executor or administrator is the proper party, by or against whom the revivor is to be. If the suit respects the real estate of the deceased party, his heir or heirs are the proper parties to the Bill of revivor.³

[*290] *§ 355. It is highly probable, that the Bill of revivor was borrowed from the civil law, or the canon law. If the party died pending the suit, by the civil law and the canon law, the other party had a *citatio ad re-assumendam causam*. But then it was necessary to be made to appear to the judge by the proof, that the party was dead ; for it was not enough for the judge to know it in his private capacity ; but it was necessary, that it should be proved judicially to him. This process lay only against the heir of the defendant, and for the heir of the plaintiff, and so from heir to heir, *usque ad conclusionem in causâ*, and even after sentence, to have execution of the sentence pronounced.⁴ We shall see, presently, how close the analogy is between the subpœna to revive, and the *citatio ad re-assumendam causam*.

¹ Mitf. Eq. Pl. by Jeremy, 57, 58 ; Cooper Eq. Pl. 63 ; Gilb. For. Rom. 175, 176, 177, 178. It is said, that if a suit abates by the death of the defendant, the plaintiff may bring a new original suit, or a Bill of revivor at his election ; for he may be able to make a better case than by his first Bill. Wyatt Pr. Reg. 91 ; Spencer v. Wray, 1 Vern. 463 ; Anon. 3 Atk. 485, 486 ; Nicoll v. Roosevelt, 3 John. Ch. R. 60.

² Mitf. Eq. Pl. by Jeremy, 58 ; Cooper Eq. Pl. 64 ; Gilb. For. Rom. 174, 175, 176, 177 ; Wyatt Pr. Reg. 90, 91, 92.

³ Post § 364 ; Mitf. Eq. Pl. by Jeremy, 69.

⁴ Gilb. For. Rom. 172.

§ 356. The death of one of the parties to a suit does not in all cases necessarily produce such an abatement of it, as to suspend all further proceedings. If the interest of a party dying so determines, that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, (which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency), the suit does not so abate, as to require any proceeding to warrant the prosecution of the suit against the remaining parties.¹ But, if the party so dying be the only plaintiff, or the only defendant, there will necessarily be an end of the suit, if there is no subject of litigation remaining.²

§ 357. If the whole interest of a party dying survives *to another party, so that no claim can be made [*291] by or against the representatives of the party dying ; as, if a Bill is filed by or against trustees or executors, and one dies not having possessed any of the property in question, or done any act relating to it, which may be questioned in the suit ; or if a Bill is filed by or against husband and wife, in right of the wife, and the husband dies under circumstances, which admit of no demand by or against his representatives, the proceedings do not abate.³ So, if a surviving party can sustain the suit, as in the case of several creditors, plaintiffs on behalf of themselves and other creditors, the proceedings do not abate.⁴ For the persons, remaining before the Court in all these cases, either have in them the whole interest

¹ Mitf. Eq. Pl. by Jeremy, 58, and cases there cited ; Cooper Eq. Pl. 65 ; Gilb. For. Rom. 176.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 58, 59.

⁴ Ibid.

in the matter in litigation, or at least are competent to call upon the Court for its decree.¹

§ 358. Upon the same principle, if two joint tenants exhibit their Bill, and one dies, this will not abate the suit as to the other; for the whole interest belongs to the survivor.² But it is otherwise in the case of tenants in common; for if one of them dies, the suit abates; because his right descends to his representatives, who may revive.³ And though the proposition stated in our law books is true, that where a tenant in common dies, his representative may revive without the other; yet it is true only in a qualified sense.⁴ For where two tenants in common filed their Bill, and one died, and a Bill of revivor was brought by his representative against the same defendants, without joining the surviving tenant in [*292] *common, either as co-plaintiff, or as a defendant in the Bill of revivor, it was decided, after a great deal of discussion, that, although the representative of the deceased tenant in common might revive without making the other a co-plaintiff; yet that, if he did so, he must make him a defendant.⁵

¹ Mitf. Eq. Pl. by Jeremy, 58, 59, and cases there cited; *Fallowes v. Williamson*, 11 Ves. 306, 313.

² *Cooper Eq. Pl.* 65; *Boddy v. Kent*, 1 Meriv. R. 364; *Wright v. Dorset*, 3 Ch. Rep. 66; *Anon.* 2 Freem. 6.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Cooper Eq. Pl.* 65, 66; *Boddy v. Kent*, 1 Meriv. R. 364; *Fallowes v. Williamson*, 11 Ves. 306, 313. The reasoning of Lord Eldon on this subject, in *Fallowes v. Williamson*, 11 Ves. 306, 309, 310, is so full and important in its explanations of general principles, that though long, it is thought best to insert it at large in this place. "If for want of authority," (says he), "I am to reason upon general principles, where joint tenants file a Bill, and by the death of one the interest survives, without doubt there is no abatement; but the survivor may go on. But where the interest is that of tenants in common, there is prodigious difficulty and vast injustice in deciding, that if one dies, the representatives of that one may, without making their companion a co-plaintiff, revive. The first difficulty is of this sort. The plaintiffs in the Bill of revivor suggest

§ 359. If there are several plaintiffs, and the defendant dies, some of them may proceed to revive without

upon the Bill, that they are the representatives, and that they stand in the place of the original plaintiff. The defendant upon this argument either is, or is not, at liberty to answer. He certainly may show cause against the revivor in some way. Suppose he does not; and the representatives revive. If the co-plaintiff with the original plaintiff, deceased, does not admit, that those persons are the representatives, what is there in the state of the record, so put, authorizing the Court to say, the suit is revived, in that stage, until the surviving tenant in common has done some act acknowledging the relation, in respect of which he and the alleged representative agree, that there is a right to revive? The surviving tenant in common must have some opportunity of doing that. He may state, that he is filing a supplemental Bill to bring the real representative before the Court. If he is made a co-plaintiff, by joining he admits the character of the representative. But suppose, he knows, the other is not the heir, that he is obliged to get on with his own suit; and knows another person to be the heir; without whom he cannot get on: what is there upon the record, where the Bill of revivor does not make the survivor a co-plaintiff, to show, that he admits the character of the plaintiff reviving? Beyond that, there is another difficulty, and a very mischievous consequence, in holding, that the representatives may revive without the original co-plaintiff; even if he does admit, that they are the representatives. Circumstances may have taken place, from which the survivor may know, it would be gross injustice for him to pursue the suit: and that the representatives of the deceased tenant in common know that. Suppose they revive; and instead of a plea or demurrer the defendants state the objection by answer; and insist upon it, as entitling them to the same benefit, as if it had been by plea; the cause might go to a hearing, when revived, in the absence of the original co-plaintiff; and he may be engaged, and without his consent, in further litigation, where he thinks it unrighteous; and if he had been sole plaintiff, might have desired to have his Bill dismissed with costs. In what mode then is he to come, and say he will have nothing more to do with the suit; for there must be some form, in which he shall be at liberty to do so. On the one hand, there is great hazard of injustice, whether the alleged representatives are so, or not; and if it was to be considered originally, there is vast weight in the doubt, that has been referred to; and upon general principles I should be disposed to hold, that the revivor ought to be by both; for it is true, as has been stated, that upon a revivor by *scire facias* all must join. It would be strange upon a *scire facias* to say, the proceedings were to be put in the same plight, not only as to the persons suing it out, and against whom it was sued out, but against persons, to whom it was not addressed, and having

the others, if they refuse ; for the obstinacy of some of the parties shall not hinder the rest from asserting their own interest. But in such cases, the original plaintiffs, who refuse to join, should be made defendants in the Bill of revivor.¹

[*294] *§ 360. If a man marries an administratrix, and a decree is obtained against him and his wife for a demand out of the assets, and the wife dies before the decree is executed, the suit is abated ; and the plaintiff must revive it against the administratrix of the wife, before any further proceedings can be had in the cause against the husband ; for the assets of the wife are primarily liable to satisfy the decree.²

§ 361. If, upon the death of the husband of a female plaintiff, suing in her right, the widow does not choose to proceed in the cause, the Bill is considered as abated,

no knowledge of it. Next ; if the representatives are to file their Bill of revivor, and that is only as to the interest of the deceased, though that Bill states the original cause as the cause of both, must not the two causes be joined ; so that the Court can know, in which you are going on ? It would be novel, and against the principle of pleading in Equity, that where the interest is entire, as to the subject of the suit, though divided in enjoyment, and the defendant might object for want of parties, that the Bill of the representatives should revive as to that suit, the interest of the other plaintiff not being abated ; and therefore the two causes are joined ; though the survivor may have no inclination to go on. What is revived ? The suit as to the interest of the deceased. But then it must, in the contemplation of the Court, be a proceeding at the suit of the survivor, as his interest is not abated ; and at the suit of the representative, standing in the place of the deceased. The consequence is, all subsequent process must be at the suit of both, and in a cause, entitled in the names of both."

¹ Gilb. For. Rom. 176 ; Wyatt Pr. Reg. 90, 94.

² Cooper Eq. Pl. 67, 76, 210 ; *Jackson v. Rawlins*, 2 Vern. R. 194 and Raithby's note (2) ; *Bachelor v. Bean*, 2 Vern. R. 61 ; *Sanderson v. Crouch*, 2 Vern. R. 118. It would seem, from these cases, that the husband was not liable, except for the assets, of which he was possessed, or which came to his or the wife's hands after the intermarriage. See also *Norton v. Sprigg*, 1 Vern. 309.

and she is not liable to the costs.¹ If she thinks proper to proceed in the cause, she may do so without a Bill of revivor; for she alone has the whole interest, and the husband was a party in her right, and therefore the whole advantage of the proceedings survives to her; so that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it.² But if she takes any step in the suit after her husband's death, she makes herself liable to the costs from the beginning.³ If a female plaintiff marries pending a suit, and afterwards, before revivor, her husband dies, a Bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed.⁴ But the subsequent proceedings ought to be in the name and with the description which she has acquired by the marriage.⁵

¹ Mitf. Eq. Pl. by Jeremy, 59, 60, and cases there cited; Gilb. For. Rom. 175, 176; Wyatt Prac. Reg. 91, 92. Upon this subject Mr. Cooper has commented as follows: "In the case of husband and wife suing for a demand in right of the wife, though if the husband dies, it is no abatement, as herein before mentioned, yet if they have examined witnesses, and afterwards the husband dies, the wife is not bound, unless she chooses; and she may file a new Bill and examine the same witnesses over again, as if no examination had ever taken place. But if the Bill is brought against the husband and wife, where the wife's property is concerned, as if she is an executrix, and the defendants answer, and witnesses are examined, and publication passes, and the husband afterwards dies, it has been decided, that the wife *shall* be bound by the answer and depositions. Upon this I cannot help observing, that there seems an inconsistency in the principle, that the wife surviving should be bound by the answer and depositions, when she was defendant with her husband, but not by their Bill and depositions, when they stood in the character of plaintiffs. In the last mentioned case, the Court takes a distinction, that although the wife shall be bound by the answer and depositions in a matter of personalty; yet in case of the wife's inheritance it might be otherwise. But in another case the Master of the Rolls seems to have allowed a husband's answer, whereby he had confessed a settlement, to be read as evidence against the wife, though it was insisted, that, it being the case of the wife's inheritance, she was not bound by such evidence. And there

² Ibid.³ Ibid.⁴ Ibid.⁵ Ibid.

§ 362. For the like reason, if the plaintiff, in a Bill of interpleader, should die after a decree, that the defendants should interplead, there will be no abatement of the suit; for by such a decree the suit is terminated as to the plaintiff, though the litigation may still continue between the defendants under the decree of interpleader; and in that event the cause may still proceed, without any revivor against the representatives of the plaintiff.¹

[*296] *§ 363. Whenever there is an original Bill and a cross Bill thereto, if an abatement takes place, there must generally be a Bill of revivor in each cause. But if the Bills regard an account, and there is a decree for an account, the two causes become thereby so consolidated, that one Bill of revivor, praying for a revivor of the whole, will revive both causes.²

§ 364. Having stated the cases, where a Bill of revivor is not necessary, notwithstanding an intervening death of one of the parties, let us now proceed to consider the cases, in which a Bill of revivor is necessary and proper. Wherever a suit abates by death, and the

seems an anomaly in another rule of pleading relative to the above-mentioned case of husband and wife, which is, that though where they exhibit their Bill for a demand in her right, and the husband dies, the wife, if she thinks proper, may proceed in the cause without a Bill of revivor, she alone having the whole interest, and the whole advantage of the proceedings surviving to her; so much so, that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it; yet, if she does not choose to proceed in the cause, the Bill is considered as abated, and she is not liable to the costs. And the case is the same, if a female plaintiff marries, pending a suit, and afterwards, before revivor, her husband dies; for her incapacity to prosecute the suit is removed; but the subsequent proceedings are in the name and description, which she has acquired by the marriage." Cooper Eq. Pl. 66, 67, and cases there cited.

¹ Mitf. Eq. Pl. by Jeremy, 60. Ante § 297 a.

² Cooper Eq. Pl. 64; Wyatt Pr. Reg. 88; Hinde's Prac. 51; Gilb. For. Rom. 174.

interest of the person whose death has caused the abatement is transmitted to that representative, which the law gives or ascertains, as an heir at law, or an executor or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested, is alone to be ascertained, the suit may be continued by a Bill of revivor merely.¹ If a suit abates by the marriage of a female plaintiff, and no act is done to affect the rights of the party, but the marriage, no title can be disputed. The person of the husband is the sole fact to be ascertained; and therefore the suit may be continued in this case likewise by Bill of revivor merely.²

§ 365. In the case of a Bill brought by a creditor in behalf of himself and all other creditors, if he dies, the suit may be revived by his personal representative. If the latter does not choose to revive it, then any other creditor, *at least any one, who has proved his [*297] debt under a decree before the Master, may, by a supplemental Bill, continue the cause, and proceed therein for the benefit of all the creditors.³

§ 366. When a suit became abated after a decree signed and enrolled, it was anciently the practice to revive the decree by a subpoena in the nature of a *scire facias*, upon the return of which, the party, to whom it

¹ Mitf. Eq. Pl. by Jeremy, 69; Cooper Eq. Pl. 63, 64.

² Mitf. Eq. Pl. by Jeremy, 69, and cases there cited; Gilb. For. Rom. 175, 177, 189; Wyatt Pr. Reg. 90; Douglas v. Sherman, 2 Paige R. 358; Phelps v. Sproule, 4 Sim. 318.

³ Mitf. Eq. Pl. by Jeremy, 79, and note (t); Dixon v. Wyatt, 4 Madd. R. 393; Burney v. Morgan, 1 Sim. & Stu. 358; Houlditch v. Donnegal, 1 Sim. R. 479; Davis v. Williams, 1 Sim. R. 5. It is often said, that the creditor in such a case has a right to *revive*. But quære, whether the suit in such a case is technically abated? See 1 Eq. Abridg. 2, 3; Cooper Eq. Pl. 65.

was directed, might show cause against the reviving of the decree by insisting, that he was not bound by the decree ; or that for some other reason it ought not to be enforced against him ; or that the person suing the subpoena was not entitled to the benefit of the decree.¹ If the opinion of the Court was in his favor, he was dismissed with costs. If it was against him, or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination, touching any matter necessary to the proceedings.² If he opposed the reviving of the decree on the ground of facts, which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead ; and, issue being joined, and witnesses examined, the matter was finally heard and determined by the Court.³ But if there had been any proceedings, subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings could not be revived except by Bill. The enrollment of decrees being [*298] *now much disused, it is become the practice to revive in all cases, indiscriminately, by Bill.⁴

§ 367. A suit, which has become entirely abated, may be revived as to part only of the matter in litigation, or as to a part by one Bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit upon his death become vested, a part in his real, and a part in his personal, representatives, the real representative may revive the suit, so far as concerns his title, and the personal representative, so far as his demand extends.⁵

§ 368. Therefore, where the plaintiff's intestate had obtained a decree against the defendant for payment of

¹ Mitf. Eq. Pl. by Jeremy, 69, 70, and cases there cited ; Gilb. For. Rom. 177.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Mitf. Eq. Pl. by Jeremy, 79, 80 ; Gilb. For. Rom. 174.

a sum of money, and also for a conveyance of land and a delivery of deeds; but before any thing was done upon it, he died intestate; and the plaintiff, as his personal representative, having revived the decree, the defendant objected, because the heir was not made a party, and a decree could not be revived in parts. But the Court held, that it was like a judgment at law in waste, where there may be two revivors, and they ordered the decree to be revived as to the personalty.¹

§ 369. When there are several plaintiffs or several defendants, all having an interest, which survives, the death of any one of them makes an abatement only as to himself, and the suit is continued as to the rest, who are living.² But if any thing is required to be done by or against the interest of the party, who is dead, his proper representative must be brought before the Court by a Bill of revivor.³ If some of the plaintiffs, entitled to a Bill of revivor, refuse to join in it, they may be [*299] made parties defendant.⁴

§ 370. If a decree is obtained against an executor for the payment of a debt of his testator, and of costs out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets may be pursued in his hands, without reviving against the representative of the original defendant.⁵

§ 370. *a.* Where a Bill is filed by a plaintiff to revive a suit after a decree, and to prosecute the decree, it is

¹ Cooper Eq. Pl. 71, and cases there cited; *Ferrers v. Cherry*, 1 Eq. Abridg. 4 pl. 11.

² Ante § 364.

³ Ante § 364.

⁴ *Finch v. Winchelsea*, 1 Eq. Abridg. 2 pl. 7; *Nicoll v. Roosevelt*, 3 John. Ch. R. 60; Ante § 359.

⁵ Mitf. Eq. Pl. by Jeremy, 78; *Johnson v. Peck*, 2 Ves. 465.

not competent for the defendant in his answer to resist the revival by stating matter, which existed before the decree, or which has arisen since; and such matter, if stated, will be treated as impertinent.¹ The reason is, that if the facts existed before the decree, and the proper time for making them a part of the defence has been permitted to pass by, the omission cannot be supplied in this manner; and if new matter has arisen since the decree, varying the situation of the parties, other means exist for bringing it forward. The right of a party to prosecute a decree, and to do what is necessary for that purpose, cannot depend upon the merits of the decree.²

§ 371. It is a general rule, that no suit shall be revived for costs merely, unless such costs are taxed, and a report thereof made in the lifetime of the party.³ But if costs are to be paid out of an estate, the suit may be revived for them. And the case is still stronger, if a Bill of revivor is brought for a duty and costs, though the costs are not taxed in the defendant's lifetime.⁴

§ 371. *a.* A Bill of revivor cannot properly be brought upon a Bill of discovery merely, after the answer is put in and the discovery is made; for in such a case the entire object of the Bill has been obtained; and the plaintiff can have no motive for reviving it; and the other party has no interest in reviving it.⁵

¹ *Devaynes v. Morris*, 1 Mylne & Craig, 213, 225; Post § 376.

² *Ibid.* Ante § 332, § 333, and notes; Post, § 376, § 423.

³ *Cooper Eq. Pl.* 68; *Gilb. For. Rom.* 181; *Wyatt Pr. Reg.* 93; *Jenour v. Jenour*, 10 Ves. 572. But see *Morgan v. Scudamore*, 2 Ves. jr. 315, 316; *S. C.* 3 Ves. 195; *Glenham v. Stutwell*, 1 Dick. 14; *Dodson v. Oliver*, Bunb. R. 160; *Blower v. Morrets*, 3 Atk. 772; *Kemp v. Morrell*, 3 Atk. 812; *Johnson v. Peck*, 2 Ves. 465. But see *Travis v. Waters*, 1 John. Ch. R. 85.

⁴ *Ibid.*

⁵ *Horsburg v. Baker*, 1 Peters R. 232, 236. After a discovery is obtained upon such a Bill, it is not proper to dismiss the Bill; but the Court should pass an order, that no further proceedings be had in the cause. *Ibid.*

§ 372. Hitherto we have been considering cases, where the plaintiff may revive. In some cases a defendant, after a decree, is permitted to file a Bill of revivor, if the plaintiff, or those standing in his right, neglect to do it; for then the rights of the parties are ascertained; and the plaintiff and the defendant are equally entitled to the benefit of the decree, and equally have a right to prosecute it.¹ But this rule must be taken with some qualification. Lord Hardwicke has *ex- [*300] pressly laid it down, that a defendant can revive only in one instance, and that is, after a decree to account; for in that case both parties are actors.² But the principle has been, by subsequent decisions, extended to every case, in which the defendant can derive a benefit from the further proceedings.³ Thus, where the assignees of a bankrupt filed a Bill against a person, claiming as a mortgagee, and the title of the bankrupt was under a fine by a tenant in tail, as to whose legitimacy a question was made, and a decree was made, directing an issue, in which issue the verdict was against the legitimacy; and then the mortgagee died, and his representatives filed a Bill of revivor; though it was objected on the behalf of the assignees, that a defendant cannot revive, except after a decree for an account; yet the revivor was permitted.⁴

§ 373. Upon the same principle, there would seem to be no objection to a defendant's reviving the suit after a decree in the case of a Bill for the specific performance

¹ Cooper Eq. Pl. 68.

² Cooper Eq. Pl. 68; Anon. 3 Atk. 692; *Devaynes v. Morris*, 1 Mylne & Craig R. 213; Mitf. Eq. Pl. by Jeremy, 4th edit. p. 79.

³ Cooper Eq. Pl. 68; Mitf. Eq. Pl. by Jeremy, 4th edit. p. 79, and note (q).

⁴ Cooper Eq. Pl. 68; *Williams v. Cooke*, 10 Ves. 406.

of an agreement, or for a partition, or for a trustee to convey the legal estate. But the defendant must, in all such cases, have an interest in the further prosecution of the suit. And, therefore, where his only object is to dissolve an injunction and proceed at law, the Court will not permit him to revive.¹ However, in a case, where the plaintiff, after a decree to redeem certain mortgaged premises, filed his Bill of revivor, but neglected to revive, on the time for the defendant's answering being out, the defendant was allowed to revive, and to carry on the decree under the plaintiff's Bill.²

§ 374. In regard to the frame of a Bill of revivor, a [*301] *brief statement may suffice. A Bill of revivor, then, must state the original Bill, or rather, who were the plaintiffs and defendants to it, and what its prayer or object was, and the several proceedings thereon, and the abatement. It ought also to show the title of the plaintiff to revive the suit.³ It is, also, necessary to state so much new matter, and no more, as is requisite to show, how the plaintiff becomes entitled to revive, and to charge, that the cause ought to be revived, and to stand in the same condition, with respect to the parties to the original Bill, as it was at the time when the abatement happened; and it must pray, that the suit may be revived accordingly.⁴ It may likewise be necessary in many cases to pray, that the defendant may answer the Bill of revivor; as in the case of an admission of assets or an account of the personal estate being requisite from

¹ Cooper Eq. Pl. 69.

² Cooper Eq. Pl. 68, 69, and the cases there cited; Mitf. Eq. Pl. by Jeremy, 79; 1 Eq. Abridg. 2, 3; Wyatt Pr. Reg. 92.

³ *Phelps v. Sproule*, 4 Simons R. 318; *Vigers v. Lord Audley*, 9 Sim. R. 72, 75; Mitf. Eq. Pl. by Jeremy, 76; Coop. Eq. Pl. 70.

⁴ Cooper Eq. Pl. 70; Comyns Rep. 570; Mitf. Eq. Pl. by Jeremy, 76.

the representative of a deceased party.¹ In this latter case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely.² But if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit.³ And the prayer of the Bill, therefore, in such a case usually is, not only, that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, such accounts may be taken. And so far the Bill is in the nature of an original Bill.⁴

¹ Cooper Eq. Pl. 70; Wyatt Pr. Reg. 91; Mitf. Eq. Pl. by Jeremy, 76.

² Ibid.

³ Cooper Eq. Pl. 70; Mitf. Eq. Pl. by Jeremy, 76.

⁴ Cooper Eq. Pl. 70, and cases there cited; Gilb. For. Rom. 173, 174; Wyatt Pr. Reg. 91, 92, 93, 94. This passage is taken by Mr. Cooper almost literally from Lord Redesdale's Treatise (Mitf. Eq. Pl. by Jeremy, 76, 77). But the few words added by Mr. Cooper make the sense more clear and definite, and I have therefore followed the latter. The following passage from Lord Redesdale's Eq. Pl. 77, 78, may be useful to show the practice as to Bills of revivor. "Upon a Bill of revivor" (says he), "the defendants must answer in eight days after appearance, and submit, that the suit shall be revived, or show cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion, as a matter of course. The ground for this is an allegation, that the time allowed the defendant to answer by the course of the Court is expired, and that no answer is put in. It is therefore presumed, that the defendant can show no cause against reviving the suit in the manner prayed by the Bill. An order to revive may also be obtained in like manner, if the defendant puts in an answer, submitting to the revivor, or even without that submission, if he shows no cause against the revivor. Though the suit is revived of course in default of the defendant's answer within eight days, he must yet put in an answer, if the Bill requires it. As, if the Bill seeks an admission of assets, or calls for an answer to the original Bill, the end of the order of revivor being only to put the suit and proceedings in the situation, in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for revivor has been thus obtained, yet if the defendant

§ 375. If a defendant to an original Bill dies before putting in an answer; or after an answer, to which exceptions have been taken; or after an amendment of the Bill, to which no answer has been given; the Bill of revivor, though requiring in itself no answer, must pray, that the person, against whom it seeks to revive the suit, may answer the original Bill, or so much of it, as the exceptions, taken to the answer of the former defendant, extend to, or as the amendment remaining unanswered requires.¹

§ 376. Where a Bill of revivor is brought by a de-

conceives, that the plaintiff is not entitled to revive the suit against him, he may take those steps, which are necessary to prevent the further proceeding on the Bill, and which will be noticed in treating of the different modes of defence to Bills of revivor. And though these steps should not be taken, yet if the plaintiff does not show a title to revive, he cannot finally have the benefit of the suit, when the determination of the Court is called for on the subject." He adds:—"After a cause is revived, if the person reviving finds the original Bill to require amendment, and the pleadings are in such a state, that an amendment of the Bill would be permitted, if the deceased party were living, the Bill may be amended notwithstanding the death of that party; and matters may be inserted, which existed before the original Bill was filed, and stated, as if the deceased party had been living." In Van Heythuysen's Equity Draftsman, p. 340 to p. 346, will be found the common forms of Bills of revivor. The common prayer in the case of a Bill of revivor on the death of the plaintiff, is: "To the end, therefore, that the said defendant may answer the premises, and that the said suit and proceedings, which so became abated as aforesaid, may stand revived, and be in the same plight and condition as the same were in at the time of the death of the said J. A., or that the said defendant may shew good cause to the contrary; May it please, &c." In the case of the death of the defendant, it is as follows:—"Therefore, that the said suit and proceedings, which became so abated by the death of the said S. N., may stand and be revived against the said T. R. and be in the same plight, state and condition, as the same were in at the time of the abatement thereof. And that plaintiff may have the benefit thereof; or that the said defendant T. R. may shew cause, why the said suit and proceedings should not be so revived, and that the same may be revived accordingly," Van Heyth. Eq. Drafts. 341, 342.

¹ Mitf. Eq. Pl. by Jeremy, 76, 77, and cases there cited; Cooper Eq. Pl. 70, 71.

fendant after a decree, it merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided.¹

§ 377. Fourthly ; a Bill in the nature of a Bill of revivor. We have seen, that a Bill of revivor, properly so called, lies only in cases, where a death intervenes, and it is necessary to bring the proper real or personal representatives of the deceased party before the Court ; or, where, by reason of the marriage of a female plaintiff, her rights are so modified, that the suit cannot be carried on by herself alone, but her husband becomes a necessary party.² In each of these cases, there is no other fact to be ascertained, than whether the new party brought before the Court has the character imputed to him. If he has, the revivor is of course.³ But there are many cases, in which there are other facts, which [*304] may be brought into litigation, besides the mere question of the character of the new party ; and to such cases, therefore, the simple Bill of revivor does not technically apply. Under such circumstances, an original Bill, in the nature of a Bill of revivor, is the appropriate process to bring those facts before the Court, and to put the original proceedings again in motion, and enable the new party to have the benefit of the former proceedings.⁴

§ 378. Thus, if the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest, that the title to it, as well as

¹ Mitf. Eq. Pl. by Jeremy, 79 ; and cases there cited ; Cooper Eq. Pl. 71. *Devaynes v. Morris*, 1 Mylne & Craig, 213, 225. Ante § 370 a.

² Ante, § 364 ; Cooper Eq. Pl. 64.

³ Ibid.

⁴ Mitf. Eq. Pl. by Jeremy, 71, 97 ; Wyatt Pr. Reg. 90, 91.

the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of a real estate, the suit is not permitted to be continued by a Bill of revivor. An original Bill, upon which the title may be litigated, must be filed. And this Bill will have so far the effect of a Bill of revivor, that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former Bill, as if the suit had been continued by a Bill of revivor.¹

[*305] *§ 379. The ground of this distinction between Bills of revivor, and Bills in the nature of Bills of revivor, seems to be, that the former, in case of death, are founded upon mere privity of blood or representation by operation of law; the latter, in privity of estate or title by the act of the party.² In the former case, nothing can be in contest, except whether the party be heir or personal representative; in the latter, the nature and operation of the whole act, by which the privity of estate or title is created, is open to controversy.³ Thus, for

¹ Mitf. Eq. Pl. by Jeremy, 71; Ibid. 97, and cases there cited; 1 Eq. Abridg. 2, 3; *Clare v. Wordell*, 2 Vern. 548; S. C. 1 Eq. Abridg. 3, pl. 3; *Wyatt Pr. Reg.* 90; *Jones v. Jones*, 3 Atk. 217; *Douglas v. Sherman*, 2 Paige R. 358. Lord Redesdale repeats the same proposition with some slight alterations, in p. 97, of his Treatise. His language there is:—"It has been already mentioned, that when the interest of a party dying is transmitted to another in such a manner, that the transmission may be litigated in this Court, as in the case of a devise, the suit cannot be revived by or against the person, to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original Bill in nature of a Bill of revivor."

² *Wyatt Prac. Reg.* 90.

³ This subject is discussed at large in *Slack v. Walcott*, 3 Mason R. 508, to which the learned reader is referred. Gilbert, in his *Forum Ro-*

example, the heir may be made a party by a Bill of revivor; for his title is by mere operation of law. But the devisee must come in by a Bill in the nature of a Bill of revivor; for he comes in as a purchaser under the testator, in privity of estate or title, which may be disputed.¹

§ 380. The Bill is said to be original, merely for want of that privity of title between the party to the former Bill and the party to the latter Bill, though claiming the *same interest, which would have permitted the [*306] continuance of the suit by a Bill of revivor.² Therefore, when the validity of the alleged transmission of interest is established, the party to the new Bill will be equally bound by, or have advantage of, the proceedings on the original Bill, as if there had been such a privity between him and the party to the original Bill, claiming the same interest.³ And the suit is considered as pending from the filing of the original Bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer, before an answer can be compelled to a cross-bill, and to have every other advantage, which

manum, 172, states the reasons thus:—"This subpoena is only for the heir, executor, or administrator, who came in in privity, as they call it, that is in immediate representation to the party litigant deceased; for a devisee or assignee of any plaintiff cannot have subpoena *ad revivendum* after the decease of such plaintiff. And this is for two reasons. First, because they looked upon a suit to be a chose in action, which was not assignable over for fear of maintenance. But this reason has been long since obsolete in the Court of Chancery, where they allow the assignment of such interest. But the second and better reason is, because, where the party devises, or assigns his interest, and dies; if the devisee or assignee were to bring his Bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition, and therefore he must bring his original Bill, and make the heir or executor a party."

¹ Cooper Eq. Pl. 63, 69, 77; Gilb. For. Rom. ch. 9, p. 172; Wyatt Pr. Reg. 90; 1 Eq. Abridg. 2. B. pl. 1; Harrison v. Ridley, 2 Eq. Abridg. 3; S. C. Comyn's R. 589; Douglas v. Sherman, 2 Paige, 358.

² Mitf. Eq. Pl. by Jeremy, 97, 98.

³ Ibid.

would have attended the institution of the suit by the original Bill, if it could have been continued by a Bill of revivor merely.¹

§ 381. In the case of the marriage of a female plaintiff, the husband comes in by what may properly be called a privity of representation, by operation of law, upon the marriage.² If, on the marriage, her property becomes vested by a settlement in trustees, or if any third person, such as trustees, or issue, are made interested in it, a mere Bill of revivor will not do; but the interest of such third persons must be brought forward by an original Bill, in the nature of a supplemental Bill and a Bill of revivor.³

§ 382. So, if an administrator obtains a decree in a suit; but before there is a complete execution of it, he dies; the administrator *de bonis non* cannot revive the suit, so as to have the benefit thereof by a Bill of revivor; because he comes not in privity under the administrator, [*307] *who obtained the decree, but paramount to him. He represents the intestate, and not merely the former administrator.⁴ The true mode of obtaining the

¹ Mitf. Eq. Pl. by Jeremy, 97, 98, and cases there cited.

² Ante § 354.

³ See Cooper Eq. Pl. 64, 77; see Post § 387; Mitford Eq. Pl. by Jeremy, 70, 71; Merryweather v. Mellish, 13 Ves. 161, 163.

⁴ Cooper Eq. Pl. 67, 76, 210. See Phelps v. Sproule, 4 Sim. R. 318. The case of Owen v. Curzon, 2 Vern. 237, as reported, seems the other way. But Mr. Cooper says he has examined the record, and the demurrer was allowed. (Cooper Eq. Pl. 67, 76, 210, and notes *ibid*.) Mr. Raithby, in his note (1) to the case in 2 Vernon, 237, confirms Mr. Cooper's statement. See S. C. 1 Eq. Abridg. 3 pl. 6. The statute of 30 Ch. II. ch. 6, provided, that an administrator *de bonis non* may sue a *scire facias*, and take execution upon a judgment had in the name of an executor or former administrator. By analogy an original Bill in the nature of a Bill of revivor, would seem to lie in Equity. See Huggins v. York Buildings Co. (2 Eq. Abridg. 3. pl. 14), where it is said, a Bill of revivor would lie in such a case. But *quære*, if it is not an inaccurate expression and intended for a Bill in the nature of a Bill of revivor, upon the analogies stated in the text?

benefit of the decree in such a case would seem to be by an original Bill in the nature of a Bill of revivor.¹

§ 383. So, in the case of a Bill against executors for an account, if after the usual decree for an account, one of the executors becomes bankrupt, the suit is in the same state, as if abated; and his assignees cannot proceed in the account, until they have revived the suit by a supplemental Bill in the nature of a Bill of revivor.²

* § 384. It has been remarked by Lord Redes- [*308] dale, that there seems to be this difference between an original Bill in the nature of a Bill of revivor, and an original Bill in the nature of a supplemental Bill. Upon the first the benefit of the former proceedings is absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any have

¹ *Huggins v. York Buildings Co.* 2 Eq. Abridg. 3 pl. 14; *Cooper Eq. Pl.* 76; *Mitf. Eq. Pl. by Jeremy*, 64, note (r), and *Phelps v. Sproule*, 4 Sim. R. 318.

² *Russell v. Sharp*, 1 Ves. & Beam. 509. See *Randall v. Mumford*, 18 Ves. 424. In the statement of this proposition, I have followed the language of the register and counsel in the case of *Russell v. Sharp*, 1 Ves. & Beam. 500. See also *Porter v. Cox*, 4 Madd. R. 80. Lord Eldon, in *Randall v. Mumford*, 18 Ves. 427, seemed to doubt, whether the suit was abated or not; and he hesitated, as to what name should be given to the Bill. His language was:—"This Court, however, without saying, whether bankruptcy is, or is not, strictly an abatement, has said, that according to the course of the Court, the suit is become as defective, as if it was abated. And, as the assignees will have the benefit of the suit, and assuming in practice, that he, who is a bankrupt, will continue so, the course, which the Court has taken, is to require him to bring his assignees before it by Bill of revivor, or supplemental Bill in the nature of a Bill of revivor, or by whatever name it is called." At present it seems understood, that by the bankruptcy of a party the suit is not abated, and therefore, technically, a revivor is not necessary; but an original Bill, in the nature of a supplemental Bill. See *Cooper Eq. Pl.* 76, 77; *Mitf. Eq. Pl. by Jeremy*, 65, and note (t); *Id.* 98; *Sellas v. Dawson*, 2 Anst. 458, note; *Davidson v. Butler*, 2 Anst. 460, note; *Harrison v. Ridley*, Com. R. 589.

been taken, may be used in the same manner, as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second. But in the other case a new defence may be made; the pleadings and depositions cannot be used in the same manner, as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the Court to make a similar decree.¹

§ 385. A Bill in the nature of a Bill of revivor or supplement cannot be brought except by some person, who claims in privity with the plaintiff in the original Bill. Thus, for example, if a Bill is filed by a devisee under a will, and afterwards a subsequent will is proved, by which the same property is devised to another devisee; in such a case, the latter devisee cannot, by a Bill in the nature of a supplemental Bill, avail himself of the proceedings in the original suit; for there is no privity between [*309] the plaintiff in the original suit, and the plaintiff in the supplemental Bill. But if the Bill had been filed by the devisor himself for some matter touching the estate devised, then the second devisee might file a supplemental Bill in the nature of a Bill of revivor, notwithstanding the first devisee has already filed such a Bill; for he derives his title solely from the devisor, independently of the first devisee.²

§ 386. An original Bill in the nature of a Bill of revivor should generally state the same facts, as a Bill of revivor. It should state the original Bill, the proceed-

¹ Mitf. Eq. Pl. by Jeremy, 72, 73, and cases there cited. See also *Lloyd v. Jones*, 9 Ves. 37, &c.

² *Oldham v. Eboral*, 1 Coop. Sel. Cas. 27; *Rylands v. Latouche*, 2 Bligh R. 586; *Tonkin v. Lethbridge*, Coop. Eq. R. 43.

ings upon it, the abatement, and the manner, in which the interest of the party dead has been transmitted. It must also charge the validity of the transmission, and state the rights, which have accrued by it.¹ The Bill should also pray, that the suit may be revived, and the plaintiff have the benefit of all the former proceedings thereon.²

§ 387. *Fifthly—a Bill of revivor and supple- [*310] ment. This Bill is a mere compound of the two preceding species of Bills, and in its separate parts it must be framed and proceeded upon in the same manner.³ It becomes proper, where not only an abatement has taken place in a suit, but defects are to be supplied, or new events are to be stated, which have arisen since the commencement of the suit.⁴ Thus, if a suit becomes abated, and by any act besides the event, by which the abatement happens, the rights of the parties are affected,

¹ Mitf. Eq. Pl. by Jeremy, 97 ; Phelps v. Sproule, 4 Sim. R. 318.

² The following is the form of the prayer of an original Bill in the nature of a Bill of revivor, where a Bill to foreclose a mortgage was brought, and the defendant died, after a decree referring it to a Master, &c., leaving a will, under which the equity of redemption was supposed to be devised, and the present Bill was brought against the heir and the devisees. “ And that in case it shall appear, that the equity of redemption of the said mortgaged premises descended upon the death of the said T. H. to the said W. H., then that the said suit and proceedings therein may stand, and be revived against the said W. H., and be in the same plight and condition, as the same were in at the time of the abatement thereof. But in case it shall appear, that the said equity of redemption was devised to the said R. L. and B. J., then that the said decree, made on the hearing of this cause, may be prosecuted and carried into full effect against them the said R. L. and B. J., in the same manner, as the same might have been prosecuted against the said late defendant, T. H.; and that all necessary directions may be given for effectuating the several matters aforesaid; May it please, &c.” Van Heyth. Eq. Drafts. 348.

³ Mitf. Eq. Pl. by Jeremy, 80 ; Cooper Eq. Pl. 84.

⁴ Cooper Eq. Pl. 84 ; Pendleton v. Fay, 3 Paige R. 204 ; Wescott v. Cady, 5 John. Ch. R. 342.

as by a settlement, or a devise, under certain circumstances, though a Bill of revivor merely may continue the suit, so as to enable the parties to prosecute it ; yet to bring before the Court the whole matter necessary for its consideration, the parties must, by supplemental Bill, added to and made part of the Bill of revivor, show the settlement, or devise, or other act, by which their rights are affected. And, in the same manner, if any other event, which occasions an abatement, is accompanied or followed by any matter necessary to be stated to the Court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show, by or against whom the cause is to be revived, that matter must be set forth by way of supplemental Bill, added to the Bill of revivor.¹

§ 388. We come, in the next place, to the consideration of the remaining class of Bills not original, viz. [*311] *Bills, which though occasioned by, or seeking the benefit of, a former Bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of the former Bill, but are in the nature of original Bills.² They are, in truth, of a mixed character, partaking partly of the character of original Bills, and partly of that of Bills not original.³

¹ Mitf. Eq. Pl. by Jeremy, 70, 71 ; Cooper Eq. Pl. 64 ; Merrywether v. Mellish, 13 Ves. 161, 163, 435. Lord Redesdale has put this illustration under the head of a Bill of revivor and supplement. Is it not rather an original Bill in the nature of a Bill of revivor and supplement, since it brings forward new interests ? See Ante § 345, § 346.

² Mitf. Eq. Pl. by Jeremy, 33 ; Ante § 16, § 20, § 326.

³ Ante § 16, § 20 ; Cooper Eq. Pl. 62. Lord Redesdale has arranged in this class, (1.) Bills in the nature of Bills of revivor, and (2.) Bills in the nature of supplemental Bills. (Mitford Eq. Pl. by Jeremy, 80). I have preferred the arrangement of Mr. Cooper (Eq. Pl. 62), which includes them in the former class, as more convenient in a practical view, though

This class includes six kinds. (1.) Cross Bills. (2.) Bills of review. (3.) Bills in the nature of Bills of review. (4.) Bills to impeach decrees for fraud. (5.) Bills to suspend or avoid the operation of decrees. (6.) Bills to carry decrees into execution.¹ Of these we shall treat in their order.

§ 389. And first of cross Bills. A cross Bill, *ex vi terminorum*, implies a Bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original Bill.² A Bill of this kind is usually brought, either (1.) to obtain a necessary discovery of facts in aid of the defence to the original Bill, or (2.) to obtain full relief to all parties, touching the matters of the original Bill.³

§ 390. The former case (a cross Bill for discovery) *arises from a settled rule in Equity, that the [*312] plaintiff in a suit cannot be examined as a witness in that suit; and if his testimony is wanted by the defendant as to any material facts, it must be by a cross Bill.⁴ It has been well remarked, that, in the transactions of human life, it frequently happens, that the leading facts of the case are known only to the acting parties; and it is, therefore, of essential service to the cause of truth and justice, that the defendant in a suit should be enabled to interrogate the plaintiff on his oath, as to the

that of Lord Redesdale may be more exact and accurate in a scientific view. Ante § 20, § 21.

¹ Mitf. Eq. Pl. by Jeremy, 80; Cooper Eq. Pl. 62.

² Mitf. Eq. Pl. by Jeremy, 80, 81; Cooper Eq. Pl. 85; 1 Montag. Eq. Pl. 327, 328.

³ Mitf. Eq. Pl. by Jeremy, 81; Piggott v. Williams, 6 Madd. R. 95; Cooper Eq. Pl. 85.

⁴ Mayor of Colchester v. ———, 1 P. Will. 595.

subject-matter in dispute between them.¹ The cross Bill, therefore, gives a perfect reciprocity of proof to each party, derivable from the answers of each other. And on this account the right to file a cross Bill is not confined to cases between private persons ; for if a foreign sovereign brings a Bill, the defendant may file a cross Bill against him for a discovery of matters material to his defence.² The importance of a cross Bill, for the purpose of discovery, may be illustrated by a familiar example. It is a general rule, that if a defendant wants a discovery of any deed in the hands of the plaintiff, he must file a cross Bill for the purpose, although the plaintiff should state in his Bill, that the deed is in his custody, and ready to be produced as the Court shall direct.³ Now, that very deed may furnish the main grounds of establishing the defence to the original Bill.

§ 391. The latter case (a cross Bill for relief) may occur, when the original Bill is brought for the specific performance of a written contract, which the defendant at the same time insists ought to be delivered up or cancelled. Under the original Bill no such relief could be had ; and, even if the plaintiff should succeed, in obtaining a decree under his original Bill for a specific performance of the contract, he might, notwithstanding, afterwards bring his action at law for damage sustained by him by [*313] the *non-performance. It may, therefore, be necessary for the defendant, in order to his protection against any such harassing suits, to file a cross Bill for

¹ 1 Smith Ch. Pr. ch. 2, p. 67 ; *Gordon v. Gordon*, 3 Swanst. 474.

² *Rothschild v. Queen of Portugal*, 3 Younge & Coll. 594.

³ *Spragg v. Corner*, 2 Coxe R. 109.

the purpose of having the contract delivered up or cancelled.¹

§ 391. *a.* So, if a Bill should be brought by one tenant in common of the legal estate against another for a partition ; it would be a good defence by the latter, that he had acquired a good equitable title to the whole premises. But, if he should wish farther to have affirmative relief on his part, and a decree, that the plaintiff shall convey his legal title to him (the defendant) in conformity to his equitable title, he must file a cross Bill for the relief ; for under the Bill for a partition, no such relief could be had.²

§ 392. It also frequently happens, and particularly, if any question arises between two defendants to a Bill, that the Court cannot make a complete decree without a cross Bill, or cross Bills, to bring every matter in dispute completely before the Court, to be litigated by the proper parties, and upon the proper proofs. In such a case, it becomes necessary for some one or more of the defendants to the original Bill to file a cross Bill against the plaintiff and some or all of the other defendants in that Bill, and thus to bring the litigated points fully before the Court.³

§ 393. As this species of Bill is a mode of defence, a defendant is sometimes of necessity obliged to resort to it in cases, where, by the rules of pleading in equity, he would not be able to avail himself of the matter of his defence in any other way. Thus, if the matter of defence arises after the cause is at issue, as if the plaintiff has given the defendant a release, or if there

¹ Cooper Eq. Pl. 85, 86. But see *Hilton v. Barren*, 1 Ves. jr. 284, where Lord Rosslyn said such a Bill was not a pure cross Bill.

² *German v. Mackin*, 6 Paige, 288.

³ Mitf. Eq. Pl. by Jeremy, 81 ; Cooper Eq. Pl. 85 ; *Pattison v. Hull*, 9 Cowen R. 747 ; 1 Mont. Eq. Pl. 327, 328.

has been an award made on a reference after issue joined, or perhaps in case of the defendant's bankruptcy, if he has obtained his certificate after issue joined, (all of which at law may be made the subjects of a plea *puis darrein continuance*,) a defendant in equity cannot avail himself of either of these defences by plea or answer, and therefore he must make them the subject of cross Bill.¹ Thus, where pending a suit, and after replication [*314] *and issue, the defendant having obtained a release, attempted to prove it *vivâ voce* at the hearing, it was determined, that the release not being in issue in the cause, the Court could not try the fact, or direct a trial at law for that purpose, and that a new Bill must be filed to put the release in issue.² In the case before the Court, indeed, the Bill, directed to be filed, seems to have been intended to impeach the release on the ground of fraud or surprise, and therefore to have been a proceeding on the part of the plaintiff in the original Bill. But it was clearly determined, that without being put in issue in the cause by a new Bill, it could not be used in proof.³

§ 394. A cross Bill is now unnecessary in some cases, in which it was formerly required. As, for example, if a Bill is filed for the specific performance of an agreement, and the defendant should insist upon a different agreement from that stated by the plaintiff in the Bill, and should offer to perform the specific agreement, which he represents to have been made; the old course would have required, that the defendant should file a cross Bill, to entitle himself to a decree for the performance of the agreement as set up and proved by

¹ Cooper Eq. Pl. 86, 87, and cases there cited; Mitf. Eq. Pl. by Jeremy, 82; Hayne v. Hayne, 3 Ch. R. 19. See Ante, § 337, in what cases new matter, or newly discovered evidence, occurring after the Bill, can be brought forward by a supplemental Bill. Barrington v. O'Brien, 2 Ball & Beat. 140.

² Ibid.

³ Ibid.

the defendant. But this would now be unnecessary ; because the Court will, under such circumstances, at his request, decree a specific performance of the agreement, actually set up and established in the defence.¹

*§ 395. It is a general rule, that a cross Bill [*315] must be brought before publication has passed in the original cause, unless the plaintiff in the cross Bill will go to the hearing upon the depositions and proofs already published.² This rule is established to prevent

¹ Cooper Eq. Pl. 85, 86; *Fife v. Clayton*, 13 Ves. 546. In this case of *Fife v. Clayton*, 13 Ves. 546, the plaintiff wished to dismiss the Bill, and the defendant insisted upon the specific performance of the agreement, stated in his answer and proved by himself; and therefore the averment of his willingness to perform it was relied on by his counsel, who cited *Scott v. Stapylton* (13 Ves. 425) as in point, where the Master of the Rolls dismissed the cross Bill of the defendant with costs, considering it as unnecessary, as the Court would, upon the answer, have decreed a specific performance of what was the real agreement, the defendant submitting to perform the agreement. On this occasion Lord Chancellor Eldon said; "The old course required a cross Bill; but I am willing to follow a precedent, that will save expense, and is right upon principle, the plaintiff by his Bill offering to perform the specific agreement, which he represents." And a specific performance was decreed with costs. The case, therefore, was one where the defendant submitted to perform the agreement set up and proved by himself. But if the plaintiff had wished the agreement, as admitted by the defendant, to be specifically performed, it seems, that he would not have been permitted to have a decree for it, as it was not the case stated in his Bill. See Sugden on Vendors, 7th edit. 217; Sugden on Vendors, ch. iv. §, n. (b), 10th edition; *Higginson v. Clowes*, 15 Ves. 525; *Clowes v. Higginson*, 1 Ves. & Beam. 524; *Lindsay v. Lynch*, 2 Sch. & Lefr. 1; *Legal v. Miller*, 2 Ves. 299; *Lagh v. Haverfield*, 5 Ves. 452; *Woolam v. Hearn*, 7 Ves. 211. The proper course in such a case would seem to be, for the plaintiff to amend his Bill upon the coming in of the defendant's answer; or to have his Bill dismissed without prejudice at the hearing. See *Ibid.* and *Deniston v. Little*, cited in the note to 2 Sch. & Lefr. 11. Where a plaintiff brings a Bill for an account and allowances in that account, the defendant has a right to make objections to it in the same way, as if he had brought a cross Bill. *Ayliffe v. Murray*, 2 Atk. 59.

² Cooper Eq. Pl. 87; 1 Eq. Abridg. G. 8. pl. 1, p. 80; *Bassett v. Nesworthy*, Rep. Temp. Finch, 102, 103; *White v. Buloid*, 2 Paige R. 164; *Field v. Schieffelin*, 7 John. Ch. R. 250; *Sterry v. Arden*, 1 John. Ch. R. 62; *Gouverneur v. Elmendorf*, 4 John. Ch. R. 357.

the danger of perjury, and the subornation of perjury, in case the parties should, after the publication of the former depositions and proofs, be permitted to examine witnesses *de novo* to the same matters, to which they or others have been already examined.¹ However, publication will be enlarged, or (perhaps more properly speaking) postponed, for the purpose of enabling the defendant to file a cross Bill upon a special application, shewing sufficient grounds to the Court for making such an order. And when an original Bill and cross Bill are [*316] both filed, both *causes commonly proceed to be heard together, which could not be done, if the cross Bill were filed after publication in the original cause, unless the cross Bill were heard on the Bill and answer.²

§ 396. But although the general rule is, that a cross Bill must be filed before publication, to entitle the party to take testimony in support of the facts asserted in it, independent of the answer; this rule is a restriction upon the rights of the defendant, and not upon the authority of the Court; for, where it is necessary for the purposes of justice in a particular cause, the Court may afterwards direct a cross Bill to be filed.³ Thus, upon hearing a cause, it sometimes appears, that the suit already instituted is insufficient to bring before the Court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens, where persons in opposite interests are co-

¹ Ibid. Hence it is a rule, that where a cross Bill is filed after publication, and before a decree in the original cause, the evidence, taken on the cross Bill, to any matters in issue in the original cause, cannot be read at the hearing of the latter. And on the hearing of the cross cause, the testimony of new witnesses to the matters in issue in the original cause, will not, after a decree in the original cause, be allowed to be read in the cross cause. But to matters not so in issue it may be read. *Wilford v. Bensley*, 3 Atk. 501; *Taylor v. Obee*, 3 Price R. 26, 83; *Field v. Schieffelin*, 7 John. Ch. R. 252, 253.

² Cooper Eq. Pl. 87, 88.

³ Mitf. Eq. Pl. by Jeremy, 82, 83.

defendants, so that the Court cannot determine their opposite interests upon the Bill already filed, and yet the determination of their interests is necessary to a complete decree upon the subject-matter of the suit. In such a case, if, upon hearing the cause, the difficulty appears, and a cross Bill has not been exhibited to remove the difficulty, the Court will direct a Bill to be filed, in order to bring all the rights of all the parties fully and properly before it for its decision ; and it will reserve the directions or declarations, which it may be necessary to give, or make, touching the matter not fully in litigation by the former Bill, until this new Bill is brought to a hearing.¹

§ 397. And, if a creditor, who has come in under a *decree in favor of creditors against a debtor, [*317] should require relief for the purpose of assisting the investigation of demands, affecting the estate, before the Master, which relief cannot be obtained under the original Bill, or by a rehearing, he may, even without the direction of the Court, file a cross Bill for the purpose ;² for he might not have had any opportunity, at an earlier stage of the proceedings, of presenting his case and his objections.

§ 398. Where the cross Bill seeks, not only a discovery, but relief, care should be taken, that the relief prayed by the cross Bill should be equitable relief ; for, to this extent, it may be considered as not purely a cross Bill, but in the nature of an original Bill, seeking farther aid from the Court ; and then the relief ought to be such as in point of jurisdiction, it is competent for the Court to give.³ It was upon this ground, that where a purchaser

¹ Mitf. Eq. Pl. by Jeremy, 82, 83 ; Id. 203, and cases there cited ; Field v. Schieffelin, 7 John. Ch. R. 253, 254.

² Latouche v. Dunsany, 1 Sch. & Lefr. 137.

³ Cooper Eq. Pl. 86.

of an estate, under articles of agreement, filed his Bill for a conveyance, having got into possession of a part of the estate, and the vendor filed a cross Bill to recover back the possession from the purchaser, the Court, though it dismissed the original Bill, refused to give the relief sought upon the cross Bill ; for it was the proper object of an action of ejectment, and entirely within the competence of a Court of Law.¹

§ 399. But, subject to this qualification, a cross Bill, being generally considered as a defence to the original Bill, or as a proceeding necessary to a complete determination of a matter already in litigation, the plaintiff is not, at least, as against the defendant in the original Bill, obliged to show any ground of equity to support [*318] *the jurisdiction of the Court.² It is treated, in short, as a mere auxiliary suit, or as a dependency upon the original suit.

§ 400. It seems, that in England it is not indispensable, that a cross Bill should be filed in the same Court, in which the original Bill is filed ; as, for example, if the original Bill is brought in the Court of Exchequer, the cross Bill may be brought in the Court of Chancery.³

¹ *Calverley v. Williams*, 1 Ves. jr. 211, 213; *Cooper Eq. Pl.* 86, 87; *Mitf. Eq. Pl.* by Jeremy, 81, and note (2).

² *Mitf. Eq. Pl.* by Jeremy, 81, 82; *Id.* 203; *Cooper Eq. Pl.* 86; *Burgess v. Wheate*, 1 Eden R. 190; *Kemp v. Mackrell*, 3 Atk. 812; *Doble v. Potman*, Hardr. R. 160; *Wyatt Pr. Reg.* 85, 86.

³ *Cooper Eq. Pl.* 87; *Glegg v. Legh*, 4 Madd. R. 192; *Parker v. Leigh*, 6 Madd. R. 115. Mr. Cooper so lays down the doctrine in the text, and cites for it the case of *Newbury v. Wren*, 1 Vern. 220; *S. C.* 1 *Equity Abridg.* 80, pl. 2. *Id.* 134, pl. 3. But this case was not strictly a cross Bill, though it was in the nature of a cross Bill. The original Bill in the Exchequer was a Bill to redeem, and the Bill in Chancery was by the defendant in the original suit to foreclose. So that it was strictly an original Bill for relief. The objection raised was by a plea of the pendency of the first suit for the same cause. The plea was overruled. But in *Parker v. Leigh* (6 Madd. R. 115), the doctrine was affirmed in a cross Bill for a discovery. There seems no small difficulty in understanding,

Whether the like doctrine is maintainable in the Courts of America generally may admit of question. But, at all events, there cannot be a cross Bill in a State Court to an original Bill pending in a Circuit Court of the United States. If any cross Bill is wanted in such a case, it may be brought in the same Circuit Court, in which the original Bill is depending, as it is not an original, but an ancillary suit.¹

*§ 401. In regard to the frame of a cross Bill, [*319] a brief statement may suffice. It should state the original Bill, or rather the parties, and prayer, and objects of it, the proceedings thereon, and the rights of the party exhibiting the Bill, which are necessary to be made the subject of cross litigation, or the ground, on which he resists the claim of the plaintiff in the original Bill, if that is the object of the new Bill.² A cross Bill should not introduce new and distinct matters, not embraced in the original suit; for, as to such matters, it is an original Bill, and they cannot properly be examined at the hearing of the first suit.³

§ 402. The cross Bill of Equity Jurisprudence is manifestly derived from the canon law. By that law, when the *Reus*, or defendant, was brought in to answer, he was said to be convened, which the canonists called

how a cross Bill, strictly so called, for relief, can be brought in a different Court from that, where the original Bill is depending; as the object is to enable the Court to hear both causes together; or, at all events, to enable the Court to make a decree upon the whole merits, as disclosed in each case. See *Field v. Schieffelin*, 7 John. Ch. R. 252; *Gouverneur v. El-mendorf*, 4 John. Ch. R. 357; *Glegg v. Legh*, 4 Madd. R. 192; *Beames Pl. in Eq.* 142.

¹ Mitf. Eq. Pl. by Jeremy, 81, 82, 203. See *Carnochan v. Christie*, 11 Wheat. 446, 467.

² Mitf. Eq. Pl. by Jeremy, 81; *Cooper Eq. Pl.* 88.

³ *Galavan v. Erwin*, Hopk. R. 48; S. C. 8 Cowen R. 361. A Bill, defective in its frame, as a Bill of review, may sometimes be sustained as a cross Bill. *Cooper Eq. Pl.* 96; *Houghton v. West*, 5 Bro. Parl. Rep. 152; S. C. 2 Bro. Parl. Rep. by Tomlins, 88.

conventio, because the plaintiff and defendant met to contest; and since the defendant might likewise have demands against the plaintiff, he had liberty to exhibit a Bill against him also, which they called *reconventio*. And not only may the cross Bill be thus traced back in its origin to the canon law; but the ordinary practice in regard to it is derived from the same source. Thus, if the *reconventio* came in before the *litis contestatio*, both causes went on *pari passu*, and the same probatory term was assigned to both, and the same time given for publication. But the defendant was to answer on the *conventio*, before the plaintiff was to answer on the *reconventio*; because the plaintiff first brought the defendant [*320] *into Court to answer his suit, and the defendant's *reconventio* was only a superstructure upon it. But, if the *reconventio* did not come in until after the *litis contestatio*, then both causes did not proceed *pari passu*; and therefore it did not stop the plaintiff in the examination of his witnesses. But, if the plaintiff were in contempt for not answering on the *reconventio*, then he would be stopped from proceeding on his own *conventio*. If the *reconventio* came in after publication, it stopped the hearing, till the plaintiff had contested it; because, otherwise, if the defendant had a right, he could not have a decree upon the plaintiff's libel.¹ It has been sometimes suggested, that upon filing a cross Bill the original

¹ Gilb. For. Rom. 45, 46, 47. Lord Chief Baron Gilbert has remarked:—
 ‘ Our law touching cross Bills, which is the *reconventio* with us, agrees in all things with this; for if the cross Bill comes in before issue joined, it goes *pari passu* with the original Bill. But if it comes in after issue joined, it cannot go *pari passu* with it, and stops nothing, till the plaintiff has incurred a contempt. But if it comes in after publication, it stops the hearing till answered, and the rather with us, because the defendant has a right to the plaintiff's answer upon oath. But if such Bill be filed after publication, nothing can be put in issue upon it, that was in issue in the original cause.’

defendant was entitled to stay proceedings and excused from putting in his answer to the original Bill until after the defendant in the cross Bill had put in his answer thereto. But this, though apparently founded upon some authorities, is not maintainable in principle;¹ for it is an attempt by a party to relieve himself from the performance of his duty in answering the original Bill by merely requiring an answer to a cross Bill from his adversary.²

§ 403. Secondly, of Bills of review. A Bill of review is in the nature of a writ of error, and its object is to procure an examination, and alteration, or reversal of a decree made upon a former Bill, which decree has been signed and enrolled.³ This enrollment of the decree is essential to what is called, by way of preëminence, a Bill of review; for if the decree has not been enrolled, then a Bill in the nature of a Bill of review, or a supplemental Bill in the nature of a Bill of review, is (as we shall presently see) the appropriate remedy.⁴

¹ *Ramkissenseat v. Barker*, 1 Atk. 19.

² *Wigley v. Whitaker*, 1 Beavan R. 349, 351.

³ *Mitf. Eq. Pl. by Jeremy*, 83; *Gilb. For. Rom.* 184, 185; *Cooper Eq. Pl.* 88.

⁴ *Cooper Eq. Pl.* 88, 89; *Mitf. Eq. Pl. by Jeremy*, 90; *Dexter v. Arnold*, 5 Mason R. 303, 310. The following remarks of Chief Baron Gilbert, in his *Forum Romanum*, Ch. x, p. 182, 183, will serve to explain the probable origin of the Bill of review, and the reason, why it requires an enrollment. "The sentence" (says he), "by the canon and civil was twofold, interlocutory and definitive. The interlocutory was any order pronounced by the judge in the cause touching the proceedings, before they came to a definite sentence; and the interlocutory order is always alterable before the definitive sentence. The definitive sentence must always be in writing, and cannot be altered after it is pronounced and signed by the judge. But after it is so signed, they might appeal to a superior jurisdiction. But where they were in the last resort, as when it came up to the prince, there they might appeal from the prince uninformed to the prince better informed, which was in nature of a review of

The enrollment of decrees in England is now little known in practice, and therefore Bills of review are rarely brought.¹ But as the same principles are generally applicable to all the varieties of this species of Bills, we shall state them under the leading head of Bills of review. Indeed, there is the more reason for so doing, because in most of the State Courts of Equity in America, and certainly in the Courts of the United States, all decrees in equity, as well as judgments at law, are matters of record, and are deemed to be enrolled, as of the term of the Court, at which they are passed, whether actually enrolled or not; so that in those Courts a Bill of review is the ordinary and appropriate proceeding.²

the same sentence. Thus it is in the Court of Chancery; for all orders are interlocutory, till they come to the definitive sentence, which is signed by the Court; for that sentence signed and enrolled is the definitive sentence in the cause, and all preparations before that are but interlocutory. For the decree pronounced on the hearing, which is taken down by the register, is but an interlocutory sentence, till it comes to be signed by the judge of the Court and enrolled."

¹ The defendant may enroll a decree in order to enable him to bring a Bill of review. But this seems unnecessary, as he may (as we shall presently see), bring a Bill in the nature of a Bill of review, or move for a rehearing (as the case may require), where the plaintiff has not enrolled the decree. Cooper Eq. Pl. 91.

² *Dexter v. Arnold*, 5 Mason R. 303, 310, 311. The very point came before the Supreme Court of the United States, in *Whiting v. Bank of U. S.* 13 Peters R. 6, 13. On that occasion the Court said; "Some suggestions have been made as to the nature and character of the present Bill—whether it is to be treated as a Bill of review, or what other is its appropriate denomination. As the original decree, which it seeks to review, was properly, according to our course of practice, to be deemed recorded and enrolled as of the term, in which the final decree was passed, it is certainly a Bill of review in contradistinction to a Bill in the nature of a Bill of review; which latter Bill lies only when there has been no enrollment of the decree. Being a Bill brought by the original parties and their privies in representation, it is also properly a Bill of review, in contradistinction to an original Bill in the nature of a Bill of review;

§ 404. There are but two cases, in which a Bill of review is permitted to be brought, and these two cases are settled and declared by the first of the Ordinances in Chancery of Lord Chancellor Bacon respecting Bills of review, which Ordinances have never since been departed from. It is as follows: "No decree shall be reversed, altered, or explained, being once under the great seal, but upon Bill of review. And no Bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to light after the decree was made, which could not possibly have been used at the time, when the decree passed, a Bill of review may be grounded by the special license of the Court, and not otherwise."¹ So, that from this Ordinance a Bill of review may be brought, first, for error of law; secondly, upon discovery of new matter.

§ 405. And, first, it may be brought for error of law, appearing upon the face of the decree; as if a decree should be against the statute law, which case happened, where a decree directed the legacy belonging to a child,

which latter Bill brings forward the interests affected by the decree, other than those, which are founded in privity of representation. The present Bill seeks to revive the suit by introducing the heirs of Whiting before the Court; and so far it has the character of a Bill of revivor. It seeks also to state a new fact, viz., the death of Whiting, before the sale; and so far it is supplementary. It is, therefore, a compound Bill of review, of supplement, and of revivor; and it is entirely maintainable as such, if it presents facts which go to the merits of the original decree of foreclosure and sale."

¹ Cooper Eq. Pl. 89, and cases there cited; *Dexter v. Arnold*, 5 Mason R. 310; *Beam. Ord.* in Ch. 1.

who had died an infant intestate without wife or children, to be distributed amongst his mother, brothers and sisters equally, whereas by the statute of distributions it vested entirely in the father, who had survived the child.¹ So, if an absolute decree should be made against a person, who, upon the face of it, appears to have been [*323] *an infant at the time.² But, by the Ordinance of the Lord Chancellor above mentioned, any error in figures, as in miscasting, shall be explained and reconciled by an order, without a Bill of review. And by the term miscasting is not to be understood any pretended misrating or misvaluing, but only error in the auditing or numbering; and it is not necessary to obtain leave of the Court, before a Bill of this kind can be filed.³

§ 406. But by another of the Ordinances above mentioned, the decree must be first obeyed and performed, before a Bill of review can be brought; as if it be for land, the possession must be given up; if it be for money, the money must be paid; if for evidences, the evidences must be brought in; and so in other cases. But if any act be decreed to be done, which extinguishes the parties' right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds, or evidences, and the like, it is declared, that those parts of the decree are to be spared, until the Bill of review be determined. But such sparing is to be warranted by public order made in Court. And even the rule, as to obedience and performance of the decree, has been dispensed with by the Court in some cases; as where a sum of money has been ordered to be

¹ Cooper Eq. Pl. 89, 90; Gilb. For. Rom. 184, 185, 186, 187; Beam. Ord. in Chan. 3, 4; Gregor v. Molesworth, 2 Ves. 109.

² Ibid.

³ Ibid.

paid, and it appeared, that the party was unable to pay it.¹

*§ 407. In regard to errors of law, apparent [*324] upon the face of the decree, the established doctrine is, that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the Court upon an appeal. But taking the facts to be, as they are stated to be on the face of the decree, you must show, that the Court have erred in point of law. If, therefore, the decree do not contain a statement of the material facts, on which the decree proceeds, it is plain, that there can be no relief by a Bill of review, but only by an appeal to some superior tribunal. It is on this account, that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact, which support the decree. In the Courts of the United States the decrees are usually general, without any such statement of facts. In England the decree embodies the substance of the Bill, pleadings, and answers. In the Courts of the United States the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the Bill, answers, and other proceedings are, in our practice,

¹ Cooper Eq. Pl. 90 ; Gilb. For. Rom. 185, 186, 187 ; Wyatt Pr. Reg. 98 ; Partridge v. Osborne, 5 Russ. R. 195, 244 to 253 ; Wiser v. Blackley, 2 John. Ch. R. 488 ; Mitf. Eq. Pl. by Jeremy, 88. There are other exceptions to the rule, as to the performance of the decree, than those stated in the text ; as for example, the party is not bound to perform any more of the decree than his adversary can show, that he is bound to perform at the time, when he seeks to bring a Bill of review, and in regard to which he is in default. See Partridge v. Osborne, 5 Russ. R. 195, 244 to 253, where the subject was most elaborately considered by Lord Lyndhurst.

as much a part of the record before the Court, as the decree itself; for it is only by a comparison with the former, that the correctness of the latter can be ascertained.¹

[*325] *§ 408. Where a decree has been affirmed in Parliament, it may well be doubted, whether a Bill of review for errors apparent upon the face of the decree can be brought; for the highest appellate Court has pronounced in effect, that it is not erroneous.² The

¹ *Dexter v. Arnold*, 5 Mason R. 311, 312; *Wyatt Pr. Reg.* 98; *Coombs v. Proud*, 1 Ch. Cas. 54; *S. C.* 2 Freem. R. 182; *Hollingsworth v. McDonald*, 2 Harr. & John. R. 230; *Webb v. Pell*, 3 Paige R. 368. The same point arose in the Supreme Court of the United States, in *Whiting v. Bank of U. States*, 13 Peters R. 6, 13, 14. On that occasion, the Court said; "It has also been suggested, at the bar, that no Bill of review lies for errors of law, except where such errors are apparent on the face of the decree of the Court. That is true in the sense, in which the language is used in the English practice. In England, the decree always recites the substance of the Bill and answer and pleadings, and also the facts on which the Court founds its decree. But in America the decree does not ordinarily recite either the Bill, or answer, or pleadings; and generally not the facts, on which the decree is founded. But with us the Bill, answer, and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each country is precisely the same, in legal effect; although expressed in different language; viz., that the Bill of review must be founded on some error apparent upon the Bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large, in order to establish an objection to the decree, founded on the supposed mistake of the Court in its own deductions from the evidence." In *Perry v. Phelps*, 17 Ves. 178, Lord Eldon, speaking on this subject, said, "With regard to the other point, there is a great distinction between error in the decree and error apparent. The latter description does not apply to a merely erroneous judgment. And this is a point of essential importance; as, if I am to hear this cause upon the ground, that the judgment is wrong, though there is no error apparent, the consequence is, that in every instance a Bill of review may be filed; and the question, whether the cause is well decided, will be argued in that shape: not, whether the decree is right or wrong on the face of it. The cases of error apparent, found in the books, are of this sort; an infant not having a day to show cause, &c. not merely an erroneous judgment."

² *Mitf. Eq. Pl. by Jeremy*, 88; *Cooper Eq. Pl.* 91, 92.

same objection does not apply (as we shall presently see), where the Bill of review is for matter of new-discovered evidence.

§ 408. *a.* A Bill of review also lies only after a final decree; for the Court may, if the decree be only interlocutory, afterwards and before a final decree vary or rescind it. But a decree is final in the sense of the rule, which finally adjudicates upon all the merits of the controversy, and leaves nothing further to be done, but the execution of it. Thus, for example, a decree of foreclosure and *sale*, upon a Bill brought by a mortgagee for a foreclosure and sale, (according to the practice in many States in America), is final, and the sale is but in the nature of an execution.¹

§ 409. No persons, except the parties and their privies in representation, such as heirs, executors, and administrators, can have a Bill of review, strictly so called.² But other persons in interest, and in privity of title or estate, who are aggrieved by the decree, such as devisees, and remainder-men, are, as we shall presently see, entitled to maintain an original Bill in the nature of a Bill of review, so far as their own interests are concerned.³ Of course, no persons, but persons having an interest, are entitled to maintain a Bill of review.⁴ And even persons, having an interest in the cause, if not ag-

¹ *Whiting v. Bank of U. S.* 13 Peters R. 6, 15; *Ray v. Low*, 3 Cranch, 79.

² *Gilb. For. Rom.* 186; *Wyatt Pr. Reg.* 95; *Slingsby v. Hale*, 1 Ch. Cas. 122. The language of Gilbert, in *For. Roman.* 186, is very broad, and requires qualification. It is—"None but parties and privies, as heirs, executors, or administrators, can have this Bill of review, since nobody else can be aggrieved by such decree, because it can only be revived by such privies." Why may not a devisee be aggrieved, or a remainder-man?

³ *Mitf. Eq. Pl.* by Jeremy, 92; *Wyatt Pr. Reg.* 98, 100.

⁴ *Webb v. Pell*, 3 Paige R. 368.

grieved by the particular errors assigned in the decree, cannot maintain a Bill of review, however injuriously the decree may affect the rights of third persons.¹ But with this exception, it may be generally stated, that all the parties to the original Bill ought to join in a Bill of review.²

[*326] * § 410. A Bill of review for errors apparent upon the face of the record, will not lie after the time, when a writ of error could be brought; for Courts of Equity govern themselves in this particular by the analogy of the common law in regard to writs of error.³ Hence, in England, where writs of error must be brought within twenty years after a judgment, unless in certain cases of disabilities, the like limitation is adopted in Courts of Equity as to Bills of review for errors, apparent on the face of decrees. For the same reason, in the Courts of the United States, Bills of review for errors, apparent upon the face of decrees, are limited to five years, that being the limitation of Writs of Error upon judgments at law.⁴ So, for the like reason, a fine and non-claim for five years, if there has been no impediment to the remedy, will be a bar to a Bill of review respecting lands.⁵

§ 411. Error in matter of form only, though apparent on the face of a decree, seems not to have been considered as a sufficient ground for reversing the decree.

¹ *Thomas v. Harvie's Heirs*, 10 Wheat. R. 146; Mitf. Eq. Pl. by Jeremy, 205.

² *Bank of U. States v. White*, 8 Peters R. 252.

³ *Smith v. Clay*, Ambl. R. 645; S. C. 3 Bro. Ch. R. by Belt, 639, note; Mitf. Eq. Pl. by Jeremy, 88; *Cooper Eq. Pl.* 91, 92, 93; *Wyatt Pr. Reg.* 97, 98; *Lytton v. Lytton*, 4 Bro. Ch. R. 441.

⁴ *Thomas v. Harvie's Heirs*, 10 Wheat. R. 146.

⁵ *Cooper Eq. Pl.* 91; Mitf. Eq. Pl. by Jeremy, 250, 251.

And matter of abatement has been also treated as not capable of being shown for error to reverse a decree.¹

§ 412. Secondly. A Bill of review may be brought upon the discovery of new matter; such, for example, as the discovery of a release, or a receipt, which would change the merits of the claim, upon which the decree was *founded.² But leave of the Court must be [*327] obtained, before a Bill of review can be filed on this ground; which leave to file it will not grant without an affidavit, that the new matter could not be produced or used by the party claiming the benefit of it in the original cause. The affidavit must also state the nature of the new matter, in order that the Court may exercise its judgment upon its relevancy and materiality.³

§ 413. Both of these considerations, to which the affidavit applies, are indispensable. In the first place, the new matter must be relevant and material, and such, as if known, might probably have produced a different determination.⁴ In other words, it must generally be new matter, to prove what was before in issue, and not to prove a title not before in issue; not to make a new case; but to establish the old one.⁵ In the next place, the new matter must have first come to the knowledge

¹ Mitf. Eq. Pl. by Jeremy, 85; Cooper Eq. Pl. 95; *Hartwell v. Townsend*, 6 Bro. Parl. R. 289; S. C. 2 Bro. Parl. R. 107, Tomlins's edit.; *Slingsby v. Hale*, 1 Ch. Cas. 122; S. C. 1 Eq. Abridg. 169.

² Cooper Eq. Pl. 91; *Standish v. Radley*, 2 Atk. 178; *Wyatt Pr. Reg.* 98; *Gilb. For. Rom.* 186, 187.

³ Cooper Eq. Pl. 92; Mitf. Eq. Pl. by Jeremy, 84; *Gilb. For. Rom.* 186, 187, 188; *Wyatt Pr. Reg.* 95.

⁴ Mitf. Eq. Pl. by Jeremy, 84, 85; *Wyatt Pr. Reg.* 95; *Ord v. Noel*, 6 Madd. R. 127; *Blake v. Foster*, 2 Molloy R. 257; *Wiser v. Blackley*, 2 John. Ch. R. 488; *Livingston v. Hubbs*, 3 John. Ch. R. 124.

⁵ *Dexter v. Arnold*, 5 Mason R. 312; *Young v. Keighley*, 16 Ves. 348, 354. But see *Partridge v. Usborne*, 5 Russ. R. 195.

of the party, after the time, when it could have been used in the cause at the original hearing. Lord Bacon's Ordinance says, in one part, it must be "after the decree." But that seems corrected by the subsequent words,— "and could not possibly have been used at the time when the decree passed," which words point to the period of the publication of the testimony. And accordingly it is now the established exposition of the Ordinance, that the new *matter shall not have been discovered until after publication has passed.¹

§ 414. In the next place, another qualification of the rule, quite as important and instructive, is, that the matter must not only be new, but it must be such, as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief.²

§ 415. It has been remarked by Lord Redesdale, that "it has been questioned, whether the discovery of new matter not in issue in the cause, in which a decree

¹ *Dexter v. Arnold*, 5 Mason R. 312; *Mitt. Eq. Pl. by Jeremy*, 84, 85; *Ord v. Noel*, 6 Madd. R. 127; *Wiser v. Blackley*, 2 John. Ch. R. 488; *Livingston v. Hubbs*, 3 John. Ch. R. 124. Lord Hardwicke is reported to have said, that the words of Lord Bacon are dark. But that the construction has been, that the new matter must have come to the knowledge of the party after publication passed. *Patterson v. Slaughter*, Amb. R. 293; *Norris v. Le Neve*, 3 Atk. 25, 34.

² *Dexter v. Arnold*, 5 Mason R. 312, 320, 321; *Bingham v. Dawson*, Jacob R. 243; *Livingston v. Hubbs*, 3 John. Ch. R. 124; *Pendleton v. Fay*, 3 Paige R. 204; *Ord v. Noel*, 6 Madd. R. 127. That doctrine was expounded and adhered to by Lord Eldon in *Young v. Keighley* (16 Ves. 348), and was acted upon by Lord Manners in *Barrington v. O'Brien* (2 B. & Beatt. 140), and *Blake v. Foster* (2 B. & Beatt. 457, 461). It was fully recognised by Mr. Chancellor Kent, and received the sanction of his high authority in *Wiser v. Blackley* (2 Johns. Ch. R. 488), and *Barrow v. Rhinelander* (3 Johns. Ch. R. 120). And in the very recent case of *Bingham v. Dawson* (1 Jac. & Walk. 243), Lord Eldon infused into it additional vigor.

has been made, could be the ground of a Bill of review ; and whether the new matter, on which Bills of review have been founded, has not always been new matter to be used as evidence to prove matter in issue, in some manner, in the original Bill. A case, indeed, can rarely happen, in which new matter discovered would not be, in some degree, evidence of matter in issue in the original cause, if the pleadings were properly framed. *Thus, if after a decree, founded on a revocable [*329] deed, a deed of revocation and new limitations were discovered ; as it would be a necessary allegation of title under the revocable deed, that it had not been revoked, the question of revocation would have been in issue in the original cause, if the pleadings had been properly framed. So, if, after a decree, founded on a supposed title of a person claiming as heir, a settlement or will were discovered, which destroyed or qualified that title, it would be a necessary allegation of the title of the person claiming as heir, that the ancestor died seised in fee-simple, and intestate. But if a case were to arise, in which the new matter discovered could not be evidence of any matter in issue in the original cause ; and yet clearly demonstrated error in the decree ; it should seem, that it might be used, as ground for a Bill of review, if relief could not otherwise be obtained. It is scarcely possible, however, that such a case should arise, which might not be deemed in some degree a case of fraud, and the decree impeachable on that ground. In the case, where the doubt before mentioned appears to have been stated, the new matter, discovered and alleged as ground for a Bill of review, was a purchase for valuable consideration, without notice of the plaintiff's title. This could only be used as a defence. And it seems to have been thought, that although it might have been proper, under the cir-

cumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer, and put it in issue; yet it could not be made the subject of a Bill of review; because it created no title paramount to the title of the plaintiff, but merely a ground to induce a Court of Equity not to interfere. And where a settlement had been made on a marriage in pursuance of articles, and the settlement following the [*330] *words of the articles had made the husband tenant for life, with remainder to the heirs-male of his body; and the husband, claiming as tenant in tail under the settlement, had levied a fine and devised to trustees, principally for the benefit of his son; and the trustees had obtained a decree to carry the trusts of the will into execution against the son; the son afterwards, on discovery of the articles, brought a Bill to have the settlement rectified according to the articles, and a decree was made accordingly. In this case, the new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that, on which the first decree was made.”¹

¹ Mitf. Eq. Pl. by Jeremy, 85 to 87, and cases there cited; Gilb. For. Rom. 186. This subject (which seems involved in some difficulty), was a good deal investigated in the case of *Dexter v. Arnold*, 5 Mason R. 313, where the Court said:—“Upon another point there is not perhaps a uniformity of opinion in the authorities. I allude to the distinction taken in an anonymous case in 2 Freem. Rep. 31, where the Chancellor said, that ‘where a matter of fact was particularly in issue before the former hearing, though you have *new proof* of that matter, upon that you shall never have a Bill of review. But where a *new fact* is alleged, that was not at the former hearing, there it may be a ground for a Bill of review.’ Now, assuming that under certain circumstances, new matter, not in evidence, that is, not in issue in the original cause, but clearly demonstrating error in the decree, may support a Bill of review, if it is the only mode of obtaining relief; still it must be admitted, that the general rule is, that the new matter must be such as is relevant to the original case in issue. Lord Hardwicke, in *Norris v. Le Neve* (3 Atk. 33, 35), is reported to

§ 416. The doctrine here asserted by Lord Redesdale seems now to be fully confirmed; and it has been established, that matter discovered after a decree has

have admitted, that a Bill of review might be founded upon new matter, not at all in issue in the former cause, which seems contrary to his opinion in *Patterson v. Slaughter*, (Ambler 293), or upon matter, which was in issue, but discovered since the hearing. But the very point in 2 Freeman, 31 (if I rightly understand it), is that a newly discovered fact is ground for a Bill; but not newly discovered evidence in proof of any fact already in issue. This seems to me at variance with Lord Bacon's Ordinance; for it is there said, that there may be a review upon 'new matter, which hath arisen in time after the decree,' and also 'upon *new proof*, that has come to light after the decree made, and could not possibly have been used at the time, when the decree passed.' It is also contrary to what Lord Hardwicke held in the cases cited from 3 Atk. 33, and Ambl. 293. Lord Eldon, in *Young v. Keighley* (16 Ves. 348, 350), said, 'The ground [of a Bill of review] is error apparent on the face of the decree, or new *evidence* of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority, that *new evidence* would not be sufficient ground.' That was also the opinion of Lord Mannes, in *Blake v. Foster* (2 B. & Beatt. 457). Mr. Chancellor Kent, in *Livingston v. Hubbs* (3 Johns. Ch. 124), adopted the like conclusion; and he seemed to think, that such new evidence must not be a mere accumulation of witnesses to the same fact; but some stringent written evidence or newly discovered papers. Gilbert, in his *Forum Romanum*, ch. 10, p. 186, leans to the same limitation; for he says, that in Bills of Review, 'they can examine to nothing, that was in the original cause, unless it be matter happening subsequent, which was not before in issue, or upon matter of record or writing not known before; for if the Court should give them leave to enter into *proofs* upon the same points, that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury.' There is much good sense in such a distinction, operating upon the discretion of the Court in refusing a Bill of review, and I should be glad to know, that it has always been adhered to. It is certain, that cumulative written evidence has been admitted; and even written evidence to contradict the testimony of a witness. That was the case of *Attorney General v. Turner* (Ambler, 587). *Willan v. Willan* (16 Ves. 72, 88), supposes, that new testimony of witnesses may be admissible. If it be admissible (upon which I am not called to decide), it ought to be received with extreme caution, and only when it is of such a nature as ought to be decisive proof. There is so much of just

been made, though not capable of being used as evidence of any thing, which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a Bill of review, or of a supplemental Bill in the nature of a Bill of review.¹

§ 417. In the next place, there is another important qualification, which is indeed deducible from the very language of Lord Bacon's Ordinance; and that is, that the granting of such a Bill of review for new-discovered evidence is not a matter of right; but it rests in the sound discretion of the Court. It may, therefore, be refused, although the facts, if admitted, would change the decree, where the Court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable.²

reasoning in the opinion of the Court of Appeals of Kentucky on this subject, that I should hesitate long before I should act against it." See also *Respass v. McClanahan*, Hardin's Kent. R. 342; Gilb. For. Rom. 186; and the doctrine of Lord Eldon, in *Young v. Keighly*, 16 Ves. 354; *Livingston v. Hubbs*, 3 John. Ch. R. 124. The Court has refused its leave to file a Bill of review, where it would have been the means of introducing an entirely new case, of the matter of which the plaintiff was sufficiently well apprized of to have been able, with the exertion of reasonable diligence, to have brought the same at first completely before the Court. *Young v. Keighly*, 16 Ves. 348. And see *Ord v. Noel*, 6 Madd. 127, and *Bingham v. Dawson*, 1 Jac. R. 243, which, although cases relating to supplemental Bills, in the nature of Bills of review, illustrate this principle. See also *Ludlow v. Lord Mucartney*, 2 Bro. C. C. 67, Toml. ed.; *Le Neve v. Norris*, 2 Bro. P. C. 73, Toml. ed.; *M'Neill v. Cahill*, 2 Bligh, P. C. 228; *Roberts v. Kingsley*, 1 Ves. 238. If this last case is accurately reported, the Bill seems to have been filed without the previous leave of the Court; and on the hearing, an inquiry was directed as to the fact of the discovery of the articles. See *Young v. Keighly*, 16 Ves. 348.

¹ *Partridge v. Osborne*, 5 Russ. R. 195. But see *Young v. Keighly*, 16 Ves. 354.

² *Bennet v. Lee*, 2 Atk. 528; *Wilson v. Wall*, 2 Cox. R. 3; *Young v. Keighly*, 16 Ves. 348; *Perry v. Phelps*, 17 Ves. 176, 177, 178; *Ord v. Noel*, 6 Madd. R. 127; *Partridge v. Osborne*, 5 Russ. R. 245; *Dexter v. Arnold*, 5 Mason R. 315; *Thomas v. Harvie's Heirs*, 10 Wheat. R. 146; *Wood v. Mann*, 2 Sumner R. 316; Ante § 412.

§ 418. A Bill of review upon new discovered matter has been permitted even after an affirmance of the decree in Parliament. As where after a decree dismissing a Bill, and which dismissal was affirmed in the House of Lords, a Bill of review was brought for discovery of a deed, said to be burnt pending the appeal, which made out the plaintiff's title ; and the Bill was in order, that *after such discovery the plaintiff might apply to [*333] the lords for relief ; the defendant demurred to the Bill ; but the demurrer was overruled, and the defendant ordered to answer. And a Bill of review may be brought after one Bill of review already filed ; as if upon a Bill of review a decree has been reversed, another Bill of review may be brought upon the decree of reversal.¹ But, if a demurrer has been allowed to a Bill of review, a new Bill of review upon the same ground will not be allowed.²

§ 419. We have already seen, that a Bill of review for error apparent on the face of the decree, must be brought within the same period, which limits writs of error at law.³ The question may arise, whether the like limitation applies to Bills of review upon new discovered facts and evidence. There can be no doubt, that it would be a good bar, that the Bill of review was not brought within the period limited for writs of error, after the discovery of the new facts or evidence. But the point, intended to be stated, is, whether any Bill of review will lie after the lapse of that period from the time of making the decree, although the Bill of review is

¹ Cooper Eq. Pl. 92, and cases there cited ; Mitf. Eq. Pl. by Jeremy, 88. But see *Stafford v. Bryan*, 2 Paige R. 45.

² Mitf. Eq. Pl. by Jeremy, 88 ; Cooper Eq. Pl. 93 ; *Denny v. Filmore*, 1 Vern. R. 135.

³ Ante § 410.

brought within the prescribed period after the discovery of the new facts or evidence. There does not seem to be any decision settling the point ; and, as the allowance of a Bill of review for new discovered evidence is discretionary with the Court, it is scarcely probable, that it will arise in judgment, as the lapse of time will always [*334] *have great weight with the Court in refusing the application, in connexion with the other circumstances.¹

§ 420. Let us now consider the frame of a Bill of review. In a Bill of this nature, it is necessary to state the former Bill, and the proceedings thereon ; the decree, and the point, in which the party exhibiting the Bill of review conceives himself aggrieved by it ; and the ground of law, or matter discovered, upon which he seeks to impeach it.² And if the decree is impeached on the latter ground, it seems necessary to state in the Bill the leave obtained to file it, and the fact of the discovery.³ It has been doubted, whether, after leave given to file the Bill, that fact is traversable. But this doubt may be questioned, if the defendant to the Bill of review can offer evidence, that the matter alleged in the Bill of review was within the knowledge of the party, who might have taken the benefit of it in the original cause.⁴ The Bill may simply pray, that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution.⁵ If it has been carried into execution, the Bill may also pray the further decree of the Court to put the party complaining of the former decree into the situation, in which he would have been, if that decree had not been executed.⁶ If the Bill is

¹ The point was before the Supreme Court in *Thomas v. Harvie's Heirs*, 10 Wheat. R. 146, 151 ; but the Court left it undecided. See also *Mitf. Eq. Pl. by Jeremy*, 88 ; *Cooper Eq. Pl.* 92, 93.

² *Mitf. Eq. Pl. by Jeremy*, 88, 89 ; *Cooper Eq. Pl.* 93.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

brought to review the reversal of a former decree, it may pray, that the original decree may stand.¹ The Bill may also, if the original suit has become abated, be at the same time a Bill of revivor.² A supplemental Bill may likewise be added, if any event has happened, which requires it; and, particularly, if any person, not a party to the original suit, becomes interested in the subject, he *must be made a party to the Bill of review by [*335] way of supplement.³ It may be added, that all the parties to the original Bill ought to be made parties to the Bill of review; for it is a principle of natural justice,

¹ Mitf. Eq. Pl. by Jeremy, 88 to 90, and cases there cited; Cooper Eq. Pl. 95; *Dexter v. Arnold*, 5 Mason R. 308, 309. In *Dexter v. Arnold*, 5 Mason R. 308, 309, the Court, upon the hearing of the petition for leave to file a Bill of Review, allowed the adverse party to file counter affidavits. On that occasion, the Court said:—"This course, though not very common, is, as I conceive, perfectly within the range of the authority of the Court; and may be indispensable for a just exercise of its functions, in granting or withholding the review. If, indeed, it were doubtful, in case the Bill of review should be allowed, whether the defendants could by plea or answer traverse the allegation in such Bill, that the matter of fact is new, I should not hesitate to inquire, in the most ample manner, into the truth of such allegation, before the Bill was granted, in order to prevent gross injustice. But as every such Bill of review must contain an allegation, that the matter of fact is new, it seems to me clear upon principle, that, as it is vital to the relief, it is traversable by plea or answer, and must be proved, if not admitted at the hearing. In *Hanbury v. Stevens* (1784), cited by Lord Redesdale (Redesd. Eq. Pl. 80), [3d ed. 70, Id. 4th ed. by Jeremy 89], the Court is reported to have held that doctrine. The case of *Lewellen v. Mackworth* (2 Atk. R. 40; Barnard. Ch. R. 445), though very imperfectly, and, as I should think, inaccurately reported, seems to me to support the same conclusion. It has been relied on by the best text-writers for that purpose. Lord Redesdale, in his original work on Equity Pleadings (Redesd. Eq. Pl. 80, 2d edition), stated the point, as one which may be doubted. But upon principle I cannot see, how that can well be. And in the last edition (the third), revised by his Lordship, I find, that he has questioned the propriety of such a doubt." See also *Hanbury v. Stevens*, cited in note (k) to Mitf. Eq. Pl. by Jeremy, 89.

² Ibid.

³ Ibid.

that no one ought to be affected by any decree without his first being heard.¹

§ 421. Thirdly. Bills in the nature of Bills of review. It has been already stated, that the only distinction between Bills of review, and Bills in the nature of Bills of review, consists in the enrollment or non-enrollment of the decree. In the former case, a Bill of review is proper; in the latter case, a Bill in the nature of a Bill [*336] of review.² As, however, a decree, not signed and enrolled, may be altered or reversed upon a rehearing, without the assistance of a Bill in the nature of a Bill of review, if there is sufficient matter to alter or reverse it, appearing upon the former proceedings, the new investigation of the decree must be, or at least

¹ Cooper Eq. Pl. 95.

² Ante § 403; Cooper Eq. Pl. 88; Mitf. Eq. Pl. by Jeremy, 90; *Standish v. Radley*, 2 Atk. 178; *Wyatt Pr. Reg.* 96; *Wiser v. Blachley*, 2 John. Ch. R. 488; *Smith v. Clay*, 3 Bro. Ch. R. by Belt, 639, note; *S. C. Ambler R.* 645. This is not merely a formal distinction; but in many cases it is connected with the rights of the party. Thus, although a Bill of review lies for errors of law apparent on the face of a decree; yet it has never been decided, that a Bill in the nature of a Bill of review lies in such a case; for the proper remedy may be had by a rehearing. In *Perry v. Phelps* (17 Ves. 178), Lord Eldon used the following language: "I further doubt upon this case, whether a Bill in nature of a Bill of review can be filed upon matter of law. Where the decree has been enrolled, there are two grounds of review: error apparent; and new facts, or facts newly discovered. In the first case, the plaintiff has a right to file a Bill of review; in the two latter cases, he must have the leave of the Court. Where the objection is upon matter of law apparent, or a mistake in law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is the subject of a rehearing; and there is no occasion for a Bill in nature of a Bill of review, unless a supplemental Bill is also necessary to introduce new facts; in which case the cause will come on to be heard upon the matter of that supplemental Bill, together with a rehearing of the original cause. And the Court will vary the decree upon the rehearing; taking into consideration the new, or lately discovered, facts. But I apprehend, there is no instance of a Bill in nature of a Bill of review upon error apparent."

usually is, brought on by a petition for a rehearing, when there is no defect to be supplied.¹

*§ 422. The true office of this sort of Bill, as [*337] now used, is to bring before the Court new matter, discovered since publication in the original cause, when the decree has not been signed and enrolled.² In such a case the new matter is brought forward by a supplemental Bill, or a new Bill in the nature of a Bill of review; and it ought to be accompanied by a petition to rehear the original cause at the same time, that it is heard upon the supplemental Bill.³ Such a supple-

¹ Mitf. Eq. Pl. by Jeremy, 90, 91; Cooper Eq. Pl. 89, 93; Gilb. For. Rom. 183; Wyatt Pr. Reg. 96, 99; Standish v. Radley, 2 Atk. 178; Moore v. Moore, 2 Ves. 598; Perry v. Phelps, 17 Ves. 173, 176, 178; Pendleton v. Fay, 3 Paige R. 204; Wiser v. Blackley, 2 John. Ch. R. 488. The following note from Mitf. Eq. Pl. by Jeremy, 90, may be here usefully cited; "The rehearing, which is thus far alluded to, not being sought in respect to any new matter, is obtained upon certificate of counsel (18 Ves. 325), by a petition merely, which states the case as brought before the Court, when the decree was made. Wood v. Griffiths, 1 Meriv. 35; and the grounds, on which the rehearing is prayed. 1 Sch. & Lefr. 398. And here it may not be improper to notice, that the Court will not, without consent (3 Swanst. 234), vary a decree after it has been passed and entered, except as to mere clerical errors (Lane v. Hobbs, 12 Ves. 458; Weston v. Haggerston, Coop. R. 134; Hawker v. Duncombe, 2 Madd. R. 391; 3 Swanst. 234; Tomlins v. Palk, 1 Russ. R. 475); or, matters of course (Pickard v. Mattheson, 7 Ves. 293); Newhouse v. Mitford, 12 Ves. 456); unless upon a petition of rehearing or upon a Bill of review, or Bill in the nature of a Bill of review (4 Madd. 32; Grey v. Dickenson, 4 Madd. 464; Brackenbury v. Brackenbury, 2 Jac. & Walk. 391; Willis v. Parkinson, 3 Swanst. 233; Brookfield v. Bradley, 2 Sim. & Stu. 64); according as the decree has, or has not, been signed and enrolled; and as it is sought to have the case reheard as originally brought before the Court, or accompanied with new matter." In some cases a rehearing will be allowed by the Court notwithstanding the application for the rehearing is made after the ordinary time allowed for the purpose; as, for example, where a decree not final in its nature, or which has been only partially acted on, is radically erroneous, so that upon an appeal it would be reversed. Ackland v. Braddick, 3 Younge & Coll. 237.

² Moore v. Moore, 2 Ves. 596, 598; S. C. 1 Dick. 66; Beam. Ord. in Ch. 366 to 368, and note; Wyatt Prac. Reg. 96, 98, 99; Phelps v. Phelps, 17 Ves. 176, 177, 178; Pendleton v. Fay, 3 Paige R. 204; Mitf. Eq. Pl. by Jeremy, 91, 92. Post § 425.

³ Ibid.

mental Bill cannot be filed without the leave of the Court, and without an affidavit similar to that required in the like case of a Bill of review.¹ If necessary, a Bill of review may also be incorporated into such a supplemental Bill.²

§ 423. It seems to be a general rule, that a supplemental Bill for new-discovered matter, should be filed as soon after the new matter is discovered, as it reasonably may be.³ If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim [*338] is founded, he will not be permitted afterwards to file a supplemental Bill in the nature of a Bill of review, founded on those facts ; for it was his own laches not to have brought them forward at an earlier stage of the cause.⁴

§ 424. If a decree has been made against a person, who had no interest at all in the matter in dispute, or who had not such an interest, as was sufficient to render the decree against him binding upon some person, claiming the same or a similar interest, relief may be obtained against the error in the decree by a supplemental Bill in the nature of a Bill of review, as has been already mentioned in treating of supplemental Bills.⁵ Thus, where a Bill was filed by a vicar for tithe of lead against a parish, and four parishioners were named defendants, and a decree was made against them ; and one, who

¹ Cooper Eq. Pl. 93, 94 ; Pendleton v. Fay, 3 Paige R. 204 ; Wyatt Pr. Reg. 99 ; Mitf. Eq. Pl. by Jeremy, 91.

² Wyatt Pr. Reg. 99 ; Phelps v. Phelps, 17 Ves. 176, 177 ; Pendleton v. Fay, 3 Paige R. 208.

³ Ante § 337, § 370, a, § 338, a.

⁴ Pendleton v. Fay, 3 Paige R. 204 ; Bingham v. Dawson, Jac. R. 243 ; Ord. v. Noel, 6 Madd. R. 127 ; Dias v. Merle, 4 Paige R. 259. Ante § 337, § 370, a.

⁵ Ante § 338.

claimed under none of them, contested the decree; the Court allowed him to have a Bill of review. If a decree is made against a tenant for life only, a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a Bill, showing the error in the decree, the incompetency of the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying, that the proceedings in the original cause may be reviewed, and that, for that purpose, the other party may appear to and answer this new Bill, and that the rights of the parties may be properly ascertained. A Bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person, under whom he claims, may be filed *without leave of the Court being first obtained [*339] for that purpose.¹

§ 425. A supplemental Bill in the nature of a Bill of review nearly resembles in its frame a Bill of review, except that instead of praying, that the former decree may be reviewed or reversed, it prays, that the cause may be heard with respect to the new matter made the subject of the supplemental Bill, at the same time that it is reheard upon the original Bill; and that the plaintiff may have such relief, as the nature of the case made by the supplemental Bill, requires.² It should, also, state the circumstances positively, which entitle the party to file it, viz. that the decree has not been enrolled; and not merely state them in the alternative, praying one sort of relief, as upon a Bill of review, if the decree has been enrolled, and if not enrolled, then to have the ben-

¹ Cooper Eq. Pl. 94, and cases there cited; Mitford Eq. Pl. by Jeremy, 92; Brown v. Vermuden, 1 Ch. Cas. 272; Osborne v. Usher, 6 Bro. Parl. R. by Tomlins, p. 20; S. C. 2 Bro. Parl. R. 314.

² Mitf. Eq. Pl. by Jeremy, 91, 92; Cooper Eq. Pl. 96.

efit of it, as upon a supplemental Bill in the nature of a Bill of review.¹

¹ The remarks of Lord Eldon (in *Perry v. Phelps*, 17 Ves. 176 to 178), on this whole subject, are so very important, that, though long, I cannot omit to bring them before the reader, as they explain the text, and also illustrate the principles of pleading in this case. "There is no objection," (said he), "to this Bill, as being on the face of it a Bill of Review and a Bill of revivor and supplement; as in some cases the Bill must of necessity be both a Bill of review and a Bill of revivor; and in some, a Bill of supplement also, in addition to those two descriptions. Admitting that there is not much difference between a Bill of review and a Bill in nature of a Bill of review, I have considerable doubt upon this Bill; whether the plaintiff must not, as far as he seeks relief, determine, that his Bill shall be either a Bill of review, or a Bill in nature of a Bill of review; and, I apprehend, I should let in a mischievous practice, by not requiring him to make that determination, whether his cause should be treated as introduced by a Bill of the one or the other description. If it is competent to a plaintiff, not filing a Bill of review, together with a Bill of revivor and supplement, in order to have the relief, which may be obtained by such a Bill, but stating, that he will not determine, whether there is error apparent in the decree, contending that there is; but, in case it shall not prove so, electing in his prayer to make it a mere Bill of revivor, or supplement, or both, the consequence is, that all the protection against a Bill of review, founded on error apparent in the decree, is gone by the effect of that alternative prayer. In the case of newly discovered facts, the leave of the Court must be obtained, which gives protection. But this difficulty occurs from putting the case in the alternative, that the defendant can neither plead nor demur. He must be brought to a hearing, and may incur all the vexation of a suit, whether it shall turn out to be a Bill of review, or not. Upon these grounds, I have considerable doubt, whether the plaintiff can put his case in the alternative, as a Bill of review; or, if the Court shall think it not so, then as a Bill of revivor and supplement. There is this difference between a Bill of review, and a supplemental Bill in nature of a Bill of review: in the former, if introducing also matter of supplement or revivor, the prayer, as far as it is a Bill of review, is, that the decree may be reviewed and reversed: in the other, adopting also the proper prayer for revivor, as to the supplemental matter, you pray, that the cause may be reheard. In that respect, also, I doubt, whether this is an accurate record in not stating positively the fact, whether the decree is enrolled or not. If it is enrolled, the Bill is a Bill of review, strictly speaking; if not, it is a Bill in nature of a Bill of review; and then, according to Lord Redesdale, the plaintiff, stating, that there is error in the decree, prays, that the cause may be reheard."

§ 426. Fourthly ; Bills impeaching decrees for fraud. A Bill of this sort is an original Bill in the nature of a Bill of review.¹ There is no doubt of the jurisdiction of Courts of Equity to grant relief against a former decree, where the same has been obtained by fraud and imposition ; for these will infect judgments at law and decrees of all Courts ; but they annul the whole in the consideration of Courts of Equity. This must be done by an original Bill ; and there is no instance of its being done by petition ; though it seems once to have been thought, that a decree, as well as any interlocutory order, could be set aside for fraud by petition only. Where a decree has been so obtained, the Court will restore the *parties to their former situation, whatever their [*341] rights may be. This kind of Bill may be filed without leave of the Court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue, and being necessary to be established by proof, before the propriety of the decree can be investigated.²

¹ *Mussel v. Morgan*, 3 Bro. Ch. R. 79.

² *Cooper Eq. Pl.* 96, 97, 98, and cases there cited ; *Mitf. Eq. Pl.* by Jeremy, 92, 93, 94 ; *Kennedy v. Daly*, 1 Sch. & Lefr. 355, 374, 375 ; *Barnesley v. Powell*, 1 Ves. 120 ; *Richmond v. Tayleur*, 1 P. Will. 736, 737. In *Sheldon v. Fortescue Aland*, 3 P. Will. 111, the Lord Chancellor. (King) said ; “ I admit even a decree, much more an interlocutory order, if gained by collusion, may be set aside on a petition ; *a fortiori* may the same be set aside by Bill.” This doctrine was probably intended to apply to a case, where the decree had not been enrolled, and where the fact of fraud could not be controverted. *Mitf. Eq. Pl.* by Jeremy, 92, note (o). In *Mussell v. Morgan*, 3 Bro. Ch. R. 74, 79, Lord Thurlow expressly overruled the doctrine in 3 P. Will. 111, saying ; “ There was no instance hitherto of its being done ; and that he could not see a reason, why it should not be by an original Bill in the nature of a Bill of review. Either there is enough before the Court already to act upon, or not. If there is, it may be done by a rehearing ; if not, the new matter must be brought before the Court ;” that is, by an original Bill in the nature of a

§ 427. A decree obtained without making those parties to the suit, in which it was had, whose rights are affected thereby, is fraudulent and void as to those parties.¹ And even a purchaser under it, having notice of the defect, is not protected by such decree; for otherwise the decree of a Court of Equity might be used as an engine for the purpose of effecting the grossest fraud.² And, therefore, where a decree has been made against a trustee, the *cestui que trust* not being before the Court, and the trust not discovered; or where a decree ~~has~~ [*342] *been made against a person, who has made some conveyance or incumbrance not discovered; or where a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject matter of the suit; the concealment of the trust, or subsequent conveyance, or incumbrance, or will, in these several cases, ought to be treated as a fraud.³ It has been also said, that where an improper decree has been made against an infant, though the same were not gained by fraud, or collusion, or surprise, it ought to be impeached by original Bill; and the infant, aggrieved by it, need not stay till he is of age; but he may apply to reverse it, as soon as he thinks fit.

Bill of review. See also Cooper on Eq. Pl. 96, note (o); Bennett v. Hamill, 2 Sch. & Lefr. 576. Where a decree has been enrolled by surprise, the plaintiff intending to move for a rehearing, and notice thereof having been given to the adverse party, the Court will set aside the enrollment. Stevens v. Guppy, 1 Turn. & Russ. 178.

¹ Cooper Eq. Pl. 96, 97, 98, and cases before cited. Mr. Cooper (Cooper Eq. Pl. 98), has placed the case of Coker v. Bevis, 1 Ch. Cas. 61, under this head, as a case of fraud in obtaining a decree. The decree does not seem to have put the relief granted upon the ground of fraud; but upon the ground, that the original decree for a foreclosure, unless the money was paid at a certain time, had not been complied with from circumstances of inevitable necessity, and without wilful default; and that, therefore, the defendant ought to have the time for payment of the mortgage money enlarged, notwithstanding the decree had by lapse of

² Ibid.

³ Ibid.

§ 428. A Bill to set aside a decree for fraud, or upon any of the above grounds, must state the decree, and the proceedings, which led to it, with the circumstances of fraud, or whatever the ground may be, on which it is impeached. The prayer must necessarily be varied according to the nature of the fraud, or the other improper means used, and the extent of their operation in obtaining an improper decision of the Court.¹

*429. Fifthly : Bills to carry decrees into ex- [*343] ecution. Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the Court. This happens, generally, in cases, where parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the Court to settle and ascertain them. Sometimes, such a Bill is exhibited by a person, who was not a party ; or who does not claim under any party to the original decree ; but who claims in a similar interest ; or who is unable to obtain the determination of his own rights, till the decree is carried into execution. Or, it may be brought by or against a person, claiming as assignee of a party to the decree.²

§ 430. The Court in these cases, in general, only enforces, and does not vary, the decree. But on circumstances it has sometimes considered the original

time become absolute. Lord Redesdale has treated this case, as not so much founded in fraud, as on its own special circumstances. See Mitf. Eq. Pl. by Jeremy, 94, and note (i).

¹ Cooper Eq. Pl. 98, and cases there cited ; Mitf. Eq. Pl. by Jeremy, 94 ; Gifford v. Hort, 1 Sch. & Lefr. 386 ; Kennedy v. Daly, 1 Sch. & Lefr. 355, 374, 375.

² Mitf. Eq. Pl. by Jeremy, 95, and cases there cited ; Cooper Eq. Pl. 98, 99.

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directions, and varied them in case of mistake.¹ And it has even, on circumstances, refused to enforce the decree; though in other cases the Court, and the House of Lords, upon an appeal, seem to have considered, that the law of the decree ought not to be examined on a Bill to carry it into execution.²

§ 431. Such a Bill may also be brought to carry into execution the judgment of an inferior Court of Equity, if the jurisdiction of that Court is not equal to the purpose; as in the case of a decree in Wales, which the defendant has avoided by flying into England. In such [*344] a case the Court has thought itself entitled to examine the justice of the decision, though it had been affirmed in the House of Lords.³ But it has been justly remarked, that on that occasion the Court suffered its anxiety to do justice to carry it far beyond the limits of its jurisdiction.⁴

§ 432. A Bill for this purpose is, generally, partly an original Bill, and partly a Bill in the nature of an original Bill, though not strictly original; and sometimes it is likewise a Bill of revivor, or a supplemental Bill, or both. The frame of the Bill is varied accordingly.⁵

¹ Mitf. Eq. Pl. by Jeremy, 95, 96, and cases there cited; Cooper Eq. Pl. 99.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 96, 97, and cases there cited; Cooper Eq. Pl. 99, 100.

⁴ Cooper Eq. Pl. 100; Galbraith v. Neville, Doug. R. 5, note (2).

⁵ Mitf. Eq. Pl. by Jeremy, 97. See Pott v. Gallini, 1 Sim & Stu, 206.

CHAPTER IX.

MODES OF DEFENCE.

§ 433. HAVING disposed of the general considerations applicable to the frame and structure of Bills, we shall now proceed to the consideration of the general nature of the matters of defence to Bills, which may be insisted on in Courts of Equity, and of the various modes, in which those matters may or should be asserted.

§ 434. The matters of defence, which may be relied on in Courts of Equity, are in their nature susceptible of two divisions, viz. (1.) Into those, which are dilatory, which merely dismiss, or suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on is removed ; and, (2.) Into those, which are peremptory, and permanent, and go to the entire merits of the suit. Dilatory defences may again be divided into four sorts ; first, to the jurisdiction of the Court, insisting, that the Bill is not preferred to the proper tribunal, which is authorized to entertain the case upon its merits ; secondly, to the person, that the Bill is preferred by or against an improper person, not competent to maintain or defend it ; thirdly, to the form of proceedings, that the suit is irregularly brought, or defective in its appropriate allegations or parties ; and, fourthly, to the propriety of maintaining the suit itself, because of the pendency of another suit for the same controversy.¹

§ 435. Peremptory, or permanent defences, may be

¹ 1 Montag. Eq. Pl. 88, 89.

divided into two sorts; first, those, which insist, that the plaintiff never had any right to institute the suit; and, secondly, those, which insist, that the original right, if any, is extinguished or determined. Under the former head may be included the following defences; (1.) That the plaintiff has not a superior right to the defendant; (2.) That the defendant has no interest; and, (3.) That there is no privity between the plaintiff and defendant, or any other right to sustain the suit. Under the latter head, may be included the following defences; (1.) That the right is determined by the act of the parties; or, (2.) That it is determined by operation of law.¹

§ 436. In regard to the modes of defence, they are of four sorts, (1.) By demurrer, by which the defendant demands the judgment of the Court, whether he shall be compelled to answer the Bill, or not. (2.) By plea, whereby he shows some cause, why the suit should be dismissed, delayed, or barred. (3.) By answer, which, controverting the case stated by the Bill, confesses and avoids it; or traverses and denies the material allegations in the Bill; or, admitting the case made by the Bill, submits to the judgment of the Court upon it; or relies upon a new case, or upon new matter stated in the answer, or upon both. (4.) By disclaimer, which seeks at once a termination of the suit, by the defendant's disclaiming all right and interest in the matter sought by the Bill.²

§ 437. It has been well remarked, in further illustration of these different modes of defence, that the form of making defence varies according to the foundation, on which it is made, and the extent, in which it submits to the judgment of the Court.³ If it rests on the Bill, and,

¹ 1 Montag. Eq. Pl. 89.

² Mitf. Eq. Pl. by Jeremy, 13, 14, 106; Cooper Eq. Pl. 108, 110, 223, 309, 312; Wyatt Pr. Reg. 11, 162, 175, 324.

³ Ibid.

on the foundation of matter there apparent, demands the judgment of the Court, whether, the suit shall proceed at all, it is termed a demurrer.¹ If it rests on the foundation of new matter offered, it demands the judgment of the Court, whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a plea.² If it submits to answer generally the charges in the Bill, demanding the judgment of the Court on the whole case made on both sides, it is offered in a shape still different, and is simply called an answer.³ If the defendant disclaims all interest in the matters in question by the Bill, his answer to the complaint made is again varied in form, and is termed a disclaimer.⁴ All, or any of these modes of defence may be joined, provided each relates to a separate and distinct part of the Bill.⁵

§ 438. The grounds, on which defence may be made to a Bill, either by answer, or by disputing the right of the plaintiff to compel the answer, which the Bill requires, are various both in their nature and in their effect. Some of them, though a complete defence as to any relief, are not so as to a discovery; and, when there is no ground for disputing the right of the plaintiff to the relief prayed; or if the Bill seeks only a discovery, yet if there is any impropriety in requiring the discovery; or if it can answer no purpose for which a Court of Equity ought to compel it; the impropriety of compelling the discovery, or the immateriality of the discovery, if made, may be used as a ground to protect the defendant from making it.⁶ Different grounds of defence, therefore, may be applicable to different parts of a Bill. And every species of Bill requiring its own peculiar ground to support it, and

¹ Mitf. Eq. Pl. by Jeremy, 13, 14.

² Ibid. ³ Ibid. ⁴ Ibid.

⁵ Mitf. Eq. Pl. by Jeremy, 14. Id. 106. *Livingston v. Story*, 9 Peters R. 632.

⁶ Mitf. Eq. Pl. by Jeremy, 107.

its own peculiar form to give it effect, a deficiency in either of these points is a ground of defence to it.¹

§ 439. In many cases, the same matter may be insisted upon as a defence, either by demurrer, or by plea, or by answer. In some cases, the defence can be made only by demurrer; in some only by plea; and in others again only by answer. The same objections do not (as we have just seen) always lie to a Bill of discovery only, as do lie to a Bill of discovery and relief. And matters of defence may be made against Bills not original, which are inapplicable to original Bills, or to Bills in the nature of original Bills. But, as the defences, which may be made to original Bills, in their variety comprehend the defences, which may be made to every other kind of Bill, except such as arise from the peculiar form and object of each kind,² it will be convenient for us in our future inquiries, first to treat of defences to original Bills; and then, secondly, to treat of defences to Bills not original; and, thirdly and lastly, to treat of defences to Bills in the nature of original Bills.

§ 440. Original Bills have been already divided into two kinds, viz. (1.) Original Bills praying relief; and (2.) Original Bills, not praying relief. We shall first consider the several defences belonging to original Bills for relief, which, of course, include a prayer for discovery, as well as for relief; and afterwards, we shall consider the defences peculiar to the other kinds of Bills.³

§ 441. In treating of defences to original Bills for relief, we shall, in the first place, consider those, which may be taken by demurrer. We have already had occasion to remark, that demurrers to relief frequently include a demurrer to discovery, and demurrers to dis-

¹ Mitf. Eq. Pl. by Jeremy, 106, 107.

² Idem. 109.

³ See Mitf. Eq. Pl. 109.

covery only sometimes consequentially affect the relief ; and that if a demurrer to relief is good, it is of course a good bar to the discovery.¹ The word demurrer comes (as Lord Coke has said) from the Latin word *demorari*, to abide ; and therefore he, that demurreth in law, is said to abide in law ; *moratur*, or *demoratur in lege*. He will go no further, until the Court has decided, whether the other party has shown sufficient matter in point of law to maintain his suit.² A demurrer is then in the nature of a declinatory exception in the civil law, which was always put in before the Prætor, *ante litem contestatam*.³

→ § 442. A demurrer may be to the whole Bill, or to a part only of the Bill ; and the defendant may therefore demur as to a part, plead as to another part, and answer as to the rest of the Bill. But care must be taken, that each of these modes of defence is actually applied to different and distinct parts of the Bill, and that, as applied, each is consistent with the other ; so that one does not overrule the other.⁴ Thus, for example, if there is a demurrer to the whole Bill, an answer to a part thereof is inconsistent ; and the demurrer will be overruled.⁵ For the same reason, if there is a demurrer to a part of a Bill, there cannot be a plea or answer to the same part, without overruling the demurrer.⁶

§ 443. If a demurrer is too general, that is, if it covers, or is applied to the whole Bill, when it is good to a part

¹ Ante § 312. Mitf. Eq. Pl. by Jeremy, 109, 110.

² Co. Litt. 71, b. ; Cooper Eq. Pl. 110 ; 3 Black. Comm. 314.

³ Gilb. For. Rom. 50.

⁴ Cooper Eq. Pl. 112, 113.

⁵ Cooper Eq. Pl. 112 ; Tidd v. Clare, 2 Dick. 712 ; Mitf. Eq. Pl. by Jeremy, 209, 210 ; Portarlington v. Soulby, 6 Sim. 356 ; Davies v. Davies, 2 Keen R. 538.

⁶ Cooper Eq. Pl. 113 ; Jones v. Strafford, 38 ; 3 P. Will. 80 ; Dormer v. Fortescue, 2 Atk. 282 ; Clark v. Phelps, 6 John. Ch. R. 214.

only ; or if it is a demurrer to a part of a Bill only ; but yet is not good to the full extent, which it covers, but is so to a part only, it will be overruled ; for it is a general rule, that a demurrer (it is otherwise as to a plea) cannot be good as to a part, which it covers, and bad as to the rest ; and therefore it must stand or fall altogether.¹ But a demurrer may be put in, and several causes assigned ; and if one cause is good to the whole extent of the demurrer, and another is bad, the demurrer will be sustained ; for if both were bad, the defendant may *ore tenus*, assign new causes of demurrer at the argument to matters of substance, though not to matters of form ; so that any one good cause existing of record or otherwise assigned will do.²

§ 444. And a defendant may put in separate demurrers to separate and distinct parts of a Bill for separate and distinct causes ; for the same grounds of demurrer frequently will not apply to different parts of a Bill. And if separate demurrers are put in to different and distinct parts of a Bill, one demurrer may be overruled upon ar-

¹ Cooper Eq. Pl. 112, 113 ; Metcalf v. Hervey, 1 Ves. 248 ; 2 Verplanck v. Caines, 1 John. Ch. R. 57 ; Higginbotham v. Burnet, 5 John. Ch. R. 136 ; Todd v. Gee, 17 Ves. 273 ; Knight v. Moseley, Amb. R. 176 ; Jones v. Frost, Jac. R. 466 ; Wynne v. Jackson, 1 McClell. & Younge, 35 ; Jones v. Frost, 3 Madd. R. 8 ; Attorney General v. Brown, 1 Swanst. R. 304 ; Kuypers v. Dutch Reformed Church, 6 Paige R. 570 ; 1 Mont. Eq. Pl. 99, 100, 110. Lord Redesdale, after stating, that where a demurrer is put in, which is too extensive, it is generally considered, that the demurrer must be overruled, has added, " but there are instances of allowing demurrers in part." And he cites 2 Eq. Abridg. 759 ; 2 Bro. Parl. Cas. 514, Tomlins's edition. The doctrine of the text is now, however, firmly established. Mayor of London v. Levy, 8 Ves. 403 ; Baker v. Mellish, 11 Ves. 70 ; Todd v. Gee, 17 Ves. 280. See also Mitf. Eq. Pl. by Jeremy, 214, note (i). Where a demurrer is too extensive, the Court will, if a fair case is made, in its discretion, give leave, upon proper terms, to the defendant to amend his demurrer by narrowing its terms. Cooper Eq. Pl. 112, 113, 115 ; Mitf. Eq. Pl. by Jeremy, 214, 215, and cases there cited. Baker v. Mellish, 11 Ves. 70 ; Post § 692.

² Cooper Eq. Pl. 112, 113 ; Jones v. Frost, Jac. R. 468 ; Beames Ord. in Chan. 174.

gument, and another be allowed.¹ So that, in this way, the hazard of one general demurrer to all the objectionable parts of a Bill may be avoided.

§ 445. Where there are several defendants, if they all join in one demurrer to a Bill, the demurrer may be good, and be allowed, as to one of the defendants, and be bad, and disallowed as to the other defendants ; for the defence may be good as to one person, and be wholly inapplicable to another.² And there is a clear, though a nice, distinction between a demurrer, which is too large in regard to all the defendants, and one, which is too large or inapplicable to some of the defendants. In this respect, there is a difference between pleadings in law and in Equity ; for a joint demurrer, or a joint plea at law, bad as to one defendant, is bad as to all.

§ 446. Whenever any ground of defence is apparent on the Bill itself, either from the matter contained in it, or from the defect in its frame, or in the case made by it, the proper mode of defence is by demurrer.³ A demurrer is an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows, that as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer ; or that for some reason apparent on the face of the Bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance, which ought to be attendant thereon, the defendant ought not to be compelled to answer.⁴ It therefore demands the judgment of the Court, whether the defendant shall be compelled to make answer to the plaintiff's Bill, or to some certain part thereof.⁵

¹ Cooper Eq. Pl. 113 ; Mitf. Eq. Pl. by Jeremy, 214, 215.

² Cooper Eq. Pl. 113 ; *Mayor of London v. Levy*, 8 Ves. 403, 404.

³ Mitf. Eq. Pl. by Jeremy 107.

⁴ Ibid.

⁵ Ibid.

§ 447. The causes of demurrer must be upon some matter in the Bill, or upon the omission of some matter, which ought to be therein, or attendant thereon ; and not upon any foreign matter alleged by the defendant.¹ The principal ends of a demurrer are, to avoid a discovery, which may be prejudicial to the defendant, or to cover a defective title, or to prevent an unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer.² For, in general, if a demurrer would hold to a Bill, the Court, though the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases, in which the Court has given relief upon the hearing, though a demurrer to the relief would probably have been allowed. But such cases are rare.³

§ 448. From what has been said, as to the nature and office of a demurrer, it is clear, that it can be only for objections apparent upon the face of the Bill itself, either from the matter inserted, or omitted therein, or from defects in the frame or form thereof.⁴ It cannot, therefore, state, what does not appear upon the face of the Bill, otherwise it would be, what has been emphatically called, a speaking demurrer ; that is, a demurrer, where a new fact is introduced to support it.⁵ Thus, for example, where a Bill was brought to redeem a mortgage, and it did not allege possession in the mortgagor within twenty years, otherwise than by saying, that in or about the year 1770, the plaintiff's ancestor (the mortgagor) died, and soon after, the defendant took possession ; and

¹ Mitf. Eq. Pl. by Jeremy, 107, 108, and cases there cited. Wyatt Pr. Reg. 162.

² Ibid.

³ Ibid.

⁴ Beames Ord. Ch. 26.

⁵ Cooper Eq. Pl. 111 ; Davies v. Williams, 1 Sim. R. 5 ; Brooks v. Gibbons, 4 Paige R. 374 ; Brownsword v. Edwards, 2 Ves. 245 ; Edsell v. Buchanan, 2 Ves. jr. 83 ; S. C. 4 Bro. Ch. R. 254 ; Cawthorne v. Chalie, 2 Sim. & Stu. 129 ; Kuypers v. Dutch Reformed Church, 6 Paige R. 570.

a demurrer was put in, and alleged for cause, that it appeared upon the face of the Bill, that from the year 1770, "which is upwards of twenty years before the filing of the Bill," the defendant had been in possession, and the plaintiff was under no disability, &c., and had shown no right to redeem; the Court overruled the demurrer, saying it was a speaking demurrer, containing an averment of a matter of fact, the possession for twenty years by defendant, which did not appear in certainty on the face of the Bill.¹ We shall presently have occasion to consider more fully the proper frame of a demurrer.²

§ 449. A demurrer being (as we have seen) always upon matter apparent on the face of the Bill, and not upon any matter alleged by the defendant, it sometimes happens, that a Bill, which, if all the parts of the case were fully disclosed, would be open to a demurrer, is so artfully drawn, as to avoid showing upon the face of it any cause of demurrer. In this case, the defendant is compelled to resort to a plea, by which he may allege matter, which, if it appeared upon the face of the Bill, would be a good cause of demurrer. For in many cases, what is a good defence by way of plea, is also good by way of demurrer, if the facts appear sufficiently by the Bill.³ But of this subject more will be said hereafter.⁴

§ 450. Where the facts relied on as a matter of de-

¹ *Edsell v. Buchanan*, 4 Bro. Ch. R. 254; S. C. 2 Ves. jr. 83; *Brooks v. Gibbons*, 4 Paige R. 374. But if the lapse of more than twenty years had appeared with certainty upon the face of the Bill, the objection might have been taken by demurrer. *Hadley v. Healey*, 1 Ves. & B. 536; *Foster v. Hodgson*, 19 Ves. 180; *Barron v. Martin*, 19 Ves. 327; S. C. Cooper R. 189; Mr. Belt's note to *Deloraine v. Browne*, 3 Bro. Ch. R. 633; *Hoare v. Peck*, 6 Sim. R. 51; *Hovenden v. Annesley*, 2 Sch. & Lefr. 637; Mitf. Eq. Pl. by Jeremy, 212, and note.

² Post. § 457.

³ Mitf. Eq. Pl. by Jeremy, 216.

⁴ Post § 647, § 652.

fence by the defendant, are stated in the Bill only by way of pretence, and not expressly charged, it is not generally safe to demur to the Bill, unless the whole right against the defendant is founded on that charge.¹ Thus, for example, where a Bill relied on a decree, directing a conveyance, and the decree was stated only by way of pretence, and not expressly charged; the Court at first doubted, whether the defence could be taken by demurrer, and ought not to have been taken by plea, as the decree was not averred in a direct statement. But the demurrer was at last held good, upon the ground, that without that conveyance the plaintiff had no title; and the relief prayed turned upon the due execution of the conveyance.²

§ 451. So, where a Bill stated the sale of an office, and prayed an account of the profits, a demurrer was held not to lie, upon the ground of the sale of the office being illegal; because there was no sufficient averment in the Bill, that the office was one within the reach of the prohibition of the statute of 5th and 6th of Edward VI.³ So, where a Bill *quia timet* was brought, founded upon an equitable lien for the purchase-money of an estate; and the Bill stated, that a bond was taken, as a farther and additional security, a demurrer to the Bill, upon the ground, that the taking of the bond was a waiver of the lien, was overruled; for the allegation of the Bill was, that it was taken as additional security; and if it was not, the objection should be in another form.⁴

§ 452. A demurrer necessarily admits the truth of the

¹ *Fletcher v. Tollet*, 5 Ves. jr. 3. 1 Mont. Eq. Pl. 94.

² *Ibid.*

³ *Hicks v. Raincock*, 1 Cox R. 40.

⁴ *Braband v. Hoskins*, 3 Price R. 31.

facts stated in the Bill, so far as they are relevant and are well pleaded ; but it does not admit the conclusions of law drawn therefrom, although they are also alleged in the Bill.¹ Thus, if a demurrer extends to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the Bill. And if the defendant demurs to relief only, the whole case made by the Bill, to ground the relief prayed for, is considered as true. A demurrer is, therefore, always preceded by a protestation against the truth of the matters contained in the Bill, a practice borrowed from the common law, and probably intended to avoid any conclusion in another suit ; for in the present suit it is wholly without effect.²

§ 453. In regard to the appropriate use of a demurrer, it may be stated as a general rule, that whenever the ground of objection or defence is apparent on the face of the Bill itself, either from matter contained in it, or from defect in its frame, the proper mode of taking it is by demurrer, and not by way of plea.³ Hence, if the case of the plaintiff, as stated in his Bill, will not entitle him to a decree, the proper course is for the defendant to insist upon it by way of demurrer, although it may

¹ Cooper Eq. Pl. 111 ; Mitf. Eq. Pl. by Jeremy, 211, 212 ; Williams v. Steward, 3 Meriv. R. 472, 492 ; Ford v. Peering, 1 Ves. jr. 77 ; East India Co. v. Henchman, 1 Ves. jr. 291 ; Wyatt Pr. Reg. 163 ; Penfold v. Nunn, 5 Sim. R. 405. In Baker v. Booker (6 Price 381), Baron Wood said ; "A demurrer only admits matters positively alleged in the Bill ; not every fanciful pretence suggested." But this proposition must be taken *sub modo* ; for if a fact be not positively asserted, and yet it is material, and is stated in terms, which may be deemed reasonably certain in their import, the demurrer will admit them.

² Mitf. Eq. Pl. by Jeremy, 107, 211, 212 ; Cooper Eq. Pl. 111. Post § 457.

³ Cooper Eq. Pl. 118 ; Billings v. Flight, 1 Madd. R. 230 ; Hindes Pr. Ch. 154 ; 2 Madd. Ch. Pr. 224.

be equally fatal at the hearing.¹ When the Bill is defective in substance, it is in general advisable to demur, because it saves unnecessary expense to all parties. When the objection is to a defect in matter of form, the objection may, and indeed ordinarily must be taken by demurrer.²

§ 454. The want of due form substitutes a just objection to the proceedings in every court of justice ; for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice.³ Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked, that infinite mischief has been produced by the facility of courts of justice in overlooking errors in form. It encourages carelessness ; and places ignorance too much on a footing with knowledge amongst those, who practice the drawing of pleadings.⁴ To which it may be added, that it often exposes the parties themselves to no small hardship, by embarrassing them at every step in the progress of the cause ; and involving the merits of the cause in superfluous details and inartificial allegations, at once loose, obscure, and misleading. In practice, however, objections to slight mistakes of form are not usually insisted on, where there are merits in the cause, nor unless the Bill seeks to enforce some harsh and rigorous claim.⁵

¹ *Hovenden v. Annesley*, 2 Sch. & Lefr. 638 ; *Barker v. Dacie*, 6 Ves. 686.

² Post § 528.

³ *Cooper Eq. Pl.* 118.

⁴ Lord Chief Justice Eyre in *Morgan v. Sargent*, 1 Bos. & Pul. 59 ; *Cooper Eq. Pl.* 118.

⁵ Mr. Barton, in a note (2) to his work on Suits in Equity, p. 113, remarks, that "Courts of Equity are apt, and with reason, to look with a suspicious eye upon defendants, who, by availing themselves of every

§ 455. Demurrers are either general or special. They are general, when no particular cause is assigned, except the usual formulary (to comply with the rules of the Court), that there is no equity in the Bill.¹ They are special, when the particular defects or objections are pointed out. The former will be sufficient (though special causes are usually stated) when the Bill is defective in substance. The latter is indispensable, where the objection is to the defects of the Bill in point of form.² By the rules of Courts of Equity, every demur-

cause of demurrer or plea, show an unwillingness fairly to meet the plaintiff's case. It is seldom, therefore, advisable to have recourse to these modes of defence, unless to prevent the expense of an examination of witnesses, or to avoid a discovery, which might be detrimental to the defendant's just and rightful interests. And, upon this principle of discountenancing these dilatory pleas, and encouraging an open and manly defence, have proceeded many of those cases, which we have had occasion to refer to. But, independent of these considerations, it is sometimes prudent to forego the benefit of those defences, and submit to answer the complainant's Bill; by which means the defendant has frequently an opportunity of pressing upon the Court, by his answer, facts and circumstances in rebuttal of the plaintiff's claims, which could not, consistently with the established mode of pleading, be offered together with such defences."

> ¹ The usual formulary is, "And for causes of demurrer say, that the complainant's said Bill of complaint, in case the same were true, which these defendants do in nowise admit, contains not any matter of equity, whereon this Court can ground any decree, or give the complainant any relief or assistance, as against them, these defendants." *Barton's Suit in Equity*, 107, 108.

> ² *Cooper Eq. Pl.* 118. The common form of a general demurrer is as follows; "These defendants, by protestation, not confessing all or any of the matters and things, in the said complainant's Bill contained, to be true in such manner and form, as the same are therein set forth and alleged, do demur to the said Bill, and for cause of demurrer show, that the said complainant has not, by his said Bill, made such a case as entitles him, in a Court of Equity, to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in the said Bill, or any of such matters; and that any discovery, which can be made by these defendants, or any of them, touching the matters complained of in the said Bill, or any of them, cannot be of any avail to the

rer is required to contain the causes thereof;¹ and they must be set down with reasonable certainty and directness.²

§ 456. Demurrers, though sometimes for dilatory causes, in the nature of a plea in abatement, are always in legal effect in bar of the suit, praying for a dismissal of it.³ But there is this difference, that where the suit is dismissed upon a hearing upon the merits, it is ordi-

said complainant for any of the purposes, for which a discovery is sought against these defendants by the said Bill, nor entitle the said complainant to any relief in this Court, touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said Bill, these defendants do demur thereto; and they pray the judgment of this honorable Court, whether they shall be compelled to make any further and other answer to the said Bill; and they humbly pray to be dismissed from hence, with their reasonable costs in this behalf sustained." (Van Heyth. Eq. Draft. 419.) 2 Harrison Ch. Pr. by Newl. p. 607. The form in Barton's Suit in Equity, p. 107, 108, is more concise and succinct. See same form, post § 483, note.

¹ Beames Ord. in Chan. 77, 173.

² Barton's Suit in Eq. 108, note (1.); Mitf. Eq. Pl. by Jeremy, 213, 214.

³ Roberdeau v. Rous, 1 Atk. 544; 2 Madd. Ch. Pr. 225; Jones v. Strafford, 3 P. Will. 80. Lord Loughborough, in Brooke v. Hewitt, 3 Ves. 255, said; "A demurrer must be founded upon this, that it is an absolute, certain, clear proposition, that the Bill would be dismissed, with costs, at the hearing." This is true, as to demurrers for defects in the substance of the Bill. But it does not apply to matters of form. Lord Hardwicke, in Roberdeau v. Rous, 1 Atk. R. 544, is made to say; "The defendant should not have demurred for want of jurisdiction; for a demurrer is always in bar, and goes to the merits of the case; and therefore it is informal and improper in this respect; for he should have pleaded to the jurisdiction." This language is loose and inaccurate. If the Court has no jurisdiction, the objection may be taken by demurrer, if it is apparent on the face of the Bill. Mitf. Eq. Pl. by Jeremy, 110, 216; Hill v. Reardon, 2 Sim. & Stu. 431. And a demurrer may be for causes not going to the merits. Lord Redesdale has remarked, that "A demurrer being frequently a matter of form, is not generally a bar to a new Bill. But if the Court, upon a demurrer, has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit." Mitf. Eq. Pl. by Jeremy, 216; Cooper Eq. Pl. 115.

narily, unless the dismissal is without prejudice, a bar to another Bill; whereas, if the Bill is dismissed for defect of form or structure of it, not going to the merits, it is no bar to a future suit for the same subject-matter.¹ It may also be remarked, in this connexion, that demurrers are inapplicable to pleas, or to answers. If a plea be bad in substance, the course is, not to demur to it, but to set it down for argument; and, if then found bad, it is at once overruled.² If an answer is insufficient in its responses to the charges and statements in the Bill, the objections are to be taken to it by exceptions filed.³ If it be in substance bad as a defence, and no farther proofs are required by the plaintiff, the case can be set down for a hearing upon the Bill and answer, and will be adjudged accordingly.

§ 457. In regard to the frame of a demurrer, it remains to add a few words. We have already seen, that it begins by a protestation, and that it must always express the several causes, on which it is founded.³ If the demurrer does not go to the whole Bill, it must clearly express the particular parts of the Bill, which it is designed to cover; for if the particulars are not distinguished, the Court will be compelled to look over the whole Bill, in order to pick them out.⁴ And this must be done, not by way of exception, as by demurring to all, except certain parts of the Bill; but by positive de-

¹ 2 Madd. Ch. Pr. 248; *Holmes v. Remsen*, 7 John. Ch. R. 286; Mitf. Eq. Pl. by Jeremy, 216.

² Mitf. Eq. Pl. by Jeremy, 301; Cooper Eq. Pl. 231; *Harrison Ch. Pr. by Newl.* 232, 233; *Wyatt Pr. Reg.* 163; *Durdant v. Redman*, 1 Vern. R. 78.

³ Post § 864.

⁴ Ante § 452; § 455, note (2.)

⁵ Mitf. Eq. Pl. by Jeremy, 213, 214; *Chetwynd v. Lindon*, 2 Ves. 450; *Salkeld v. Science*, 2 Ves. 106; *Barton Suit in Eq.* 108, 110, notes.

inition of the parts, to which the defendant seeks to avoid making any answer.¹

§ 458. Thus, for example, where a defendant put in an answer and demurrer, the demurrer extending to the whole of the Bill, except only as to such part, and so much thereof, as requires this defendant to set forth, whether, &c. &c.; it was held, that the demurrer ought to be overruled; for it imposed upon the Court the duty of comparing the demurrer and the answer with the whole Bill.² So, where a defendant put in an answer to so much of the Bill, as he was advised he was bound to answer, making an answer to certain charges in the Bill, and then put in a demurrer "to all and every the other allegations, and charges, and matters, and things in the plaintiff's Bill contained;" the demurrer was overruled; for it imposed on the Court the necessity of finding out, what was demurred to, by examining every part of the Bill.³ So, where a demurrer was

¹ Robinson v. Thompson, 2 Ves. & B. 118; Salkeld v. Science, 2 Ves. 107; Mitford Eq. Pl. by Jeremy, 214, note (h).

² Wetherhead v. Blackburn, 2 Ves. & B. 121, 123.

³ Devonsher v. Newenham, 2 Sch. & Lefr. 205. Lord Redesdale, on this occasion, said; "I have looked into the cases, and have no doubt, that this demurrer is informal. The answer is, 'to so much of the Bill, as this defendant is advised he is bound to answer unto.' In the first place, this cannot be an answer; for, if the demurrer covers the rest of Bill, no exceptions can be taken to the answer, because it does not describe, what it is, that has been so answered. But the cases on the subject have clearly determined, that the demurrer must express, in the clearest manner, what it is, that you demur to. It has been repeatedly said, that where a defendant demurs to part, and answers to part of a Bill, the Court is not to be put to the trouble of looking into the Bill or answer to see, what is covered by the demurrer; but that it ought to be expressed, in clear and precise terms, what it is, that the party refuses to answer; so that the Master, upon a reference of the answer to him upon exceptions, should be able to ascertain precisely, how far the demurrer goes, and what is to be answered. And I cannot agree, that it is a proper

put in to all the relief and to all the discovery prayed by the Bill, except so far as the Bill seeks a discovery touching the several title deeds, &c., in the Bill mentioned, &c., &c. ; and as to the residue of the Bill, not demurred to, proceeded to answer the facts specified and excepted ; the demurrer was held bad, and overruled for the like reason.¹

§ 458. *a.* Care should also be taken to frame the demurrer correctly, with reference to the nature of the Bill ; for if the Bill is for discovery only, and the demurrer, without mentioning discovery, is to relief, viz. that the plaintiff is not entitled to any such relief against the defendant, as is prayed by the Bill, the demurrer will be bad, and overruled.²

way of demurring, to say, that the defendant answers to such and such particular facts, and demurs to all the rest of a Bill ; for this would put the Master to great difficulty in saying, what was demurred to, and whether the answer was sufficient, or otherwise. The defendant ought to demur to a particular part of the Bill, specifying it precisely, and answer to all the rest. *Chetwynd v. Lyndon*, 2 Ves. 450, is an indifferent report. But one may collect from the case, what was the opinion of Lord Hardwicke on the subject. There he held, that a demurrer 'to such part of the Bill, as ought to compel defendants to discover a conspiracy,' did not sufficiently distinguish, what part it was, that was covered by the demurrer. I confess (independent of the authority of Lord Hardwicke) I might have thought, that sufficiently precise. But Lord Hardwicke thought otherwise. He said, 'the Court must look through the whole Bill to see, what the particulars are, which are demurred to. It is like the case of a plea, which begins with "as to so much of the Bill, as is not after answered to, the party pleads," which has been often overruled ; for it cannot be known, what would be pleaded to, and what answered.' I apprehend Lord Hardwicke's idea was this ; that when a party refuses to answer a particular part of the Bill, he must precisely state, what part of the Bill it is, which he refuses to answer, and upon which he demands the judgment of the Court, whether he shall answer or not ; and that he has no right to compel the Court to go through the whole Bill, to see, what it is that he refuses, and what he submits to answer."

¹ *Robinson v. Thompson*, 2 Ves. & B. 118. But see *Hicks v. Raincock*, 1 Coxe R. 40.

² *Mills v. Campbell*, 2 Younge & Coll. 369.

§ 459. If the plaintiff conceives, that there is not sufficient cause apparent on his Bill to support a demurrer put in to it, or that the demurrer is too extensive, or is otherwise improper, he may take the judgment of the Court upon it; and if he conceives, that by amending his Bill he can remove the ground of demurrer, he may do so before the demurrer is argued, on payment [*362] of *costs, which vary according to the state of the proceedings.¹ But after a demurrer to the whole of a Bill has been argued and allowed, the Bill is out of Court, and therefore cannot be regularly amended.² To avoid this consequence, the Court has, sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his Bill, paying the costs incurred by the defendant. And this has been frequently done in the case of a demurrer for want of parties.³ Where a demurrer leaves any part of a Bill untouched, the whole may be amended, notwithstanding the allowance of the demurrer; for the suit in that case continues in Court, the want of which circumstance seems to be the reason of the contrary practice, where a demurrer to the whole of a Bill has been allowed.⁴

§ 460. If a demurrer should be overruled on argument, because the facts do not sufficiently appear on the face of the Bill, defence may be made by plea, stating the facts necessary to bring the case truly before the Court, though it has been said, that the Court will not permit two dilatories.⁵ And after a plea overruled, it is said, that a demurrer has been allowed, bringing before the Court the same question in substance as was agitated in arguing the plea.⁶ But, after a demurrer has

¹ Mitf. Eq. Pl. by Jeremy, 215, 216, and cases there cited; Cooper Eq. Pl. 115; Wyatt Pr. Reg. 164, 165; Baker v. Mellish, 11 Ves. 72. Properly speaking the cause is not out of Court, until upon the allowance of the demurrer, the Bill is dismissed by the order of the Court.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

been overruled, a second demurrer will not be allowed ; for it would be in effect to rehear the case on the first demurrer ; as, on the argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the Bar ; and, if good, it will support the demurrer.¹

*§ 461. In order to prevent delays by putting [*363] in frivolous demurrers, it is required by the rules of Court, that the demurrer should be signed by counsel.² But it is not required to be put in on oath, as it asserts no fact, and relies merely upon matter upon the face of the Bill.³ It is, therefore, considered, that the defendant may, by advice of counsel, upon the sight of the Bill only, be enabled to demur thereto.⁴ And for this reason it is always made the special condition of an order giving the defendant time to demur, plead, or answer to the plaintiff's Bill, that he shall not demur alone.⁵ Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to, or answer some part of the Bill.⁶ It has been held, that answering to some fact immaterial to the cause, and denying combination, do not amount to a compliance with the terms of such an order ; and therefore, upon motion, a demurrer accompanied by such an answer has been discharged.⁷

§ 462. This rule has probably been established under the notion, that time is not necessary to determine, whether a defendant may demur to a Bill or not, and

¹ Mitf. Eq. Pl. by Jeremy, 216, 217, and cases there cited ; Cooper Eq. Pl. 115, 116 ; Mont. Eq. Pl. 112, 113 ; Baker v. Mellish, 11 Ves. 70.

² Beames Ord. in Chan. 172 ; Hinde's Pr. Ch. 148 ; Mitf. Eq. Pl. by Jeremy, 208 ; Cooper Eq. Pl. 114 ; Wyatt Pr. Reg. 165.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Mitf. Eq. Pl. by Jeremy, 208, 209, and cases there cited ; Cooper Eq. Pl. 114, 115.

the supposition, that a demurrer may be filed merely for delay.¹ But, whether a Bill may be demurred to, is sometimes a subject of serious and anxious consideration; and the preparation of a demurrer may require great attention, as, if it extends in any point too far, it must be overruled. Great inconvenience, therefore, may arise from a strict adherence to this rule.² For, it [*364] often happens, that a defendant *cannot answer any material part of the Bill, without overruling his demurrer; it being held, that if a defendant answers to any part of a Bill, to which he has demurred, he waives the benefit of the demurrer; or, if he pleads to any part of a Bill before demurred to, the plea will overrule the demurrer.³ For the plaintiff may reply to a plea or an answer, and thereupon examine witnesses, and hear the cause; but the proper conclusion of a demurrer is to demand the judgment of the Court, whether the defendant ought to answer to so much of the Bill, as the demurrer extends to, or not.⁴ The condition, that the defendant shall not demur alone, ought therefore, perhaps, to be considered liberally; and it has been formerly said, that the Court will not incline to discharge a demurrer, if the defendant denies combination only, where he cannot answer further without overruling his demurrer.⁵

§ 463. However, the modern practice is according to the original strictness of the rule; and it may be better, where the case requires it, to relax the rule upon special application to the Court, than to permit it to be evaded. Indeed, in some cases, an answer to any part of the Bill may overrule the demurrer; for, if the

¹ Mitf. Eq. Pl. by Jeremy, 209, 210, and cases there cited; Tomkin v. Lethbridge, 9 Ves. 178; Baker v. Mellish, 11 Ves. 73.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

ground of demurrer applies to the whole Bill, the answering to any part is inconsistent with that.¹ And, therefore, when the ground of demurrer was the general impropriety of the Bill, and that the defendant ought not therefore to be compelled to answer it, his answer to an immaterial part, in compliance with the order for time, which he had obtained, was held to overrule his demurrer.²

*§ 464. Where a demurrer is put in to the whole [*365] Bill for causes assigned on the record; if those causes are overruled, the defendant will be allowed to assign other causes of demurrer, *ore tenus*, at the argument.³ But in such a case, if the demurrer, *ore tenus*, is allowed, the defendant is not entitled to his costs, even though he may not be obliged to pay the costs on the demurrer on record, which has been overruled.⁴ But a demurrer, *ore tenus*, will never be allowed, unless there is a demurrer on record; for if there is a plea on record, and that is disallowed, a demurrer, *ore tenus*, will also be disallowed.⁵ Whenever a demurrer, *ore tenus*, is permitted, it must be for some cause, which covers the whole extent of the demurrer.⁶ And it has been held, that the right to put in such a demurrer, *ore tenus*, applies only to cases, where the demurrer is to the whole Bill, and not to cases, where it is to a part only, notwithstanding it is coextensive with the demurrer to that part.⁷

¹ Mitf. Eq. Pl. by Jeremy, 210, 211, and cases there cited.

² Ibid.

³ Cooper Eq. Pl. 112; Cartwright v. Green, 8 Ves. 409; Beames Ord. in Chan. 174; Brinckerhoof v. Brown, 6 John. Ch. R. 149.

⁴ Ibid.

⁵ Cooper Eq. Pl. 112; Durdant v. Redman, 1 Vern. 78, and Mr. Raithby's note; Beames Ord. in Chan. 174; Attorney General v. Brown, 1 Swanst. 288; Hook v. Dorman, 1 Sim. & Stu. 227. Ante § 443.

⁶ Baker v. Mellish, 11 Ves. 70 to 76.

⁷ Shepherd v. Lloyd, 2 Y. & Jerv. 490.

§ 465. In framing a demurrer to one part of the Bill, and answering to another part, care must be taken, not only not to include in form any part on the one, which is covered by the other; but also not to include in the answer any matter, to which the demurrer, though not in form, yet in substance properly applies; for in such a case it seems, that the demurrer is overruled by the answer.¹ Thus, for example, where a Bill was brought to stay [*366] *proceedings on an award under a submission, whereby it was agreed to be made a rule of Court, upon an allegation of fraud and corruption in the arbitrators, and the arbitrators demurred to the whole Bill, except the charges of fraud and corruption, which they answered; it was held, that as the award was to be made a rule of Court, the Court, where the rule was to be entered, had sole jurisdiction of it; and that the demurrer ought, therefore, to have extended to the whole Bill; and that the answers, as to the charges of fraud and corruption, overruled the demurrer.²

¹ *Ellice v. Goodson*, 3 Mylne & Craig, 653; *Crouch v. Hickin*, 1 Keen R. 389.

² *Dawson v. Sadler*, 1 Sim. & Stu. 537. The ground of this decision does not seem to be very intelligible; for it is not easy to say, why, upon principle, though a demurrer might have been more broad, it is not maintainable as to the matter, to which it is applied, if it completely answers that. In *Crouch v. Hickin*, 1 Keen R. 389. Lord Langdale seems to have admitted, that the distinction was too refined. On that occasion, he said; "A defendant, taking care to distinguish the different parts of a Bill, may plead to one part, and demur to the rest; or, if necessary, put in several demurrers to distinct parts of the Bill. But I conceive, that, according to the rules, perhaps too refined, on which the Court has acted, the distinct defences must be exclusively applicable to the distinct parts of the Bill, to which they are applied; and that a defence, though in words applied to only one part of the Bill, if it should on the face of it be applicable to the whole Bill, is not good, and cannot stand in conjunction with another distinct defence, which is applicable and applied to another distinct part of the Bill."

CHAPTER X.

DEMURRERS TO RELIEF.

§ 466. HAVING disposed of these preliminary matters in regard to the nature, office, and form of demurrers in general, we shall now proceed to the more particular consideration of the causes, or reasons, which may be assigned as grounds of demurrer to original Bills for relief. These may properly be divided into three classes, (1.) To the jurisdiction; (2.) To the person of the plaintiff; and, (3.) To the matter of the Bill, either as to its substance, or as to its form and frame.¹

§ 467. In regard to demurrers to the jurisdiction, the subject admits of a further subordinate division into four heads. (1.) That the subject is not cognizable by any municipal court of justice. (2.) That the subject is not within the jurisdiction of a Court of Equity. (3.) That some other Court of Equity is invested with the proper jurisdiction. (4.) That some other court possesses the proper jurisdiction.²

§ 468. And, first, that the subject is not properly cognizable by any municipal court of justice. This may arise from the subject-matter being entirely of a political nature, and therefore constituting a fit subject for nego-

¹ Cooper Eq. Pl. 118. In this division, I have implicitly followed Mr. Cooper. The whole subject of demurrers has been very amply treated by Lord Redesdale and Mr. Cooper, and I have drawn nearly all my materials from these sources, following their language, unless where some qualification seemed indispensable.

² Cooper Eq. Pl. 118, 119.

tiation, or treaty, by the executive department of the Government. Thus, for example, where political treaties were entered into, by a foreign sovereign in India, with the East India Company, acting as an independent State under an act of Parliament, and the foreign sovereign sought by a Bill to enforce certain stipulations under those treaties, it was held, that the subject-matter was not properly cognizable by any municipal court of justice.¹ Upon the same ground, a treaty between two sovereigns would be held not to be, generally, the subject of any private municipal jurisdiction of the courts of either, as it involves the political relations between the two countries, and is, therefore, properly a matter of State.² But this proposition must be received with some limitations; for where a treaty provides for the assertion of private rights, or for objects properly redressible in courts of justice, and having no connexion with, and involving no rights or duties of sovereignty, there is nothing to prevent municipal courts of justice from enforcing such treaty stipulations. Thus, for example, courts of prize will restore captured property, where the case has been provided for by treaty, at the suit of the party in interest, although the capture may have been originally lawful.³

§ 469. In the United States, the ground is perfectly clear upon the express terms of the Constitution, which declares, that the judicial power of the United States "shall extend to all cases in law and equity arising

¹ *Nabob of the Carnatic v. East India Company*, 1 Ves. jr. 371; S. C. 2 Ves. jr. 56; 4 Bro. Ch. R. 199; Cooper Eq. Pl. 119, 120.

² *Ibid.* *Foster v. Neilson*, 2 Peters R. 216.

³ See *Nabob of the Carnatic v. East India Company*, 2 Ves. 59, 60; S. C. 4 Bro. Ch. R. 199; *United States v. The Peggy*, 1 Cranch R. 103, 108; *United States v. Percheman*, 7 Peters R. 51; *The Diana*, 6 Rob. R. 60; *The Charlotte*, 5 Rob. 303; *The Elenora Wilhelmina*, 6 Rob. 331.

under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”¹ And rights derived from, and protected by treaty stipulations, have been often enforced in our courts of justice. Still, however, there can be no doubt, that cases arising under foreign treaties, which involve controversies or considerations purely of a political or sovereign character, or purely executory by the governments themselves, would be held to be, from their very nature and character, incapable of being enforced in any of the courts of the United States.² Thus, for example, the treaty, by which Louisiana was purchased, in 1803, contained a stipulation for the admission of the territory and its inhabitants into the Union as an independent State.³ But it can scarcely be doubted, that the stipulation was incapable of being enforced by France in any of our courts of justice. On the other hand, where, as in the Florida treaty, in 1819,⁴ the titles to lands in that territory were expressly confirmed and held valid, there is as little doubt, that those titles, and the treaty stipu-

¹ 1 Story on the Const. xxvii. Constitution, Art. 3, § 2; 3 Story on Const., § 1631, § 1637.

² *Foster v. Neilson*, 2 Peters R. 255; *Soulard v. United States*, 4 Peters R. 411; *United States v. Percheman*, 7 Peters R. 51. Questions may arise under our treaties with the Indian tribes, which are properly cognizable by our courts of justice, although they may involve political considerations applicable to the due exercise of State sovereignty. Such were the questions involved in the cases of the *Cherokee Nation v. The State of Georgia*, 5 Peters R. 1, and *Worcester v. The State of Georgia*, 6 Peters R. 515. This difference arises from the provisions of the Constitution of the United States, which make the treaties of the United States the supreme law of the land.

³ Treaty with France of 1803, Art. 3.

⁴ Treaty with Spain, 1819. See *Carneal v. Banks*, 10 Wheat. R. 181; *Foster v. Nielson*, 2 Peters, 216; *Soulard v. United States*, 4 Peters R. 511; *United States v. Percheman*, 7 Peters 51.

lations respecting the same, ought to be enforced in our courts of justice. Indeed, from their very nature and objects, many treaty stipulations can be properly carried into effect by courts of justice; and, accordingly, there are numerous instances, in which they have been recognised and enforced accordingly.¹

§ 470. Another illustration of the general doctrine may be seen in the case of the confiscation of certain bank stock, held in England by the Province of Maryland before the American war, and invested in trustees for certain objects, which stock had been confiscated by the State during the Revolutionary war, and after the peace was claimed by the Proprietaries under the old government, and by the new State of Maryland. It was held, that the claim was such as could not properly be cognizable in any municipal court of justice; for the nature and extent of the right of confiscation were fit subjects for political discussion, and not for discussion in courts of justice; and the Government alone had the power to say, what ought to be done with the property in that case, it being, under the circumstances, properly to be deemed as *bona vacantia*, belonging to the Crown.²

¹ *Fairfax's Devisee v. Hunter*, 7 Cranch R. 603, 610; *S. C.* 1 Wheat. R. 304; *Orr v. Hodgson*, 4 Wheat. R. 453, 460; *State of Georgia v. Brailsford*, 3 Dall. 1, 4, 5; *Ware v. Hylton*, 3 Dall. R. R. 199, 220; *McIlvaine v. Coxe's Lessee*, 4 Cranch, 299, 212; *Chirac v. Chirac*, 2 Wheat. R. 259, 269; *Hughes v. Edwards*, 9 Wheat. 489, 496; *Carneal v. Banks*, 10 Wheat. R. 181; *Blight's Lessee v. Rochester*, 7 Wheat. R. 535; *Gordon v. Kerr*, 1 Wash. Cir. R. 322; *Society for Propag. Gospel v. New Haven*, 4 Wheat. R. 464; *Foster v. Neilson*, 2 Peters R. 216; *Soulard v. United States*, 4 Peters R. 511; *United States v. Percheman*, 7 Peters, 51; *United States v. Arredondo*, 6 Peters R. 691; *United States v. Clarke*, 8 Peters R. 436; *Worcester v. State of Georgia*, 6 Peters R. 515; *Cherokee Nation v. State of Georgia*, 5 Peters R. 1.

² *Barclay v. Russell*, 3 Ves. 422; *Dolber v. Bank of England*, 10 Ves. 354; *Cooper Eq. Pl.* 120, 121. This doctrine has not been thought ap-

§ 471. Another illustration may be found in cases in England, where the question involved was, as to the nature and extent of a subordinate sovereignty derived from the Crown, which was held to be properly cognizable by the King in Council, and not elsewhere. Thus, for example, where an individual claimed a province, or an island, in the nature of a feudal principality, as was the case of the claim of the Earl of Derby with regard to the Isle of Man, in the reign of Queen Elizabeth; and as was the case of the claim of the representatives of the Duke of Montague with regard to the island of St. Vincents, in the year 1764; the exclusive jurisdiction was held to belong to the King in Council.¹ So, the original jurisdiction in cases relative to the boundaries between the adjoining provinces belonging to the British empire, involving, as it does, the right of dominion and proprietary government under the grant of the Crown, has been held to belong exclusively to the King in Council.² It was not unfrequently exercised antecedently to the American Revolution, in cases of disputes as to boundaries between the then colonies and provinces belonging to the British empire. Such, for example, were the cases of controverted boundaries between the province of New Hampshire and that of Massachusetts, and between the proprietary government of Pennsylvania and that of Maryland.³ Under the Constitution of the United States, the same

plicable to cases of confiscations of debts made in the American Revolution by the States, and where the right to recover the same was provided for by subsequent treaties. See *Ware v. Hylton*, 3 Dall. R. 199, 220.

¹ *Cooper Eq. Pl.* 122; 1 Black. Comm. 231.

² *Cooper Eq. Pl.* 122, 123; *Penn v. Lord Baltimore*, 1 Ves. 446, 447; *Massie v. Watts*, 6 Cranch R. 158.

³ *Penn v. Lord Baltimore*, 1 Ves. 446, 447; 1 Black. Comm. 232; 3 Story on the Const. § 1675.

authority, as to disputed boundaries between the States, seems delegated to the Supreme Court of the United States.¹

§ 472. Secondly ; That the subject of the suit is not within the jurisdiction of a Court of Equity. And here it may be stated, as a settled doctrine, that whenever there is no sufficient ground shown in the Bill for the interference of a Court of Equity, the defendant may demur to the Bill for want of Equity to sustain the jurisdiction.² The general nature and the true extent of the jurisdiction of Courts of Equity, whether concurrent, or exclusive, or auxiliary, have been already considered at large in a former work, the Commentaries on Equity Jurisprudence ; and, therefore, it would be wholly a misplaced inquiry, to go into a reëxamination of that subject in this place. The general objects of that jurisdiction have been well summed in a passage in Lord Redesdale's work, which may, without impropriety, be repeated in this connexion. "The jurisdiction," (says he), "when it (a Court of Equity) assumes the power of decision, is to be exercised ; (1.) Where the principles of law, by which the ordinary courts are guided, give a right ; but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose ; (2.) Where the courts of ordinary jurisdiction are made instruments of injustice ; (3.) Where the principles of law, by which the ordinary courts are guided, give no right ; but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. And

¹ 3 Story Comm. § 1673 to § 1675 ; *New York v. Connecticut*, 4 Dall. R. 3 ; *New Jersey v. New York*, 5 Peters R. 284. *Rhode Island v. Massachusetts*, 13 Peters, 23 ; S. C. 14 Peters R. 210.

² 2 Madd. Ch. Pr. 229, 230.

it may also be collected, that Courts of Equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction ; (4.) To remove impediments to the fair decision of a question in other courts ; (5.) To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those, to whose care it is by law intrusted, or by persons having immediate, but partial interests ; (6.) To restrain the assertion of doubtful rights in a manner productive of irreparable damage ; (7.) To prevent injury to a third person by the doubtful titles of others ; and, (8.) To put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that Courts of Equity, without pronouncing any judgment, which may affect the rights of parties, extend their jurisdiction ; (9.) To compel a discovery, or obtain evidence, which may assist the decision of other courts ; and, (10.) To preserve testimony, when in danger of being lost, before the matter to which it relates, can be made the subject of judicial investigation.”¹

§ 473. In general, Courts of Equity will not assume jurisdiction, where the powers of the ordinary courts are sufficient for the purposes of justice. And, therefore, it may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law, as in a Court of Equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the

¹ Mitf. Eq. Pl. by Jeremy, 111, 112. Lord Redesdale has, in the subsequent pages of his Treatise, gone into a full exposition of each of these heads, to which the reader may be referred for more full illustrations. See Mitf. Eq. Pl. by Jeremy, 112 to 151.

jurisdiction of the Court, will hold.¹ But, where there is a clear right, and yet there is no remedy in a court of law, or the remedy is not plain, adequate and complete, and adapted to the particular exigency, then, and in such cases, Courts of Equity will maintain jurisdiction.

§ 474. The full application of these tests, with the accompanying exceptions and limitations, belonging to the general rule, constitute, as has been already intimated, the appropriate functions of a Treatise on Equity Jurisprudence. But we may here glance at a few cases, which may serve to illustrate the rule, and its exceptions and limitations. Thus, for example, if the sole object of a Bill is to decide upon the validity of a will of real estate, or of personal estate, and no other equity is shown on the face of the Bill to sustain it, a general demurrer will lie; for the proper jurisdiction to try the validity of a will of real estate is a court of law; and of a will of personal estate, the Ecclesiastical Court, or other court having a jurisdiction in matters of the probate of wills.²

§ 475. So, if a Bill should be brought by the executrix of an attorney for money due from the defendant, for business done as an attorney, the Court would allow a demurrer to the relief; because there is an adequate remedy at law, and an act of Parliament has also pointed out a summary mode of redress.³

§ 476. So, if a Bill should be brought for the possession of land, which is commonly called an Ejectment Bill, it would be demurrable; for the proper redress is at law. And even if such a Bill should charge, that the

¹ Mitf. Eq. Pl. by Jeremy, 123; Coop. Eq. Pl. 124.

² *Jones v. Jones*, 2 Meriv. R. 161; *Jones v. Frost*, Jacob R. 466; S. C. 3 Madd. R. 1; 2 Story on Equity, § 1445 to § 1448; Cooper Eq. Pl. 125.

³ *Parry v. Owen*, Amb. R. 109; S. C. 3 Atk. 740; Cooper E. Pl. 124.

defendant had gotten the title-deeds, and mixed the boundaries ; and should, upon that ground, pray for a discovery, possession and account, a demurrer (at least upon the doctrine maintained in England) would lie. For, although the plaintiff would be entitled to the discovery of the title-deeds ; yet he would not have any title to the relief ; that, after the discovery, being properly to be given at law ; and by praying relief, as well as discovery, his whole Bill would be demurrable.¹

§ 477. So, (as we have already seen) where a Bill, seeking a discovery of deeds or writings, prays relief, founded on the deeds or writings, of which the discovery is sought ; if the relief so prayed be such, as might be obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his Bill an affidavit, that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant ; otherwise, the Bill will be demurrable.²

§ 478. So, if a Bill should be brought for the discovery and payment of a lost or suppressed instrument, upon which, but for the loss or suppression, there would be a complete remedy at law, the Bill (as we have seen)³ will be demurrable, unless there is annexed to it an affidavit of the loss, and unless also, in proper cases, it contains an offer of indemnity, and also a suggestion, that the evidence of the plaintiff's demand is not without such discovery in his power, and is essential to his

¹ Cooper Eq. Pl. 125 ; *Loker v. Rolle*, 3 Ves. 3 ; *Ryves v. Ryves*, 3 Ves. 342 ; Ante § 288, § 311. And see *Russell v. Clarke's Executors*, 7 Cranch, 69, 89 ; 1 Story Eq. Jurisp. § 71.

² Ante § 288, § 313 ; Mitf. Eq. Pl. by Jeremy, 54, 124, 125 ; Cooper Eq. Pl. 61 ; Idem 208.

³ Ante § 288. § 313.

rights.¹ *A fortiori*, if the Bill should seek payment of a bond or other instrument, where the remedy is complete at law, without suggesting any loss or suppression, it would be demurrable.²

§ 479. So, if a Bill should be brought for an account and share of prize-money, where it was apparent, from the face of the Bill, that it was for a sum certain in the hands of the defendant, a demurrer would lie ; for the remedy would be complete at law.³

§ 480. So, if a policy of insurance should be made in the name of an agent or trustee, and a loss should occur ; and the agent or trustee should refuse to sue thereon, a Bill for relief, suggesting these facts, and making the agent or trustee and the underwriters parties, would be demurrable ; because the proper remedy is at law ; for on every such policy, if in the name of an agent for the benefit of his principal, the principal, as well as the agent, may sue in his own name.⁴ Nor would it help the matter, that there was an allegation in the Bill, that the witnesses were abroad, or dead, for that fact would not alone change the forum.⁵

§ 481. On the other hand, matters of defence, which are good at law, will not ordinarily be redressed in Equity. As, if a Bill is to be relieved against a writ of inquiry, executed without due notice, it would be bad on

¹ Mitf. Eq. Pl. by Jeremy, 54, 123, 124, 125 ; Rootham v. Dawson, 3 Anst. 859 ; Whitchurch v. Golding, 2 P. Will. 541 ; Cooper Eq. Pl. 126 ; Walmsley v. Child, 1 Ves. 344, 345 ; Whitfield v. Fausset, 1 Ves. 393 ; Humphreys v. Humphreys, 3 P. Wills. 395 ; Ante § 288, § 313.

² Humphreys v. Humphreys, 3 P. Will. 895 ; Hook v. Dorman, 1 Sim. & Stu. 227.

³ Ogle v. Haddock's Administrator, 1 Ves. 162.

⁴ Dhegeleft v. London Assur. Comp. Mosel. R. 83 ; Fall v. Chambers, Mosel. R. 193 ; Motteaux v. London Assur. Comp. 1 Atk. 547 ; Mitf. Eq. Pl. by Jeremy, 125.

⁵ Ibid.

demurrer, because it is properly remediable at law.¹ So if a Bill is founded on an allegation, that a judgment had been obtained against the plaintiff for goods sold, for which he was not personally liable, but for which he had contracted as an agent for the Government, it would be bad on demurrer; for, if true, it would constitute a perfect defence at law.²

§ 482. Upon the same ground, if a Bill is filed for an account and payment, the subject being matter of set-off, and capable, upon the allegations in the Bill, of complete proof at law, a demurrer to the Bill will be sustained; for, under such circumstances, the relief at law would be perfect, and the interposition of a Court of Equity would be unnecessary.³ It would be different, if a discovery were indispensable to establish the plaintiff's right.

§ 483. Hitherto we have been considering cases, where there is a complete remedy at law. But the like principle will apply to cases, where, upon the face of the Bill, there is no remedy either at law, or in Equity.⁴ Thus,

¹ *Boyd v. Lomax*, Rep. Temp. Finch. 335.

² See *Macheath v. Haldimand*, 1 Term R. 172; *Debigge v. Howe*, 3 Bro. Ch. R. 155; *Cooper Eq. Pl.* 194; *Mitf. Eq. Pl.* by Jeremy, 187. But see *Graham v. Stamper*, 2 Vern. R. 146, contra.

³ *Dinwiddie v. Bayley*, 6 Ves. 136; *Cooper Eq. Pl.* 123; *Moses v. Lewis*, 12 Price R. 502.

⁴ The common form of a demurrer for want of Equity, is as follows :
“ These defendants, by protestation, not confessing all or any of the matters and things in the said complainant's Bill contained, to be true in such manner and form as the same are therein set forth and alleged, do demur to the said Bill, and for cause of demurrer show, that the said complainant has not, by his said Bill, made such a case as entitles him, in a Court of Equity, to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in the said Bill, or any of such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said Bill, or any of them, cannot be of any avail to the said com-

if a Bill should seek to recover back money, which has been voluntarily paid by a party, upon a suit being threatened or brought, and his defence is, fraud in the transaction, on which the suit was brought, or to be brought, the Bill would be demurrable, notwithstanding he should state in his Bill, that, at the time, when he made the payment, it was under a protest, that he would seek redress in Equity; for, *non constat*, that his defence might not have been effectually sustained at law; and, if so, it would have been his duty to make it in the suit at law.¹

§ 484. The same principle will apply to a Bill, which states a case within the Statute of Limitations at law, and upon which Courts of Equity follow the analogy of the law; for, under such circumstances, Courts of Equity hold, that the objection may be taken as a defence by demurrer; and that, if the plaintiff be within any exception of the statute, it is incumbent on him to state it in his Bill. Thus, for example, if it should appear on the face of a Bill, that the cause of action (arising upon a simple contract) accrued more than six years before the filing of the Bill, a demurrer would lie.²

plainant for any of the purposes for which a discovery is sought against these defendants by the said Bill, nor entitle the said complainant to any relief in this Court, touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said Bill, these defendants do demur thereto, and they pray the judgment of this honorable Court, whether they shall be compelled to make any further and other answer to the said Bill; and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained." Van Heyth. Eq. Draft. 419. See similar form Ante § 435, note.

¹ *Kemp v. Pryor*, 7 Ves. 237, 250, 251; *Cooper Eq. Pl.* 124, 125.

² *Hoare v. Peck*, 6 Sim. R. 51; *Wisner v. Barnet*, 4 Wash. Cir. R. 631; *Mitf. Eq. Pl. by Jeremy*, 272, 273; *Foster v. Hodgson*, 19 Ves. 180; *Cooper Eq. Pl.* 254, 255. Lord Redesdale seems to have held, that the defence could only be taken by plea or answer; but this is certainly not the present doctrine. *Mitf. Eq. Pl. by Jeremy*, 272, 273. But see *Ibid*, 212, 213, and notes. Post § 503.

§ 485. The same principle will apply, where there is not, according to the practice of Courts of Equity, any right, or any remedy in Equity, even though there might be at law. Thus, if a bar might not be good in a court of law by reason of the lapse of time ; yet a Court of Equity might nevertheless sustain it ; for it never administers to stale claims, or encourages gross laches. Hence, where there has been an adverse possession by a party, claiming the title, and taking the rents of an estate for twenty years, if a Bill is brought after that time by a plaintiff, insisting upon his right to the same estate, it will be held demurrable, even though a court of law might sustain an ejectment in such a case ; for the rule in Equity is, that after there has been an adverse possession of twenty years, not accounted for by some disability, such as coverture, infancy, or the like, a Court of Equity ought not to interfere, to disturb the possession ; but it will leave the parties to their remedies at law.¹

§ 486. Thirdly ; That some other Court of Equity is invested with the proper jurisdiction. This is a case, which can rarely occur in America, from the structure of our local Equity tribunals. Still, however, if a case should occur in the courts of the United States, where the question, though of equitable jurisdiction, should be more appropriate for a decision in the State tribunals ; such as the case of a Charity, to be executed by the State Government, as *parens patriæ*, it would probably be thought, that it ought to be remitted to the State tribunals.²

¹ *Cholmondeley v. Clinton*, 1 Turn. & Russ. 107, 119 ; *Hardy v. Reeves*, 4 Ves. 479.

² See *Baptist Assoc. v. Hart's Executors*, 4 Wheat. R. 1 ; 2 Story on Eq. Jurisp. ch. 31, § 1136 to 1194.

§ 487. In regard to England, the cases, in which such a question can arise, are also rare. And, upon this subject, the language of Lord Redesdale may be cited as containing every material consideration. "It has been before noticed," (says he) "that the establishment of Courts of Equity has obtained throughout the whole system of our judicial polity; and that most of the inferior branches of that system have their peculiar Courts of Equity, the Court of Chancery assuming a general jurisdiction in cases not within the bounds, or beyond the powers of inferior jurisdictions. The principal of the inferior jurisdictions in England are those of the counties palatine of Chester, Lancaster and Durham; the courts of great session in Wales; the courts of the two universities of Oxford and Cambridge; the courts of the City of London; and of the Cinque-ports. These are necessarily bounded by the locality, either of the subject of the suit, or of the residence of the parties litigant. Where those circumstances occur, which give them jurisdiction, they have exclusive jurisdiction in matters of Equity, as well as matters of law; and they have their own peculiar courts of appeal, the Court of Chancery assuming no jurisdiction of that nature, though it will in some cases remove a suit before the decision into the Chancery by writ of *certiorari*. When, therefore, it appears on the face of a Bill, that another Court of Equity has the proper jurisdiction, either immediately or by way of appeal, the defendant may demur to the jurisdiction of the Court of Chancery. Thus, to a Bill of appeal and review of a decree in the court of the county palatine of Lancaster, the defendant demurred; because on the face of the Bill it was apparent, that the Court of Chancery had no jurisdiction; and the demurrer was allowed. But demurrers of this kind are very rare; for the want

of jurisdiction can hardly appear upon the face of the Bill, at least so conclusively, as is necessary to deprive the Chancery, a court of general jurisdiction, of cognizance of the suit. And a demurrer for want of jurisdiction, founded on locality of the subject of the suit, which alone can exclude the jurisdiction of the Chancery in a matter cognizable in a Court of Equity, has even been treated as informal and improper. This, however, can only be considered as referring to cases, where circumstances may give the Chancery jurisdiction, and not to cases, where no circumstances can have that effect. Thus, the counties palatine, having their peculiar and exclusive Courts of Equity under certain circumstances, which will be more fully considered in another place, the Court of Chancery will not interfere, when all those circumstances attend the case, and they are shown to the Court. Though, if those circumstances are not shown, or if they are not shown in proper time, and the defendant, instead of resting upon them, and declining the jurisdiction, enters into the defence at large, the Court, having general jurisdiction, will exercise it. But where no circumstance can give the Chancery jurisdiction, as in the case alluded to of a Bill of appeal and review of a decree in a county palatine, it will not entertain the suit, even though the defendant does not object to its deciding on the subject.”¹

§ 488. Where the defence intended to be made is, that another Court of Equity has jurisdiction of the case, it should be taken by demurrer, if it appears on the face of the Bill; or, if it does not appear on the face of the Bill by plea; for in some cases, if the objection is not

¹ Mitf. Eq. Pl. by Jeremy, 151 to 153, and cases there cited; Cooper Eq. Pl. 160, 161, 262; Idem, 140, 141; Lord Coningsby's Case, 9 Mod. 95.

thus taken *in limine*, it will not avail the party to insist upon it at the hearing.¹

§ 489. In general, the fact, that the property is not within the jurisdiction, constitutes no bar to a proceeding in a Court of Equity, if the person is within the jurisdiction; for a Court of Equity acts upon the person; or, to use the appropriate phrase, *Æquitas agit in personam*.² But questions may arise under a Bill respecting funds, or other things, in a foreign country, so purely local, that a Court of Equity in another country might very properly decline to interfere, and remit it to the domestic forum.³

§ 490. Fourthly; That some other court possesses the proper jurisdiction. This objection is not confined to cases cognizable in Courts of common law; but it may arise in cases, where another court has an exclusive jurisdiction; or a competent, though not an exclusive jurisdiction; or a mixed jurisdiction, embracing the subject-matter.⁴ Where the jurisdiction is exclusive, it is clear (as the term imports), that no jurisdiction can attach in Equity. Thus, for example, (as we have seen), Courts of Equity will not entertain suits respecting the validity of wills of personal estate, as the exclusive cognizance thereof belongs to the Ecclesiastical Courts in England, and in America to the Probate and other courts exercising the like jurisdiction.⁵ But, in other

¹ *Trelawney v. Williams*, 2 Vern. 484; Mitf. Eq. Pl. by Jeremy, 153; Cooper Eq. Pl. 160, 161, 162.

² *Roberdeau v. Rous*, 1 Atk. 543; *Massie v. Watts*, 6 Cranch, 148, 158; 2 Story on Eq. Jurisp. § 743, § 744.

³ *Massie v. Watts*, 6 Cranch, 158; *Roberdeau v. Rous*, 1 Atk. 544; Mitf. Eq. Pl. by Jeremy, 152, 153; *Earl of Derby v. Duke of Athol*, 1 Ves. 203, 204, 205; *Mead v. Merritt*, 2 Paige R. 402.

⁴ Mitf. Eq. Pl. by Jeremy, 125, 126; Cooper Eq. Pl. 126, 127.

⁵ Ibid. Ante § 474.

cases, if any other court of ordinary jurisdiction is competent to decide upon the same subject-matter, whether its jurisdiction be exclusive or not, a demurrer to a Bill in Equity will generally hold ; for, under such circumstances, there being a full remedy elsewhere, the interference of a Court of Equity is wholly unnecessary. Thus, if the subject-matter is within the jurisdiction of a Court of Admiralty, or of a Court of Prize, or of a Court of Bankruptcy, or of an Ecclesiastical Court, it cannot ordinarily be entertained in a Court of Equity.¹

§ 491. There are, indeed, some few cases, in which Courts of Equity maintain a concurrent jurisdiction ; such, for example, as in cases of tithes, and the disposition of the personal effects of persons dying testate or intestate, in which they have assumed a concurrent jurisdiction with the Ecclesiastical Courts, as far as the jurisdiction of the latter extends. But in these cases, and cases of a like nature, the jurisdiction is mainly founded upon the consideration, that the remedy is more complete, and sometimes the only effectual remedy for the grievance.²

§ 492. There is a peculiar class of cases in America, which may give rise to an objection to the jurisdiction, founded solely upon the limited powers of the Court of Equity over the parties, and altogether independent of the subject-matter of the Bill. Under the Constitution and laws of the United States, the Circuit Courts have, with few exceptions, jurisdiction only in suits between citizens of different States. And this has been construed to require, that all the parties on each side of

¹ Mitf. Eq. Pl. by Jeremy, 125, 126 ; Cooper Eq. Pl. 126, 127, 128 ; Idem 119 ; Idem 162 ; The Ship Noysomhed, 7 Ves. 593.

² Mitf. Eq. Pl. by Jeremy, 125, 126, 136 ; Cooper Eq. Pl. 127, 128 ; 1 Story on Equity Jurisp. § 589 to § 608.

the record should be citizens of different States ; and should be expressly averred to be so in the Bill.¹ If there be not such an averment, the objection will be fatal to the suit in every stage of the proceedings ; and it may be taken advantage of by way of demurrer ; as the Court will not take jurisdiction over the parties, or the cause, unless it is apparent upon the face of the proceedings.²

§ 493. In the next place, as to demurrers to the person. These are either, (1.) That the plaintiff is not entitled to sue, by reason of some personal disability ; or, (2.) That the plaintiff has no title to the character, in which he sues.³ Each of these objections is somewhat, though not altogether, analogous in its nature to a plea in abatement at the common law ;⁴ and whenever it is apparent upon the face of the Bill, it is the proper subject of a demurrer.

§ 494. And, first, as to the personal disability of the plaintiff. If an infant, or a married woman, or an idiot, or a lunatic, exhibiting a Bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the Bill, the defendant may demur.⁵ But if the incapacity does not appear upon the face of the Bill, the defendant must take advantage of it by plea. This objection extends to the whole Bill ; and advantage may be taken of it, as well in the case of a Bill for discovery merely, as in the case of a Bill for relief.⁶ For the defendant, in a Bill for a discovery merely, being always entitled to costs after a full answer,

¹ Ante § 26, note (3) and cases there cited ; *Jackson v. Ashton*, 8 Peters R. 148. See Lord Coningsly's case, 9 Mod. 95. ² *Ibid.*

³ *Cooper Eq. Pl.* 119, 163, 164 ; *Mitford Eq. Pl.* by Jeremy, 153 ; *Hare on Discov.* 121 to 123.

⁴ *Cooper Eq. Pl.* 163.

⁵ *Mitf. Eq. Pl.* by Jeremy, 153, 154.

⁶ *Ibid.*

as a matter of course, would be materially injured by being compelled to answer a Bill exhibited by persons, whose property is not at their own disposal, and who are, therefore, incapable of paying the costs.¹

§ 495. Upon similar grounds, if an uncertificated bankrupt should sue in Equity for property, which had clearly passed to his assignees, and that fact should appear upon the face of the Bill, it would ordinarily constitute a good ground for a demurrer.² Circumstances, indeed, might exist, which might sustain the Bill; such as an allegation of fraud and collusion between the assignees and the defendant, and a refusal on their part to allow the suit, and a title in the bankrupt to a clear surplus.³

§ 496. Secondly; The defect of the title of the plaintiff to the character, in which he sues. It has been sometimes considered, that this objection is the proper subject of a plea, and not of a demurrer. But there seems no ground to sustain the proposition, where the objection positively appears (which can rarely be the case) upon the face of the Bill.⁴ Thus, for example, if it should appear upon the face of the Bill, that the plaintiff sued as administrator in virtue of the grant of an administration in a foreign country, the objection might be taken by demurrer; for it is clear, that the plaintiff has no right, under that administration, to sue in our courts.⁵

¹ Mitf. Eq. Pl. by Jeremy, 153, 154. See *Wartnaby v. Wartnaby*, Jac. R. 377. In cases of this sort, Courts of Equity will, on motion, often direct the Bill to be taken off the file, as improperly commenced.

² *Benfield v. Solomons*, 9 Ves. 77; *Cooper Eq. Pl.* 163, 164.

³ *Benfield v. Solomons*, 9 Ves. 77; *Barton v. Jayne*, 7 Sim. R. 24; *Saxton v. Davis*, 18 Ves. 72; *Lautour v. Holcombe*, 8 Sim. R. 76, 84; *Kaye v. Fosbrooke*, 8 Sim. R. 28; *Tarleton v. Hornsby*, 1 Younge & Coll. 172, 188, 189. Post § 516, § 726.

⁴ *Cooper Eq. Pl.* 164.

⁵ *Story on Conflict of Laws*, § 512, § 513 to § 518; *Mitf. Eq. Pl. by*

§ 497. So, if a voluntary association of persons, not incorporated, should affect, by their Bill, to sue in the style and character of a corporate body, the Bill would be demurrable on that very account, if the objection appeared upon the face of it ; for it is the exclusive prerogative of the Government to create corporations, and invest them with the powers of suing, as such, by their corporate name.¹ Therefore, where some of the members of a lodge of freemasons brought a Bill against others for the delivery up of certain specific chattels, in which Bill there was mention made of their laws and constitution, and the original charter, by which they were constituted, and a great affectation of a corporate character, a demurrer was allowed ; because the Court will not permit persons, who can only sue as partners, to sue in a corporate character ; and upon principles of public policy, the courts of the country do not sit to determine upon charters granted by persons, who have not the prerogative to grant charters.²

§ 498. Where the plaintiff in a court of law is a fictitious person, the defendant may plead it in abatement. But in Equity a different and more summary course is adopted ; and, upon motion, the Court will direct a stay of the proceedings, or the Bill to be taken off the file, and will order the solicitor to pay the costs, for his contempt in instituting the suit.³ So, if the name of a plaintiff should be used without his authority, a similar course would be pursued.⁴

Jeremy, 155 ; *Tourton v. Flower*, 3 P. Will. 369 ; *Cooper Eq. Pl.* 169, 170 ; *Wyatt Pr. Reg.* 165, 166. Lord Redesdale has fully expounded this doctrine in the passage already cited in § 260.

¹ *Lloyd v. Loaring*, 6 Ves. 773 ; *Cullen v. Duke of Queensberry*, cited *ibid.*, 777 ; *Cooper Eq. Pl.* 164 ; 1 Bro. Ch. R. 101.

² *Ibid.* See *Livingston v. Lynch*, 4 John. Ch. R. 573, 596.

³ *Cooper Eq. Pl.* 165.

⁴ *Cooper Eq. Pl.* 165 ; *Titterton v. Osborne*, 1 Dick. 350 ; *Dundas v. Dutens*, 1 Ves. jr. 196.

§ 499. We come, in the next place, to the consideration of demurrers to the matter of the Bill, either as to its substance, or as to its form. Some of the objections under this head have been already discussed, in our examination of the proper form and structure of Bills. But a concise review of the whole subject seems indispensable in this place to a full exposition of the nature and operation of demurrers, as to the substance and as to the form of Bills.

§ 500. And first, as to demurrers to the substance of Bills. One of the objections, which may thus be taken, is, that the value of the subject of the suit is too trivial to justify the Court in taking cognizance of it; or, as the phrase usually is, that the suit is unworthy of the dignity of the Court.¹ The true ground of this objection is, that the entertainment of suits of small value has a tendency, not only to promote expensive and mischievous litigation, but also to consume the time of the Court in unimportant and frivolous controversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land.² Courts of Equity sit to administer justice in matters of grave interest to the parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation. In England, the rule of the Courts of Equity is, not to entertain a Bill under the value of ten pounds sterling, or forty shillings per annum in land, except in special cases, such as in cases of charity; in cases of fraud; and in cases of Bills to establish a right of a permanent and valuable nature; such as in the case of six shillings claimed to be due as an Easter offering, or of a perpetual rent charge of five shillings.³

¹ Cooper Eq. Pl. 165.

² Moore v. Lyttle, 4 John. Ch. R. 183.

³ Cooper Eq. Pl. 165; Anon. Bunb. R. 17; Fox v. Frost, Rep. Temp.

§ 501. The rule itself seems to have been of great antiquity in the Court of Chancery. It may be distinctly traced back to our earliest Reports; and it is promulgated in a formal manner in the Ordinances of Lord Bacon, wherein is declared, that "all suits under the value of ten pounds are regularly to be dismissed."¹ The exceptions to the rule were probably established at a later date, from the manifest propriety of retaining suits in furtherance of rights of a permanent nature, in aid of charities, and in suppression of frauds.²

§ 502. A similar rule seems to prevail in the Courts of Equity in America; or at least in those courts, which have been called upon to express any opinion upon the subject. In New York, this was the established rule at an early period of its Equity jurisprudence; and the amount

Finch. 253; *Owens v. Smith*, Com. R. 715; 1 Harris. Ch. Pr. by Newl. 214; *Griffith v. Lewis*, 4 Bro. Parl. Cas. 314; *Brace v. Taylor*, 2 Atk. 253; Mitf. Eq. Pl. by Jeremy, 110, note (o); *Creagh v. Nugent*, Moseley R. 356; *Anon. Moseley R.* 47; *Cocks v. Foley*, 1 Vern. 359; S. C. 1 Eq. Abridg. 75, and note; *Moore v. Lyttle*, 4 John. Ch. R. 183; *Vredenderg v. Johnson*, Hopk. R. 112; *Beames Ord. in Ch.* 10, and note (33); *Curs. Canc.* 9, 15, 229; *Townley v. Osney*, Cary R. 105, 106; *East Court v. Tanner*, Cary R. 106. A Bill for a sum beneath the dignity of the Court, may also be dismissed on motion; and this is the most usual way of proceeding in such a case. *Mosely R.* 47; *Id.* 356. If the defendant should not take the objection, either by demurrer, or by motion to dismiss; but the cause should come on to a hearing, and it should then appear, that the sum in controversy was less than £10, the Court itself may order the Bill to be dismissed; for a Bill may be, and often is drawn in such a manner, as to prevent the defendant from taking the objection by way of demurrer, or motion, or plea; and therefore it would be unreasonable to deprive him of the benefit of it at the hearing. 2 Atk. 253; *Cooper Eq. Pl.* 166.

¹ *Beames Ord. in Chan.* 10, and note (33); *Curs. Canc.* 9, 15; 1 Pr. Alm. Cur. Canc. 534; *Townley v. Osney*, Cary R. 105, 106; *East Court v. Tanner*, Cary R. 106; *Tothill*, Trans. 80.

² *Cocks v. Foley*, 1 Vern. 359; *Beames Ord. in Chan.* 10, note (33); *Moore v. Lyttle*, 4 John. Ch. R. 183.

has been recently increased by the Legislature to the sum of one hundred dollars.¹

§ 503. Another objection, which may be taken by demurrer to the substance of the Bill, is, that the plaintiff has no interest in the subject-matter, or no proper title to institute a suit concerning it, whenever the objection is apparent on the face of the Bill.² If, therefore, a plaintiff should found his right to an interest in lands under a parol agreement, without alleging any circumstances amounting to a part performance; or if he should state a contract without consideration, which would be a mere nude pact (*nudum pactum*), a demurrer would undoubtedly lie.³ The same rule would lie to a Bill for the redemption of a mortgage, after a great length of time had elapsed, if the Bill were so framed as to present the objection, without any attendant circumstances to obviate it; for in this and other like cases, Courts of Equity act upon the analogy of the law as to the Statutes of Limitations; and will not entertain a suit for relief, if it would be barred at law.⁴ If the

¹ *Vredenberg v. Johnson*, Hopk. R. 112; *Mitchell v. Tighe*, Hopk. R. 119; *Moore v. Lyttle*, 4 John. Ch. R. 183; *Smets v. Williams*, 4 Paige R. 364.

² *Cooper Eq. Pl.* 166, 169; *Mitf. Eq. Pl. by Jeremy*, 154, 231; *Ante* § 260, § 261; *Hare on Discovery*, 41, 42, 43.

³ *Cooper Eq. Pl.* 166, 167; *Cozine v. Graham*, 2 Paige R. 177.

⁴ *Cooper Eq. Pl.* 167; *Mitf. Eq. Pl. by Jeremy*, 212, and note (c); *Post* § 751; *Aggas v. Pickerell*, 3 Atk. 225; *Hardy v. Reeves*, 4 Ves. 479; *Deloraine v. Brown*, 3 Bro. Ch. R. 633, and Mr. Belt's note (1); *Foster v. Hodgson*, 19 Ves. 180; *Hovenden v. Lord Annesley*, 2 Schr. & Lefr. 637; *Hoare v. Peck*, 6 Sim. R. 51; *Freake v. Cranefeldt*, 3 Mylne & Craig R. 499; *Fyson v. Pole*, 3 Younge & Coll. 266; *Humbert v. Rector, &c., of Trinity Church*, 7 Paige R. 195; *Van Hook v. Whitlock*, 7 Paige R. 373; *Coster v. Murray*, 5 John. Ch. R. 521. Lord Redesdale, in his text, has said, that it has been considered, that a defence, founded on length of time, though apparent on the face of the Bill, with-

objection does not appear on the face of the Bill, it may be taken by way of plea, or by way of answer.¹

[*390] * § 504. Upon a similar ground, if the plaintiff should file his Bill to secure the fund to pay a legacy given to a legatee, since dead, of whom the plaintiff asserts himself to be the next of kin, a demurrer would be allowed; for, as the next of kin, he has no title to such relief; and he ought to have taken out administration upon the estate of the legatee.²

§ 505. To the same head may be referred the common case, where a Bill does not show any Equity in the plaintiff to the relief, which he seeks. Thus, for example, if a Bill should be brought by one creditor against another, to deprive him of a priority, which he had lawfully obtained without any fraud, a demurrer would lie; for, in such a case, there is no ground for a Court of Equity to interfere; since all the creditors, under such circumstances, stand upon an equality of right; and then the maxim prevails, *Qui prior est in tempore, potior est in jure*, as well as the maxim, that where the Equity is equal, the law shall prevail.³

§ 506. So, where the plaintiff, in his Bill, stated himself to be the devisee of an estate purchased by the tes-

out any circumstance stated to avail it, cannot generally be made by demurrer. In so doing, he seems to have followed, what appeared at the time, when he wrote his Treatise, to be the prevailing course of authority. And he has illustrated the position by an accurate statement of what was decided by Lord Thurlow in *Deloraine v. Browne*, 3 Bro. Ch. R. 633. But the contrary doctrine is now fully established by the authorities above cited; and especially by Lord Redesdale's own judgment in *Hovenden v. Annesley*, 2 Schr. & Lefr. 636 to 638; Ante § 484.

¹ Post § 751, § 813.

² *Brown v. Dudbridge*, 2 Bro. Ch. R. 322; *Cooper Eq. Pl.* 171.

³ *Cooper Eq. Pl.* 167, 168; *The King v. Blatchford*, 1 Aust. R. 162; *Phillips v. Shaw*, 8 Ves. 241; 1 Story on Eq. Jurisp. § 57, § 58.

tator, and then subject to a mortgage; and alleged, that the mortgage debt was the debt of the testator, he having purchased it subject to the mortgage, and having covenanted to indemnify the vendor therefrom; and the Bill prayed, that the personal estate should exonerate the devised estate by paying the mortgage, a demurrer was allowed; for it was apparent upon the face of the *Bill, that the debt was not the personal debt of [*391] the testator; and there was no allegation, that he had ever had any communication with the mortgagee, or had done any act to transfer the debt from the estate to himself; and, therefore, there was no Equity for the real estate to be relieved of the encumbrance out of the personal assets.¹

§ 507. The foregoing cases are properly illustrations of the defect, either of an original title, or of a present title, to institute the suit, although the party had (strictly speaking) an interest in the subject-matter. The like principle will apply to all cases of a claim, which the plaintiff seeks to enforce, and which is unlawful, or against the policy of the law; for in such a case, there is a defect of title to maintain the suit. Thus, for example, a Bill to recover money, which has been expended for the maintenance of a suit or controversy of a third person; or to recover a premium for using influence to procure an office of trust under Government for the party; or to enforce a marriage brocage bond; or to enforce a contract founded in moral turpitude or

¹ *Tweedell v. Tweedell*, 2 Bro. Ch. R. 101, 152; *Butler v. Butler*, 5 Ves. 535; *Earl of Oxford v. Lord Rodney*, 14 Ves. 417; 1 Story on Eq. Jurisp. § 571, § 574, § 576; *Cumberland v. Coddington*, 3 John. Ch. R. 229; *Cooper Eq. Pl.* 168, 169; *Waring v. Ward*, 7 Ves. 332.

depravity ; would be demurrable on the ground of its illegality or immorality.¹

§ 508. The want of interest of the plaintiff in the subject-matter of the suit is equally fatal upon demurrer. Of this point some examples have been already adduced under a former head.² But other illustrations of it may be derived from the authorities. Thus, where the [*392] plaintiff *claimed an estate under a will, and it was apparent upon the Bill, as set forth by the plaintiff himself, that he had no title, a demurrer was allowed.³ So, where the protestant next of kin, in England, claimed a rent charge settled on a papist on her marriage, a demurrer was allowed ; for the plaintiff evidently had no title to the thing, which he demanded by the Bill, the papist being, by the then British statutes, incapable of taking by purchase, and the rent charge being, therefore, utterly void.⁴

§ 509. And the want of interest is not only a good cause of demurrer in the case of a sole plaintiff ; but if the suit is joint, a want of interest in either of the plaintiffs is equally fatal.⁵ Thus, for example, if the inventor of a medicine should sue jointly with the party, who, as his agent, prepared the medicine, but who had no interest in the invention, and should pray for an injunction and account for a violation of his right, by imitating

¹ Cooper Eq. Pl. 171, 172, 173 ; Mitf. Eq. Pl. by Jeremy, 157 ; 1 Story on Equity Jurisp. § 294, § 295, § 296, § 297, § 298.

² Ante, § 260, § 261, § 318 ; Mitf. Eq. Pl. by Jeremy, 155, 156 ; Cooper Eq. Pl. 171, 173 ; Hare on Discov. 79 to 83.

³ *Brownsword v. Edwards*, 2 Ves. 247 ; Mitf. Eq. Pl. by Jeremy, 154 ; Cooper Eq. Pl. 167, 168 ; *Beech v. Criell*, Prec. Ch. 588. See also *Parker v. Fearnley*, 2 Sim. & Stu. 592.

⁴ Mitf. Eq. Pl. by Jeremy, 154 ; *Michaux v. Grove*, 2 Atk. 210.

⁵ Ante § 231, § 232, § 233, § 237, § 249 ; Post § 541, § 544 ; *Clarkson v. De Peyster*, 3 Paige R. 336 ; *Denton v. Davis*, 1 Moore Privy Council. R. 41, 42 ; *Foot v. Bessant*, 3 Younge & Coll. 320, 325.

the labels and seals affixed to the medicines, a demurrer would hold; for upon such a Bill the plaintiffs, praying joint relief, would not be entitled to it.¹ So, if a bankrupt should sue with others, after he had been declared a bankrupt in regard to property or rights vested in his assignees, the like rule would apply.²

§ 510. Upon a similar ground, if two plaintiffs should sue, and the Bill should allege, that the title was in one *or the other of them, in the alternative, it would [*393] be demurrable; for not only is such an allegation objectionable on account of uncertainty; but, also, because it shows, that there must necessarily be a misjoinder of one or the other of the plaintiffs.³ But a mere *scintilla juris* in one of the plaintiffs, as, for example, a naked title in a trustee to serve a mere power of appointment, will be sufficient to justify making him a plaintiff for the purposes of the trust with the other persons in interest.⁴

¹ *Delondre v. Shaw*, 2 Sim. R. 237; *Page v. Townsend*, 2 Sim. R. 395; *King of Spain v. Machado*, 4 Russ. R. 225; *Cuff v. Platell*, 4 Russ. R. 242; Ante § 232; *Clarkson v. De Peyster*, 3 Paige, 336; *Makepeace v. Haythorne*, 4 Russ. R. 244; *Cholmondeley v. Clinton*, 1 Turn. & Russ. 116.

² *Makepeace v. Haythorne*, 4 Russ. R. 244; Ante § 495; Post § 726. As to how and when a misjoinder of a party may be taken advantage of, see Ante § 237, § 283; Post § 541, § 544.

³ *Cholmondeley v. Clinton*, 1 Turn. & Russ. R. 116.

⁴ *Gething v. Vigurs*, V. C. (England) Nov. 8, 1836. See also *Rhodes v. Warburton*, 6 Sim. 617. In *Rhodes v. Warburton*, 6 Sim. R. 617, the legatees of a testator were joined as plaintiffs with the executor, in suing for a debt due to his estate; and the Bill was held not demurrable. On that occasion, the Vice Chancellor said; "Legatees cannot file a Bill against a debtor to the testator's estate, unless there is collusion between the executor and the debtor. But if the executor chooses to make the legatees co-plaintiffs with him, I do not think, that superfluity renders the record not sustainable. Persons are brought here, who are not necessary parties to the suit. But it is not so injurious, as to make the Bill not sustainable. It is not an objection, that a defendant can take."

§ 511. But if the plaintiff shows a complete title, though a litigated one, or one, that may be litigated, it will be sufficient to sustain the Bill.¹ Thus, if an executor has obtained a probate of the will, it is conclusive as to his title to sue, even though fraud should be alleged in obtaining it; for the fraud is inquirable only in the proper Ecclesiastical Court, or other Probate tribunal, in a suit there instituted to repeal the probate.² The principle would be the same, even if it were alleged in the Bill, that the testator was a lunatic at the time of making the will; for the jurisdiction belongs to another forum to try that question.³ So, if an administrator should bring [*394] *a Bill for discovery of the personal estate, it would be no defence to the suit, that the administration was now in litigation upon a suit in the proper Court to repeal it; for the plaintiff has a present title, which is good, at least until the litigation is determined.⁴

§ 512. And although (as we have seen) the want of a title in the plaintiff is fatal; yet, if a doubtful title only is shown, it will be sufficient to support a Bill, which seeks the assistance of the Court to preserve the property in dispute, pending a litigation.⁵ Therefore, where a suit was pending in an Ecclesiastical Court, touching the representation to a person deceased, a demurrer by one of the parties to that suit, who had possessed himself of the personal estate of the deceased, to a Bill for an ac-

¹ Mitf. Eq. Pl. by Jeremy, 157; Ante § 318.

² Cooper Eq. Pl. 170, *Griffith v. Hamilton*, 12 Ves. 298, 307. But see *Barnesley v. Powel*, 1 Ves. 284, 288; *Jones v. Frost*, Jac. R. 466.

³ Cooper Eq. Pl. 170.

⁴ Cooper Eq. Pl. 170; *Wright v. Black*, 1 Vern. 106, 107; Mitf. Eq. Pl. by Jeremy, 157.

⁵ Mitf. Eq. Pl. by Jeremy, 157; Cooper Eq. Pl. 171.

count, filed by the other party, was overruled.¹ The ground of this decision seems to have been, the deficient power of the Ecclesiastical Court for securing the property, whilst the suit was there depending; and the doubt, as to the title of the parties, was the very ground of the application to a Court of Equity.

§ 513. Another objection, which may be taken by demurrer to the substance of the Bill, is, that, though the plaintiff has an interest in the subject-matter of the suit, and a title to institute a suit concerning it; yet he has no right to call upon the defendant to answer his demand.² This objection frequently arises from the want of privity between the parties. But it is not necessarily *confined to such cases; nor indeed does it [*395] apply to all cases, where there is a want of privity.³

§ 514. In the common course of things (as we have seen⁴), a creditor or legatee is compellable to sue the executor for satisfaction of his debt or legacy. But in such a suit he cannot ordinarily make a debtor of the estate a party; for, although the plaintiff in such suit has an interest in the testator's estate, and has a right to have it applied to answer his demands; yet he has no right to institute a suit against the debtors for the purpose of compelling them to pay their debts in satisfac-

¹ Mitf. Eq. Pl. by Jeremy, 157, 158; Cooper Eq. Pl. 171; Phipps v. Steward, 1 Atk. 286. See also Morgan v. Harris, 2 Bro. Ch. R. 121.

² Mitf. Eq. Pl. by Jeremy, 158; Ante § 227, § 266.

³ Cooper Eq. Pl. 174; Id. 142; Tollett v. Tollett, Ambl. R. 194; Hawkins v. Kelly, 8 Ves. 308; 1 Mont. Eq. Pl. 44, 45, 115; Hare on Discov. 105, 106, 107, 108, 109. In cases of contribution, there is often a want of privity; and yet a Bill will lie against a party, who is bound to contribute; as, for example, in cases of contribution of different shippers in the case of a general average. 1 Story on Equity Jurisp. § 490, § 491; Id. § 483 to § 490.

⁴ Ante § 262; 1 Mont. Eq. Pl. 45, 46.

tion of his demands ; for there is no privity between such creditor and the debtors.¹ But a special case may exist, in which such relief would be given ; as, for example, where there is collusion between the executor and the debtor ; or where the executor is insolvent.²

§ 515. For the same reason, if a debtor has conveyed his property in trust for the benefit of his creditors, the latter cannot ordinarily maintain any suit touching the property ; but the suit should be in the name of the trustee.³ Thus, for example, if a mortgagor should [*396] *make a conveyance in trust for the benefit of his creditors, the trustees, and not any of the creditors interested in the trust, would be the proper parties to bring a Bill to redeem the mortgage.⁴ But if any special case can be made out, such as collusion between the mortgagee and the trustees ; or the refusal of the latter to redeem ; or the insolvency of the latter ; in every such case, the creditors may bring a Bill to redeem the mortgage.⁵

§ 516. For the same reason, where a person has become bankrupt, and assignees are appointed, neither he, nor any of the creditors can ordinarily maintain a suit against any debtor to his estate, or to reduce any of his property into possession ; for the right belongs to the assignees.⁶ But if the assignees should collude with the

¹ Cooper Eq. Pl. 175 ; Mitf. Eq. Pl. by Jeremy, 158 ; Ante § 262 ; Alsager v. Johnson, 4 Ves. 217 ; Utterson v. Mair, 4 Bro. Ch. R. 269 ; S. C. 2 Ves. jr. 95 ; Beckley v. Dorrington, cited 6 Ves. 749 ; Doran v. Simpson, 4 Ves. 651 ; Burroughs v. Elton, 11 Ves. 29 ; Long v. Majestre, 1 John. Ch. R. 305 ; Newland v. Champion, 1 Ves. 104 ; Ante § 227.

² Alsager v. Rowley, 6 Ves. 748 ; Doran v. Simpson, 4 Ves. 651 ; Mitf. Eq. Pl. by Jeremy, 158, 159 ; Cooper Eq. Pl. 175 ; 1 Story on Equity Jurisp. § 423, § 581 ; 2 Story on Equity Jurisp. § 828 ; Ante § 178, § 227, § 263 ; Pearce v. Hewitt, 7 Sim. R. 471.

³ Cooper Eq. Pl. 174, 175.

⁴ Ibid.

⁵ Troughton v. Binkes, 6 Ves. 573 ; Cooper Eq. Pl. 174, 175.

⁶ Ibid.

other party ; or should refuse to bring a suit for the benefit of the bankrupt and of his estate ; then, in such a case, the bankrupt, or any creditor, may do so.¹

§ 517. Upon a similar ground, a Bill is not maintainable by a creditor of a legatee against the executor and the legatee, to compel the executor to pay over the legacy, in discharge of the debt of the legatee ; for there is no privity between the creditor and the executor in such a case ; and the latter is solely amenable to the legatee.² The same doctrine is applicable to the case of a suit, brought by a party interested, against a creditor or legatee, who has been improperly paid or overpaid by the executor.³

*§ 518. But there is often a privity created [*397] by operation of law between parties, without any direct and immediate contract or negotiation between them. Thus, for example, a sale by an agent or factor will create a privity between the purchaser and his principal, upon which a suit may be maintained, as well at law, as in Equity. Hence, the principal will have a right to maintain a Bill for a discovery and an account against the purchaser, in respect to any such dealings with his agent and factor ; and the objection of a want of privity between them cannot be made available.⁴

§ 519. Another objection, which may be taken by

¹ Cooper Eq. Pl. 174, 175 ; *Franklyn v. Ferne*, Barnard. Ch. R. 30 ; *Troughton v. Binkes*, 6 Ves. 573, 575 ; *Saxton v. Davis*, 18 Ves. 72 ; *Barton v. Jayne*, 7 Sim. R. 24 ; *Makepeace v. Haythorne*, 4 Russ. R. 244 ; *Kaye v. Fosbrooke*, 8 Sim. R. 28 ; Ante § 495, and cases there cited ; Post § 726.

² *Elmslie v. McAulay*, 3 Bro. Ch. R. 624 ; Mitf. Eq. Pl. by Jeremy, 158, 159 ; Ante § 262 ; Cooper Eq. Pl. 175, 176.

³ Cooper Eq. Pl. 176 ; *Alsager v. Rowley*, 6 Ves. 750 ; 1 Story on Eq. Jurisp. § 92 and note.

⁴ Mitf. Eq. Pl. by Jeremy, 159, 160 ; Cooper Eq. Pl. 176, 177.

demurrer to the substance of the Bill, is the want of interest of the defendant in the subject-matter of the suit.¹ We have already had occasion to consider some of the cases arising under this head ; such, for example, as the cases of mere witnesses, of arbitrators, and of others, having no interest in the controversy.² So, if a bankrupt is

¹ Mitf. Eq. Pl. by Jeremy, 160 ; Cooper Eq. Pl. 177 ; 1 Mont. Eq. Pl. 42 ; Hare on Discov. 63 to 83.

² Ante § 234, § 235, and § 323 ; Newman v. Godfrey, 2 Bro. Ch. R. 332 ; Mitf. Eq. Pl. by Jeremy, 159, 160 ; Cooper Eq. Pl. 177, 178 ; Fenton v. Hughes, 7 Ves. 287 ; Whitworth v. Davis, 1 Ves. & Beam. 545 ; How v. Best, 5 Madd. R. 19 ; Hare on Discov. 68. In Fenton v. Hughes (7 Ves. 290, 291), an attempt was made to maintain the right to make a witness a party, upon the ground, that the discovery in Equity would be more beneficial to the plaintiff than a mere examination at law. Lord Eldon disallowed the distinction, and on that occasion said ; "The question, however, is, whether he can be examined at law for the plaintiff in Equity with the same benefit, that would result from a discovery here. If he can, as no relief is to be given, it would introduce a new class of cases, to permit a Bill for discovery to be filed against a party so purely a witness. It is impossible, that he can be examined at law against the plaintiff, if the Bill is true ; for he may be examined upon the *voir dire* ; and then his interest will come out. It is impossible also for the plaintiff at law to prevent his being examined for the defendant ; for he may waive the objection of interest. This defendant, therefore, may, with some exceptions, be examined at law by parol as effectually as here by writing. The exceptions are these. First, I cannot satisfy myself, that a *subpœna duces tecum*, is as operative for the production of books, papers, and writings, as a *subpœna* upon a Bill in this Court. Secondly, in such a transaction as this, of considerable importance, the fact of usury being to be made out by proof of the nature and quality of the cloth, showing, that the sale was colorable, inspection may be material. But then the point is, whether upon the distinctions arising out of such circumstances, the rule, not to make a mere witness a defendant, especially upon a Bill for discovery, has even been shaken ? I can find no such authority. This demurrer, therefore, must be allowed. I will not say, as it is not necessary to determine, whether a Bill for relief might not be filed, upon the ground, that the examination at law must be of necessity defective for bringing forward all, that conscience requires ; and that what is withheld is withheld by a person, having an interest in the question. But I cannot find an authority, that a person can be made a party to a Bill for discovery merely, to aid the plaintiff in Equity, as defendant at law, upon the cir-

made a party to a Bill against his assignees in any matter touching his estate, ordinarily he may demur; for all his interest is transferred to his assignees.¹ So, a married woman, who is made a defendant to a Bill against her husband, for the mere purpose of making her a witness, she having no interest in the suit, may, *à fortiori*, demur to the Bill; for she is not compellable, in any such case, to give testimony against her husband.²

§ 520. And it is not only necessary, in order to prevent a demurrer, that the Bill should show, that the defendant has an interest in the subject-matter; but it must also be shown, that he is liable to the plaintiff's demand, which is the groundwork of the Bill.³ Thus (as we have seen), if a suit were brought by the obligee for satisfaction *of a bond of the ancestor against [*399] his heir, alleging assets by descent, it would be a fatal defect on demurrer, that the Bill did not allege, that the heir was bound by the bond.⁴

§ 521. Another ground of objection by demurrer is, when it appears on the face of the Bill, that the object of the Bill is to enforce a penalty, or a forfeiture; for it is a universal rule in Courts of Equity, not to lend their aid to enforce any penalty or forfeiture; but to leave the

cumstance, that the production and inspection of goods may be better compelled here. Demurrer allowed." See also Hare on Discov. 73 to 76; Id. 76 to 79; Day v. Drake, 3 Sim. R. 64.

¹ Whitworth v. Davis, 1 Ves. & Beam, 545; Mitf. Eq. Pl. by Jeremy, 161; Cooper Eq. Pl. 178; Ante § 231, § 232, § 233, § 237; De Wolf v. Johnson, 10 Wheat. R. 384; Hare on Discov. 79 to 83.

² Cooper Eq. Pl. 177, 178; Barron v. Guillard, 3 Ves. & Beam. 165; Le Texier v. Marquis of Anspach, 5 Ves. 322; S. C. 15 Ves. 164.

³ Ante § 257; Mitf. Eq. Pl. by Jeremy, 162, 163; Cooper Eq. Pl. 178, 179.

⁴ Ibid.

party to his remedy at law.¹ There are exceptions to the rule ; but they all stand upon peculiar grounds, entirely consistent with its general scope and objects. Thus, for example, if the plaintiff seeking relief, is solely entitled to take advantage of the penalty or forfeiture, and he expressly waives any right to the penalty or forfeiture, the Bill is maintainable.² So, a defendant may so act, or so contract, as to waive, on his own part, any objection to a Bill to enforce a penalty or forfeiture. Thus, he may contract to answer fully a Bill of discovery ; or he may by his acts, in fraud of the plaintiff and in violation of law, by implication exclude himself from the benefit of the objection, if allowing it would subvert the whole policy of the law.³

¹ 2 Story on Eq. Jurisp. § 3119, § 1494 ; Beames Eq. Pl. 258 to 271 ; Mitf. Eq. Pl. by Jeremy, 193, 194, 195, 197 ; Hare on Discov. 131 to 148 ; Paxton v. Douglas, 16 Ves. 239, S. C. 19 Ves. 225 ; Horsburg v. Baker, 1 Peters R. 232, 236.

² Southall v. —, 1 Younge R. 308, 316 ; Hare on Discov. 137, 138 ; Mitf. Eq. Pl. by Jeremy, 195, 196.

³ Hare on Discov. 139 to 144, and the cases there cited ; South Sea Company v. Bumstead, Mosel. R. 74, 77 ; S. C. 1 Eq. Abridg. 77 ; Green v. Weaver, 1 Sim. R. 404, 429, 431 ; African Comp. v. Parish, 2 Vern. 244 ; Mitf. Eq. Pl. by Jeremy, 195, 287, 288 ; Cooper Eq. Pl. 205, 206, 207 ; Beames Eq. Pl. 260 to 265. Mr. Hare (on Discovery, p. 139 to 144) has devoted a section to the consideration of these exceptions, which will reward a diligent perusal. The case of Green v. Weaver (1 Sim. R. 430) seems to have pressed the exception far beyond former cases, and is not easily reconcilable with the strong language of Lord Eldon in Paxton v. Douglas, 16 Ves. 239, S. C. 19 Ves. 225, notwithstanding the explanation by the Vice Chancellor (Sir Anthony Hart). See also *Ex parte Dyster*, 1 Meriv. R. 155 ; Hare on Discov. 153, 154. Lord Redesdale has summed the general results of the authorities on this subject, in the following words ; " If the plaintiff is alone entitled to the penalties, and expressly waives them by his Bill, the defendant shall be compelled to make the discovery ; for it can no longer subject him to a penalty. As, if a rector, or impropriator, or vicar, files a Bill for tithes, he may waive the penalty of the treble value, to which he is entitled by the statute of 2 and 3 Edward VI., and thus become entitled to a discovery of the tithes sub-

§ 522. The objection above-stated, may not only apply to the whole Bill, when the sole purpose of it is to enforce a penalty or forfeiture ; but it is equally applicable to a particular interrogatory in a Bill, otherwise unexceptionable, which may expose the defendant to a *penalty or forfeiture.¹ Thus, for example, [*401] where the defendant became a purchaser, under a decree, of the first presentation to a living, of which the plaintiff was seised for life ; and afterwards the second presentation had been conveyed to the defendant by the plaintiff ; and the latter afterwards filed a Bill to set aside the transaction on account of fraud ; and in his Bill he asserted, that the defendant had sold the first

tracted. And though a discovery may subject a defendant to penalties, to which the plaintiff is not entitled, and which he consequently cannot waive ; yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, which is the common case with respect to servants of the East India Company, he shall be compelled to answer. Where, too, a person by his own agreement subjects himself to a payment, in the nature of a penalty, if he does a particular act, a demurrer to discovery of that act will not hold. Thus, where a lessee covenanted not to dig loam, clay, sand, or gravel, except for the purpose of building on the land demised, with a proviso, that if he should dig any of those articles for any other purpose, he should pay to the lessor twenty shillings a cartload, and he afterwards dug great quantities of each article ; upon a Bill for discovery of the quantities, waiving any advantage of possible forfeiture of the term ; a demurrer of the lessee, because the discovery might subject him to a payment by way of penalty, was overruled." Mitf. Eq. Pl. by Jeremy, 195, 196 ; Cooper Eq. Pl. 205, 206. There are other exceptions, besides those stated in the text ; as, for example, cases where a statute has given the right of discovery, such as in the statutes respecting gaming and stockjobbing. *Cowan v. Phillips*, 3 Anst. 843 ; *Bancroft v. Wentworth*, 3 Bro. Ch. R. 11 ; *Hare on Discov.* 133 to 137 ; *Rawden v. Shadwell*, Ambler. R. 269, and Mr. Blunt's note ; *Newman v. Franco*, 2 Anst. 519 ; *Andrews v. Berry*, 3 Anst. 634 ; Cooper Eq. Pl. 207.

¹ *Chauncey v. Tabourden*, 2 Atk. 392, 393 ; *Southall v. —*, 1 Younge R. 308, 316 ; *Parkhurst v. Lowten*, 1 Meriv. 391 ; *Chambers v. Thomson*, 4 Bro. Ch. R. 434, 436, and Mr. Belt's note (5) ; *Hare on Discovery*, 133, 154 ; *Beames Pl. in Eq.* 260 to 264.

presentation to the present incumbent of the first presentation ; and also sought a discovery from the defendant of the alleged sale ; the defendant objected in his answer, by way of demurrer, to the discovery, upon the ground, that it might subject him to the pains and penalties of simony ; and the objection was held good by the Court.¹ So, where a cross Bill was brought against a rector to establish a modus, and the cross Bill alleged, that the defendant had been presented to the living under a simoniacal contract, and stated certain facts as evidence thereof, and prayed a discovery thereof ; and the defendant, in his answer, demurred to the discovery, so far as it respected those facts, on the ground, that it might subject him to forfeitures and penalties ; the Court allowed the demurrer to those interrogatories.²

§ 523. And the objection is not personal, and confined to the original party defendant ; but, if he should die, his personal representative would be entitled to the [*402] *same protection, which the testator or intestate might claim, if there should be any interest in such personal representative, which might be forfeited or affected by the discovery.³

§ 524. The foregoing are cases, where the party, required to make the discovery, might thereby subject himself to a penalty or forfeiture. But the same principle applies to a case, where the discovery demanded might lead to a legal accusation of a crime ; for no person is ever bound to accuse himself of a crime ; or to furnish any evidence whatsoever, which shall lead to

¹ *Parkhurst v. Lowten*, 1 Meriv. R. 391.

² *Southall v. —*, 1 Younge R. 308, 315, 316 ; *Attorney General v. Sudell*, Prac. Ch. 214. See *Gray v. Hasketh*, Ambl. 268, and Mr. Blunt's note.

³ *Parkhurst v. Lowten*, 1 Meriv. R. 391.

any accusation of that nature.¹ But it is unnecessary to dwell farther on this point in connexion with Bills for relief, because the subject will again come under review, in considering the grounds of demurrer to Bills of discovery only.²

§ 525. But the objection is strictly confined to the point of the discovery sought, and does not affect the jurisdiction of the Court to grant relief. For a party shall not protect himself against relief in a Court of Equity by alleging, that, if he answers the Bill filed against him, he must subject himself to the consequences of a supposed crime; though the Court will not force him by his own oath to subject himself to punishment. Therefore, in the case of a Bill to inquire into the validity of deeds upon a suggestion of forgery, the Court has entertained jurisdiction of the cause; and though it has not obliged the party to a discovery of any fact, which might tend to show him guilty of the crime; *yet it has directed an issue to try, whether the [*403] deeds were forged.³

§ 526. These are the principal heads of objection to the substance of Bills of relief, upon which it seems necessary to dwell. In concluding the subject, it may be stated, that if, for any reason, founded on the substance of the case, as stated in the Bill, the plaintiff is not entitled to the relief, which he prays, the defendant may demur. Many of the grounds of demurrer, already mentioned, are properly referable to this head. It is obvious, that if the case stated is such, that, admitting the whole Bill to be true, the Court ought not to give

¹ Cooper Eq. Pl. 203, 204; Mitf. Eq. Pl. by Jeremy, 194, 195.

² Post § 575 to § 598.

³ Mitf. Eq. Pl. by Jeremy, 196; Brownsword v. Edwards, 2 Ves. 246; Beames Pl. in Eq. 263.

the plaintiff the relief or assistance, which he requires, in the whole, or in part, the defect, thus appearing upon the face of the Bill, is not only a sufficient, but an appropriate, ground of demurrer.¹ And, where the objection is thus on the face of the Bill, it should be taken by a demurrer, and ought not to be taken by a plea.²

§ 527. Secondly ; We come, in the next place, to objections to the frame and form of the Bill, which may be taken by demurrer. These are, (1.) Defects of form ; (2.) Multifariousness ; and, (3.) Want of proper parties, or misjoinder of parties.

§ 528. (1.) And, in the first place, as to defects or want of form. These must ordinarily be taken advantage of by demurrer, assigning the defect of form as a special cause ; for generally, the Court will not listen to [*404] *such objections at the hearing, if the case stated is such, that the Court can properly proceed to a decree.³ The want of form, which is most usually insisted on, is the want of due certainty in the allegations, or the loose and inartificial structure of the Bill, or the omission of some prescribed formularies.⁴ In regard to the latter, it is to be observed, that any irregularity in the frame of a Bill, not only of this sort, but of any other

¹ Mitf. Eq. Pl. by Jeremy, 163 ; *Piggott v. Williams*, 6 Madd. R. 95 ; *Wyatt Pr. Reg.* 167.

² *Billing v. Flight*, 1 Madd. R. 230 ; *Hovenden v. Annesley*, 2 Sch. & Lefr. 638 ; *Utterson v. Mair*, 2 Ves. jr. 95 ; S. C. 4 Bro. Ch. R. 270 ; Mitf. Eq. Pl. by Jeremy, 218.

³ Ante § 453. Where, at the hearing, it appears, that there is a defect of form, and certain facts have occurred since the filing of the Bill, which are essential to a proper decree, the Court will, in special cases, especially where great expenses have been incurred, order the cause to lie over, and give leave to file a supplemental Bill, to bring those matters formally before the Court. *Mutter v. Chauve*, 5 Russ. R. 42.

⁴ 1 Mont. Eq. Pl. 113, 114, 115 ; *Kirkley v. Burton*, 5 Madd. R. 578.

sort, may be taken advantage of by demurrer; as, for example, if a Bill is brought contrary to the usual course of the Court.¹ In *regard to the latter, [*405] we have already had occasion, in a preceding part of this work, to consider, what is the proper structure and form of Bills as to these particulars, and especially as to certainty; and therefore it is unnecessary to repeat them in this place.² There are few addi-

¹ Mitf. Eq. Pl. by Jeremy, 206. Lord Redesdale, in his Treatise, page 206, 207, has given several illustrations, as to irregularities of this sort. He there says; "As where, after a decree directing encumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a Bill to have the advantage it would give him by way of priority over the demands of some of the defendants. This was a Bill to vary a decree, and yet was neither a Bill of review, nor a Bill in nature of a Bill of review, which are the only kinds of Bills, which can be brought to affect or alter a decree, unless the decree has been obtained by fraud. So, if a supplemental Bill is brought against a person not a party to the original Bill, praying that he may answer the original Bill, and no reason is suggested, why he could not be made a party to the original Bill by amendment, he may demur. If an irregularity arises in any alteration of a Bill by way of amendment, it may also be taken advantage of by demurrer. As, if a plaintiff amends his Bill, and states a matter, arisen subsequent to the filing of the Bill, which consequently ought to be the subject of a supplemental Bill, or Bill of revivor. But if a matter arisen subsequent to the filing of the Bill, and properly the subject of a supplemental Bill, is stated by amendment, and the defendant answers the amended Bill, it is too late to object to the irregularity at the hearing. For, as the practice of introducing by supplemental Bill matter, arisen subsequent to the institution of a suit, has been established merely to preserve order in the pleadings, the reason, on which it is founded ceases, when all the proceedings to obtain the judgment of the Court have been had without any inconvenience arising from the irregularity."

² Ante, § 26 to § 49; Id. § 240 to § 270; Mitford Eq. Pl. by Jeremy, 123, 124, 125, 155, 163; Cooper Eq. Pl. 126, 181, 182; Brooke v. Hewitt, 3 Ves. 253; Harrison v. Hogg, 2 Ves. jr. 322, 328. Where the Equity against a purchaser is founded upon an allegation in the Bill, that he had notice at the time of the purchase, it is necessary, that the charge should be alleged in direct and positive terms. If it be loose and indeterminate, stating probable or suspicious circumstances only, that will not be sufficient. Flagg v. Mann, 2 Sumner R. 549, 550.

tional illustrations, which would be afforded by any further survey of the authorities.¹ It may be remarked, however, that where the Bill consists of a great variety of circumstances, the evidence of which might sustain the relief asked, with some modifications, a demurrer will not properly lie; for it has been said, that, to sustain a demurrer, there must be a neat, short point, amounting to an absolute denial of the plaintiff's title to any relief.²

§ 529. Sometimes the want of certainty in a Bill may be cured by an allegation, that the plaintiff has no means of setting forth the particular instrument, under which he claims, with more certainty.³ Thus, for example, where the Bill was for a discovery, and it stated, that the plaintiff claimed under a settlement, which was in the possession of the defendant; and that the plaintiff was unable to set it forth with more certainty than he [*406] had done *on that account; and it admitted, that his statement might be inaccurate; upon demurrer, the Bill was sustained.⁴

§ 530. (2.) In the next place, as to multifariousness. We have already had occasion to consider this subject, in some of its most important aspects, in the preceding pages;⁵ and a few additional observations may suffice in this place.⁶ To lay down any rule universally appli-

¹ See Cooper Eq. Pl. 180, 181; Browne v. Warner, 14 Ves. 156; 1 Mont. Eq. Pl. 94, 95.

² Brooke v. Hewitt, 3 Ves. 253.

³ Wright v. Plumtre, 3 Madd. R. 489; Hare on Discov. 44.

⁴ Ibid.

⁵ Ante § 271 to § 284; Id. § 278, n. See also Cooper Eq. Pl. 182 to 185.

⁶ Lord Redesdale has laid down the general doctrine in the following terms; "The Court will not permit a plaintiff to demand, by one Bill, several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burden of costs,

cable, as to multifariousness, or to say, what constitutes multifariousness, as an abstract proposition, is (it has been said) upon the authorities utterly impossible. The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered, what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule. The only way of reconciling the authorities upon the subject is, by adverting to the fact, that although the books speak generally of demurrers for multifariousness; yet, in truth, such demurrers may be divided into two kinds. (1.) *Frequently, the objection raised to a Bill, though [*407] termed multifarious, is, in fact, properly speaking, a misjoinder of causes of suit; that is to say, the cases or claims, asserted in the Bill, are of so different a character, that the Court will not permit them to be litigated in one record. It may be, that the plaintiffs and the defendants are parties to the whole transactions, which form the subject of the suit; but, nevertheless, those transactions may be so dissimilar, that the Court will not allow them to be joined together; but will require distinct records.¹ (2.) But

by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. A defendant may, therefore, demur; because the plaintiff demands several matters of different natures of several defendants by the same Bill. But, as the defendants may combine together, to defraud the plaintiff of his rights, and such a combination is usually charged by a Bill, it has been held, that the defendant must so far answer the Bill, as to deny combination. In this, however, the defendant must be cautious; for if the answer goes farther than merely to deny combination, it will overrule the demurrer. A demurrer of this kind will hold only, where the plaintiff claims several matters of different natures. But when one general right is claimed by the Bill, though the defendants have separate and distinct rights, a demurrer will not hold. *Mitf. Eq. Pl. by Jeremy*, 181, 182, and notes (a) and (b). *Ante* § 271, § 271 a. to § 278 a.; *Id.* § 279 to § 289.

¹ *Campbell v. Mackay*, 1 *Mylne & Craig R.* 618; *Attorney General v. St. John's College*, 7 *Sim. R.* 241; *Shackell v. Macaulay*, 2 *Sim. & Stu.*

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what is more familiarly understood by multifariousness, as applied to a Bill, is, where a party is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connexion whatsoever. In such a case, he has a right to demur, and to state the evil of thus uniting distinct matters in one record to be, (and so the old form of demurrer was) that it put the parties to great and useless expense. Such an objection could have no application to the case of a mere misjoinder of different causes of action between the same parties, plaintiffs and defendants, and none others, and it might more correctly be called a misjoinder of parties.¹

79. The following cases illustrate this first sort of multifariousness. *Ward v. Duke of Northumberland*, 2 Anst. R. 469, so far as the demurrer of the Duke was concerned; *Harrison v. Hogg*, 5 Madd. R. 138; *Saxton v. Davis*, 18 Ves. 72; *Attorney General v. Goldsmiths' Company*, 5 Sim. R. 670; *Knye v. Moore*, 1 Sim. & Stu. 61. These cases are fully commented on in *Campbell v. Mackay*, 1 Mylne & Craig, 616 to 624. Ante § 271 to § 278, a, and note.

¹ *Campbell v. Mackay*, 1 Mylne & Craig R. 618, 619. The following cases illustrate this second sort of multifariousness. *Ward v. Duke of Northumberland*, 2 Anst. 469, so far as Beverley's demurrer applied; *Salvidge v. Hyde*, 5 Madd. R. 138; *S. C. on Appeal*, Jacob R. 151; *Attorney General v. Merchant Tailors' Company*, 5 Sim. R. 288; *S. C. 1 Mylne & Keen*, 189. These cases are also fully commented on in *Campbell v. Mackay*, 1 Mylne & Craig, 616 to 624. Ante § 270, § 271 a, to § 278 a; *Id.* § 274 to § 284. The form of a demurrer for a misjoinder is as follows; "This defendant, by protestation, not confessing any of the matters and things contained in the said Bill to be true, as therein alleged, saith, that he is advised by his counsel, that the complainant's said Bill is insufficient, and to which, by the rules of this honorable Court, this defendant ought not to be compelled to make or give any answer; and, for cause of demurrer thereunto, this defendant sheweth, that it appears by the said Bill, that the same is exhibited against this defendant and J. S. for several distinct matters and causes, in many whereof, as appears by the said Bill, this defendant is not, in any manner, interested or concerned; by reason of which distinct matters, the said complainant's said Bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining this defendant, and distinct matters together, which do not depend on each other, in the said Bill,

§. 531. In the former class of cases, where there is a joinder of distinct claims between the same parties, it has never been held, as a general proposition, that they cannot be united, and that the Bill is of course demurrable for that cause alone, notwithstanding the claims are of a similar nature, involving similar principles and results; and may, therefore, without inconvenience, be heard and adjudged together. If that proposition were to be established, and carried to its full extent, it would go to prevent the uniting of several instruments in one Bill, although the same parties were liable in respect of each, and the same parties were interested in the property, which was the subject of each. So, that if, for instance, a father executed three deeds, *all vesting property in the same trustees, and [*409] upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits, as there were instruments. Such a rule, if established in Equity, would be very mischievous and oppressive in practice; and no possible advantage could be gained by it. It would lead to a multiplication of suits in cases, where it could answer no assignable purpose but to have the subject-

the pleadings, orders and proceedings will, in the progress of the said suit, be intricate and prolix, and this defendant put to the unreasonable and unnecessary charges in taking copies of the same, although several parts thereof no ways relate to or concern him; for which reason, and for divers other errors appearing in the said Bill, this defendant doth demur thereto, and he prays judgment of this honorable Court, whether he shall be compelled to make any further or other answer to the said Bill; and he humbly prays to be dismissed from hence with his reasonable costs, on this behalf sustained." Van Heyth. Eq. Draft. 422. See also another form of demurrer for multifariousness, in *Shackell v. Macaulay*, 2 Sim. & Stu. 79.

matter of the contest split into a variety of separate Bills.¹

§ 532. No such rule, however, has been established. On the contrary, a different doctrine has been maintained; and it seems now supported by the most satisfactory authority. Thus, for example, where a suit was brought against a corporation to establish eight charitable trusts, created by distinct instruments, and different donors, at different times, for charitable purposes, generally similar in their nature; and no other corporation were interested in any of them but the last charity; it was held by the Court upon a demurrer for multifariousness, that the Bill was maintainable for the first seven charities; and that the Bill might be amended by striking out the eighth charity, in which another corporation was interested.²

§ 533. The result of the principles to be extracted from the cases on this subject seems to be, that where there is a common liability, and a common interest, a [*410] *common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit.³

¹ *Campbell v. Mackay*, 1 Mylne & Craig R. 617, 618; *Atty. Genl. v. Cradock*, 3 Mylne & Craig, 85.

² *Attorney General v. Merchant Tailors' Company*, 5 Sim. R. 288; *S. C.* 1 Mylne & Keen, 189, 191, 192; *Campbell v. Mackay*, 1 Mylne & Craig, 622. But see *Attorney General v. Goldsmiths' Company*, 5 Sim. R. 670, and the comments thereon in *Campbell v. Mackay*, 1 Mylne & Craig, 623; *Attorney General v. St. John's College*, 7 Sim. 241. In this last case, the Vice Chancellor said, one test, by which we might ascertain, whether an information was multifarious, or embraced one object only, was to ascertain whether one defence can be made to the whole of it. See *Ante* § 273.

³ *Campbell v. Mackay*, 1 Mylne & Craig, 623, 624; *Atty. Genl. v. Cradock*, 3 Mylne & Craig, 85.

§ 534. Indeed, where the interests of the plaintiffs are the same, although the defendants may not have a coëxtensive common interest, but their interests may be derived under different instruments, if the general objects of the Bill will be promoted by their being united in a single suit, the Court will not hesitate to sustain the Bill against all of them.¹ *A fortiori*, this doctrine would seem to apply to a case, where the defendants take under different instruments for the benefit of the plaintiffs, and the plaintiffs have a common interest, and the defendants represent and are interested in all the questions raised on the record, and the suit is for a common object.²

§ 535. These are cases, where the claims are several and distinct in respect to the defendants, but they are joint in respect to the plaintiffs. The doctrine has gone farther; and in some cases, where the interests of the plaintiffs were distinct, and yet of a similar nature, against the defendants, the objection of multifariousness has been disallowed. Thus, for example, where the residuary legatees under one will were the appointees of a share of another testator's estate, which share was taken under the first will; and the Bill was brought against the personal representatives of both testators for an account; upon a demurrer for multifariousness, it *was held, that the Bill was maintainable; and [*411] that the plaintiffs were entitled to unite the accounts of both estates in one and the same suit; and that it was not multifariousness;³ for though it was true, that the

¹ Campbell v. Mackay, 1 Mylne & Craig, 603, 623; Attorney General v. Cradock, 3 Mylne & Craig, 85; Attorney General v. St. John's College, 7 Sim. R. 241, 254.

² Ibid.

³ Turner v. Robinson, 1 Sim. & Stu. R. 313; S. C. 6 Madd. R. 94.

executor of one estate had no concern with the other; yet the demand of the plaintiffs necessarily involved the accounts of both estates. But there is some reason to doubt, if this decision is upon principle maintainable.¹

§ 536. So, where a mother, who claimed an annuity for herself, joined her children with her as plaintiffs in a Bill, the object of which was to establish two distinct claims, arising under separate instruments, the mother claiming the annuity under one, and the children a joint interest with the mother by a settlement under the other; on a demurrer for multifariousness, the Court disallowed it, saying, that the whole case of the mother being properly the subject of one Bill, the suit did not become multifarious, because all the plaintiffs were not interested to an equal extent.² It may be added, that the annuity given to the mother was upon the ground of her maintaining the children.³

§ 537. There is yet another case still more strong, where a Bill was filed by seventy-two underwriters, to restrain several actions upon different policies of insurance, effected by the defendants upon different ships. The defendants had a common interest in all the actions, as the owners of all the ships, and the plaintiffs a common defence in all the actions. But the plaintiffs in the Bill had [*412] no joint interests. *They were not only all liable to separate actions; but they were actually defendants in separate actions. They united in the Bill against all the plaintiffs in all the actions, for the purpose of obtaining a discovery in aid of their defence against all the actions.

¹ *Dunn v. Dunn*, 2 Sim. R. 329; *Campbell v. Mackay*, 1 Mylne & Craig, 624; Ante § 279, and note (3).

² *Knye v. Moore*, 1 Sim. & Stu. 61; *Campbell v. Mackay*, 1 Mylne & Craig, 624.

³ *Dunn v. Dunn*, 2 Sim. 329.

A demurrer was put in for multifariousness; but it was overruled by the Court.¹

§ 537. *a.* It is upon grounds very analogous, that it has been held, that distinct and several judgment creditors may join in one Bill for discovery and relief, in order to set aside fraudulent conveyances, which have been made by their devisor in fraud of his creditors; for they all have a common interest in the suit; and if

¹ *Kensington v. White*, 3 Price R. 164; *Irving v. Vienna*, McClell. & Younge R. 563. This case seems utterly inconsistent with principle, unless it can be asserted, that in all cases, where parties have a separate and distinct interest, which they seek to assert by a defence, common to them all, against the adverse party, that community of defence is sufficient to entitle them to join in one Bill. Such a proposition does not seem supported in any other case. Lord Abinger, in *Mills v. Campbell*, 2 Younge & Coll. 389, 396, 397, affirmed the principle of this case in the fullest manner, and applied it to the case not only of different policies, but of policies which might give rise to different actions, as policies under seal and policies not under seal. On this occasion he said; "As to the objection for multifariousness, it appears to me that there is no distinction in principle between this case and those, which have been cited, where the underwriters, having been sued upon different policies, the Court has not put them to file different bills to restrain the actions. The circumstance that one of the policies in this case is under seal, and the other not under seal, can make no difference. Formerly the only difference would have been, that in the actions on the policies the corporation of the London Assurance might have pleaded specially, that the plaintiff had no interest, while the others would have given that fact in evidence under the general issue. But the late act (3 & 4 Will. IV. c. 42; Reg. Gen. H. T. 4 Will. IV.) renders it necessary for underwriters, even in *assumpsit*, to plead specially in matters of this nature. Therefore, in fact, the two actions would be met by the same sort of plea. Upon these grounds it appears to me that the first objection fails." See also *Janson v. Solarte*, 2 Younge & Coll. 127. Notwithstanding the weight of this additional authority, it is not easy to state, how it can be reconciled with the general rule on the subject of multifariousness. Ante § 287, a; Ante § 161, note (2). It is obvious, that Lord Cottenham was not prepared to go to this length in *Campbell v. Mackay*, 1 Mylne & Craig, 624, 625. See Ante § 279, note under p. 230; Ante § 280, § 281, § 286, and note (1); Mitf. Eq. Pl. by Jeremy, 181, 182; Cooper Eq. Pl. 182, 183. See also *Brinckerhoff v. Brown*, 6 John. Ch. R. 139, 157; Ante, § 161, note; 1 Mont. Eq. Pl. 71 to 74.

they succeed, the decree will be equally beneficial to all in proportion to their respective interests.¹

§ 538. But in other cases, where the defendants have not a common interest ; but the Bill contains distinct matters, which may affect them in different ways ; or in which their interests may be entirely distinct and disconnected ; or with a large portion of which they have no concern whatsoever ; there, upon the grounds already stated, the objection of multifariousness by different defendants is often sustained. Thus, as we have already seen, in the case of the union of eight charitable donations in one Bill, where another corporation was interested in one only, the latter, if made a defendant, might demur to the Bill for multifariousness.² So, where an Information and Bill was filed for the general administration of two charities, and also impeaching a transaction, by which a part of the charity lands had been exchanged ; a demurrer by one of the defendants, who had taken the charity lands in exchange, on the ground of [*413] multifariousness, was allowed ; for the defendant had nothing to do with the general administration of the charities ; but only with so much of the matters, as regarded the exchange of the charity lands.³ This case

¹ *Brinkerhoof v. Brown*, 6 John. R. 150, 151 ; Ante § 161, note (2) ; § 286, and note, where this doctrine is questioned.

² Ante § 532 ; *Attorney General v. Merchant Tailors' Company*, 5 Sim. 288 ; S. C. 1 Mylne & Keen, 189, 190, 191.

³ *Attorney General v. Cradock*, 8 Simons R. 466 ; S. C. reversed, 3 Mylne & Craig, 85. The reversal turned upon special grounds, not impugning the general rule. The Bill charged collusion by the defendant, (who took the objection of multifariousness) with the trustees, in a breach of the trust in respect to a part of the charity estates ; and the Lord Chancellor was of opinion, that on this account the defendant was properly made a party to the suit, as the objects of the Bill were not only to have an account of the charity, but also to have the exchange set aside, new trustees appointed, and the rents apportioned among the different charita-

was afterwards overruled ; but the doctrine would have been regularly true, if the defendant had not so mixed

ble objects. On this occasion, Lord Cottenham said ; “ The defendant, Cradock, says, that he is improperly mixed up with the accounts relative to the other property of this trust ; and that, though the information states a case against him which, if true, might entitle the Attorney General to sue him in respect of the property which is alleged to have been separated from the charity, he ought not to be made a party to a suit, the object of which is to have a general account taken of the property of the charity, and an apportionment of that property to the several purposes to which it is alleged to belong. The first point to be determined is, whether he is not so involved with that part of the property which Headlam is said to have diverted from the charity, as to make it impossible to proceed against Headlam, with respect to that property, without joining Cradock ; and I think, that, under the circumstances stated, it is quite impossible, that the suit could be prosecuted in the absence of Cradock. The alleged breach of trust consists in Headlam and Cradock diverting an estate, subject to charitable purposes, by way of exchange for an estate which belonged to them jointly. The exchange complained of is one transaction, and the consideration is property in which they were jointly interested. If that be so, the question is, whether the objection of multifariousness can possibly apply ; whether a party, who has been implicated with a trustee in a breach of trust, as to part of the property which is the subject of the information, can say that, in order to accommodate him, you shall sever the case against that particular trustee, from the case against the trustees generally. In many cases it would be utterly impossible so to proceed ; for if you are bound to separate that part in which the trustee was concerned with the other party, you may make that suit defective which ought to be instituted against all the trustees in respect of the whole interest in the charity. Now this suit would be defective, if that part which relates to the transaction in which Headlam and Cradock were together concerned, were separated from the rest, the object being to have an account taken of the whole of the charity property, and an apportionment of the property among the different purposes for which it was designed. Any thing more inconvenient than having against Headlam one suit for that part of the account which relates to the property in respect of which Cradock is interested, and another suit for the remainder, there could not well be. It is obvious, that that would be a most inconvenient and improper mode of carrying on the suit. Would it ever occur to any one to file one Bill against the trustee for one part of the transaction, and another Bill for another part of the transaction ? Then, is a party entitled to raise this objection, who has made himself, by uniting with the trustee in a breach of trust, part and parcel of the transaction ? The object of the rule against multifariousness is to protect

himself up in the transactions, as to become a party to the breach of trust by the trustees, and if the very

a defendant from unnecessary expense ; but it would be a great perversion of that rule, if it were to impose upon the plaintiffs, and all the other defendants, the expenses of two suits instead of one. The object of the suit is to establish that Cradock has, by means of the transaction stated in the information, become a trustee of part of the charity estate. Suppose he had been an actual instead of a constructive trustee, and the object was to have accounts taken, and an administration made of the whole of the charity property, could he object on that ground, that he was a trustee only of a part of the charity property, and that he could not be made a party to a suit relating to the whole ? If that were to prevail, it would be directly against the decision of the Vice Chancellor, which I affirmed in *Campbell v. Mackay*. (1 Mylne & Craig, 603.) There, some of the parties were trustees of part only of the trust property in question ; but the trusts were so united, by the allegations of the Bill, that the whole was made one fund ; and first the Vice Chancellor, and afterwards myself were of opinion, that, in such a state of circumstances, the objection of multifariousness could not be sustained. If that be so, according to the decision in *Campbell v. Mackay*, when the defendant is a trustee only of part, but which part is so blended with the remainder as to make it improper to separate it, is greater favor to be shewn to a person who becomes one of the trustees by joining with another trustee in committing a breach of trust ? The doctrine of multifariousness would be carried much too far if that were to be the case. That would have been the opinion which, independently of any decision, I should have formed upon principle, and upon the case of *Campbell v. Mackay*, in which both his Honor the Vice Chancellor, and myself, concurred. The present case, however, is almost identical with *Salvidge v. Hyde* (5 Mad. 138, and Jac. R. 151), not according to the facts of that case, but according to the facts of the case which Lord Eldon assumed was brought before him. In *Salvidge v. Hyde*, there was not such a union ; there was a distinct case against the defendant Laying, who was alleged to have improperly purchased part of the testator's estate, The Vice Chancellor, Sir J. Leach, was of opinion, that that of itself would not raise the objection of multifariousness, upon the ground, that there was one entire object, namely, the administration of the estate. When the case came before Lord Eldon, he did not go to that extent, nor did he concur in the opinion of the Vice Chancellor. Culliford was a trustee, who, as well as Laying, was alleged to have purchased part of the trust estate. It was there argued, at the bar, that the land sold to Culliford was in part included in the land sold to Laying, so that the purchases were necessarily connected. The parties at the bar were driven to that argument ; and then Lord Eldon says, 'If Culliford purchased for himself, which he could not do, and then Laying

objects of the Bill did not absolutely require him to be joined.¹

§ 539. The conclusion, to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive, inflexible rule, as to what, in the sense of Courts of Equity, constitutes multifariousness, which is fatal to the suit on demurrer. These Courts have always exercised a sound discretion in determining, whether the subject-matters of the suit are properly joined, or not; and whether the parties, plaintiffs or defendants, are also properly joined or not. And it is not very easy, *à priori*, to say exactly, what is, or what ought to be the line regulating the course of pleading on this point. All, that can be done in each particular

bought of him, that would be one thing; but what charge is there in the Bill that Laying purchased what Culliford bought? If an executor, having a power to sell, agrees to sell to A. B., can a Bill be filed against him, and also for a general administration of the estate? He may have made infinitely too good a bargain with the trustee, to sell, one that the Court would not allow to stand; but that is no ground for making him a party to the general administration. The case must depend on the charges of the Bill: they may be such as to unite persons who are ordinarily dis-united.' (Jac. R. 155.) It is impossible to misunderstand what Lord Eldon means. He says, in effect, 'You are proceeding against Culliford. If the allegation in the Bill connects the other party with the purchase by Culliford, I don't dispute that he is properly joined; but here is a failure of that ground, because the Bill does not allege any connection between the purchase by Culliford and the purchase by Laying;' and upon that ground, obviously, Lord Eldon decided the case; namely, because the two purchases were not connected. Now, here it is different; because there is one property, one consideration, and it is obviously impossible to proceed against one party without the other. I consider, therefore, not on general principles only, but on the distinct authority of Lord Eldon, that the objection of multifariousness cannot be sustained. The case put to him from the bar in *Salvidge v. Hyde*, and on which he observes, was as nearly as possible identical with this. The demurrer must be overruled." (See *Pearse v. Hewitt*, 7 Sim. 471.) *Attorney General v. Cradock*, 3 Mylne & Craig, 93 to 97; Ante § 271, 278 a; *Salvidge v. Hyde*, 5 Madd. R. 138; S. C. Jacob's Rep. 181; Ante § 274.

¹ *Attorney General v. Cradock*, 3 Mylne & Craig, 85.

case, as it arises, is to consider, whether it comes nearer to the class of decisions, where the objection is held to be fatal, or to the other class, where it is held not to be fatal.¹ And in new cases, it is to be presumed, that the Court will be governed by those analogies, which seem best founded in general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other.

§ 540. It is also to be considered, that the objection of multifariousness is not confined to cases, where, upon the actual frame of the Bill, there is a necessity for all the persons, named as defendants, being made parties, [*414] *or for other persons being made parties. Many Bills may not be multifarious, as to some persons interested in the whole of the subject-matter, which may be so, as to others interested in a part of it; as, for example, in the case of distinct purchasers of different parcels of property being ~~made~~ defendants; or omitted to be made defendants. But that can furnish no reason for

¹ *Campbell v. Mackay*, 1 Mylne & Craig, 621 to 622. Nearly all the preceding observations upon multifariousness have been drawn from the learned and elaborate judgment of Lord Cottenham, in *Campbell v. Mackay* (1 Mylne & Craig, 616, 626), which will amply reward the diligent perusal of the reader. In the *Trustees of Watertown v. Cowen* (4 Paige R. 510), it was held by the Court, that where each of the plaintiffs had a distinct right and title, but the injury was the same, or common to both, it being a nuisance to both, they might well join in a Bill to restrain the erection of the nuisance, although each of them might file a separate Bill for the same purpose. The language of the Court was :—" If each of the complainants had a right to file a Bill to restrain the erection of this nuisance, as they had a common right, and the injury was the same, or common to both, I see no valid objection to their joining in one suit." When the Court here spoke of a common right, it was not intended, that the plaintiffs had a joint right, but only a right of a similar nature, which might be similarly affected by the same nuisance.

the Court's proceeding in the absence of any persons, who ought to be present, as to any part of the case ; or, if they are made parties, for depriving them of the benefit of the objection of multifariousness. It will only prove, that the plaintiffs have adopted a wrong course from the beginning, in the very frame of their Bill, by uniting distinct matters against different defendants.¹

§ 541. (3.) In the next place, as to demurrers for the want or defect of parties, and for misjoinder of parties. After the very full discussion of the subject of who are, and who are not, proper and necessary parties to Bills in the preceding pages, but little remains to be said in this place.² Whenever the want of proper parties appears on *the face of the Bill, it constitutes a good cause [*415] of demurrer.³ If the parties, not brought before the Court, are necessary and proper to the decree to be made under the Bill, the exception may also be insisted upon in the answer, or at the hearing.⁴ When the objection is taken by demurrer, if sustained, the defendant

¹ *Lumsden v. Frazer*, Mich. 1836, 15 Law Journ. 81; S. C. 1 Mylne & Craig, 589.

² Ante from § 72 to § 236. In addition to the cases already cited on the subject of Bills brought by some stockholders in a company in behalf of all, (Ante § 108, § 109), we may add the very recent case of *Vigors v. Ld. Audley* (9 Sim. R. 72; 2 Mylne & Craig, 49), where a Bill was brought by some of the shareholders of a Mining company in behalf of all, against the directors of the company, to prevent the money of the shareholders from being appropriated to the use of any persons, otherwise than for the general benefit of the shareholders. On a demurrer for want of parties, Lord Cottenham overruled the objection, saying, that the precedent in *Hitchens v. Congreve* (4 Russ. R. 562), was strictly applicable to the case; and that in the absence of precedent, it was the business of the Court to adapt its practice to the wants of the public, at the same time doing as little violence as possible to the rules of established practice.

³ *Cockburn v. Thompson*, 16 Ves. 325; Ante § 72, § 236; Post § 544, § 610.

⁴ Ante § 72, § 236; Mitf. Eq. Pl. by Jeremy, 180, 181; Id. 326; Cooper Eq. Pl. 185; *Robinson v. Smith*, 3 Paige R. 222; *Mitchell v. Lenox*, 2 Paige R. 281.

will be entitled to his costs ; but when it is taken at the hearing only, the defendant is usually not entitled to his costs.¹ But, in such cases, the Court will always give leave to make the new parties, either by an amendment, or by a supplemental Bill, when substantial justice between the actual parties to the suit requires it.² And even if the Bill should be dismissed for this defect, the dismissal will be without prejudice to another Bill.³

[*416] *§ 542. When the parties, who are omitted, are mere formal parties, if the objection is not taken by demurrer, or by plea, the Court will be indisposed to listen to the objection at the hearing ; and if it can pro-

¹ Cooper Eq. Pl. 185 ; Court v. Jeffrey, 1 Sim. & Stu. 105 ; Mitchell v. Bailey, 3 Madd. R. 61 ; Mitf. Eq. Pl. by Jeremy, 40, 181, 325, 326.

² Ante § 237 ; Post § 884 ; Millegan v. Mitchill, 1 Mylne & Craig, 433 ; Mitf. Eq. Pl. by Jeremy, 326. When the plaintiff is allowed leave to amend on account of the want of proper parties, he possesses the incidental right to amend by charging all such matters, as constitute the Equity of his case, against the new parties (Stephens v. Frost, 2 Younge & Coll. 297). The usual order, which is made at the hearing, is that the cause shall stand over, and the plaintiffs shall be at liberty to amend their original Bill, for the purpose of adding parties, as they might be advised. Sometimes an alternative clause is added, or to show, why they are unable to bring all the proper parties before the Court. Milligan v. Mitchill, 2 Younge & Coll. 433, 434, 442, 443. But under such circumstances, where the exception really taken was to a want of parties defendants, the plaintiffs will not be at liberty to make new parties plaintiffs, and to make new charges and statements applicable thereto. Milligan v. Mitchill, 1 Mylne & Craig, 433, 442, 443 ; Miller v. McCan, 7 Paige R. 451.

³ Stafford v. City of London, 1 P. Will. 428 ; S. C. 1 Str. 95 ; Jones v. Jones, 3 Atk. 112 ; S. C. 1 Dick. R. 96. It is reported to have been said by Lord Hardwicke, in an anonymous case (2 Atk. 15), and in Jones v. Jones (3 Atk 111), that a Bill in Chancery is never dismissed for want of parties ; but it stands over upon payment of the costs of the day. But, however true this may be as a general rule of practice, it is not universally true ; for if the necessary parties cannot be made, as is sometimes the case, the Bill must be dismissed. See Ante § 81, § 86 ; Ray v. Fenwick, 3 Bro. Ch. R. 25 ; Russell v. Clarke's Ex'rs. 7 Cranch R. 69, 99. See also Milligan v. Milledge, 3 Cranch R. 320 ; Ante § 75, § 236.

perly do so, it will dispose of the cause upon its merits, without requiring such formal parties to be joined. And if the joinder of a formal party would oust the jurisdiction of the Court, it will proceed to a decree upon the merits of the case between the parties actually before the Court, who have the real and substantial interests in the controversy, whenever it can be done without prejudice to the rights of others.¹

§ 543. Whenever a demurrer is put in for want of necessary parties, it must (as we have seen²) show, who are the proper parties from the facts stated in the Bill, not indeed by name, for that might be impossible; but in such a manner, as to point out to the plaintiff the objection to his Bill, and to enable him to amend by making proper parties.³

*§ 544. As to the misjoinder of parties, if the [*417] misjoinder is of parties as plaintiffs, all the defendants may demur; for as we have seen, such a misjoinder is

¹ *Wormley v. Wormley*, 8 Wheat. 451.

² Ante § 236, and § 238.

³ *Mitf. Eq. Pl. by Jeremy*, 180, 181; *Pyle v. Price*, 6 Ves. 780, 781; *Attorney General v. Jackson*, 11 Ves. 369; *Cooper Eq. Pl.* 187; *Attorney General v. Poole*, 4 Mylne & Craig R. 17; Ante § 238. The form of a demurrer for want of necessary parties, as given in *Van Heythuysen Eq. Drafts*. 419, is as follows:—"These defendants, by protestation, &c., do demur to the said Bill, and for cause of demurrer shew, that it appears by the said complainant's own shewing in the said Bill, that J. S. therein named, is a necessary party to the said Bill, inasmuch as it is therein stated, that the said testator did, in his lifetime, by certain conveyances made to the said J. S. in consideration of £ , convey to him, by way of mortgage, certain estates in the said Bill mentioned, for the purpose of paying the said testator's said debts and legacies; but yet the said complainant hath not made the said J. S. a party to the said Bill. Wherefore, &c." It has, however, been held, that upon a demurrer to a Bill for want of equity, the objection, that the Bill is defective for want of parties, may well be taken. *Vernon v. Vernon*, in Chancery (England), Feb. 1837. So the objection may be taken in the same way, if persons are improperly made plaintiffs. *Gething v. Vigurs*, Nov. 8, 1836, before the Vice Chancellor of England.

a proper ground of objection.¹ If the misjoinder is of parties as defendants, those only can demur, who are improperly joined.² But if a person is improperly joined as a defendant, who is without the jurisdiction, and is therefore a party only by virtue of the usual prayer of process, such misjoinder will not affect the cause; for until he has appeared and acted, no decree can be had against him.³ And in cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer; for if not so taken, and the Court proceeds to a hearing on the merits, it will be disregarded, at least, if it does not materially affect the propriety of the decree.⁴

¹ Ante § 232, § 236, § 237, § 279; Post § 509, § 541; *Cuff v. Platell*, 4 Russ. 242; *King of Spain v. Machado*, 4 Russ. 225; *Bell v. Cureton*, 3 M. & Keen, 503, 512.

² Where a person, having a distinct derivative interest under another person, is made a joint plaintiff with him, such, for example, as a purchaser under a settler, where both are plaintiffs to set aside the settlement, the purchaser can have no relief upon such a Bill, although he might, in a separate suit, have been entitled to relief. *Bell v. Cureton*, 3 Mylne & Keen, 503, 512. See *Hunter v. Richardson*, 6 Madd. R. 89. Where a person has been improperly made a plaintiff, who should upon the circumstances of the case have been made a defendant, the Court will sometimes allow an amendment to be made, by striking out the party as plaintiff, and making him a defendant. *Aylwin v. Bray*, 2 Young & Jerv. 518, note. And if the cause has proceeded to a hearing, the Court has sometimes gone the length of decreeing against that plaintiff and the defendants, in favor of the other plaintiffs, in the same manner, as if he had been a co-defendant instead of being a plaintiff. *Morley v. Hawke*, cited 2 Young & Jerv. 520; and *Raffity v. King*, 15 Law Jour. 87, 93, Mich's. Term, 1836; S. C. 1 Keen R. 601, 619; *Janson v. Solerte*, 2 Younge & Coll. 132.

³ *Pringle v. Crooks*, 3 Younge & Coll. 666. A *queræ* is suggested in this case, whether misjoinder of a defendant is in any case a ground for a demurrer. See Ante § 203, § 224, § 232, § 236, § 237, § 279, § 271, a. to § 278, a., § 283, § 392, § 509, § 530.

⁴ *Trustees of Watertown v. Cowen*, 4 Paige R. 510; *Raffity v. King*, 6 Law Journal, 87, N. S. Mich's. Term, 1836; S. C. 1 Keen R. 601, 619; *Wilkinson v. Parry*, 4 Russ. R. 272, 274; *Aylwin v. Bray*, cited 2 Young

& Jerv. 518, note ;—*Mosley v. Lord Hawke*, cited 2 Young & Jerv. 520 ; *Lambert v. Hutchinson*, 1 Beavan's R. 277 ; Ante § 237, § 283. In the case of *Raffity v. King*, as reported in the Law Journal (6 vol. N. S. 93), the following observations are given as a part of Lord Langdale's judgment:—
"As to the objection to John Raffity being made a plaintiff, I am not satisfied it would, under any circumstances, be considered of such importance, as to deprive the other plaintiffs of the relief they are entitled to. There have been cases, in which the Court, with a view to special justice, has overcome the difficulty occasioned by a misjoinder of plaintiffs. In the case of *Mosley v. Lord Hawke*, before Sir Wm. Grant, (cited 2 Young & Jerv. 520) a tenant for life of a fund, at whose instigation and for whose benefit a breach of trust had been committed, was joined with the other plaintiffs to the Bill. The defendant objected to any relief being granted in that state of the record ; but the objection was overruled, and a decree was made against the defendants, and the offending tenant for life, who was one of the plaintiffs. There are other cases, which might be cited on this subject ; but it does not seem to be necessary ; for John Raffity does not appear to have had any interest whatever, and he is a mere formal party. And without determining the effect of the objection, if brought forward earlier, I think it is now too late. If the objection had been stated in the answer, the plaintiffs might have obtained leave to amend their Bill, and might have made John Raffity a defendant instead of a plaintiff ; for which there is the authority of *Aylwin v. Bray* ; and in such a case as this, where the objection is reserved to the last moment, and even after the argument on the merits, I think it ought not to prevail." The same case is reported on this point in 1 Keen R. 619, to the same effect.

CHAPTER XI.

DEMURRERS TO DISCOVERY.

→ § 545. HAVING treated of demurrers to original Bills praying relief, let us proceed to consider the grounds of demurrer to Bills of discovery ; for a plaintiff may, in many cases, be entitled to maintain a Bill for discovery merely, although he could not maintain a Bill for relief, as well as for discovery.¹ We have already seen, that in cases, where the plaintiff is entitled to discovery only, if he goes on to pray relief, the whole Bill is, in England, held to be demurrable.² But it would seem, that, in America, the demurrer would be good only to the relief, and the plaintiff would still be entitled to the discovery.³

→ § 546. We have also seen, that, where the Bill is for discovery and relief, the defendant may, if he pleases, demur to the relief, and answer to the discovery. But he cannot demur to the discovery alone, and not to the relief, when the discovery is merely incidental to the relief ; for that would be to demur, not to the thing required, but to the means, by which it was to be obtained.⁴ Therefore, where a defendant had demurred to the discovery sought by a Bill, for want of title in the plaintiff to require the discovery ; but had omitted to

¹ Cooper Eq. Pl. 186.

² Cooper Eq. Pl. 188 ; Mitf. Eq. Pl. by Jeremy, 183, 184 ; Ante § 312 ; Roberts v. Clayton, 3 Anst. R. 713 ; Hare on Discov. 6, 7, 9.

³ Ante § 312, note.

⁴ Ante § 312, and note.

demur to the relief prayed, to which that discovery was merely incidental, the demurrer was held bad in point of form, and was overruled; for the demurrer, being to the discovery only, admitted the title to relief, and consequently admitted the title to the discovery, which was only incidental to the relief.¹ It would give rise to a very different question, as to the validity of a demurrer to discovery, as well as to relief, if it clearly appeared, that the discovery asked was of other distinct matters, not incidental to the relief.²

§ 547. Even in a Bill, properly before the Court, for discovery and relief, there may be objections made by way of demurrer to particular discoveries asked, though not applicable to all the discovery. These special objections are reducible to four principal heads; (1.) That the answer may subject the defendant to penal consequences; (2.) That it is immaterial to the purposes of the suit; (3.) That it would involve a breach of some confidence, which it is the policy of the law to preserve inviolate; (4.) That the matter, which is sought to be discovered, appertains to the title of the defendant, and not to that of the plaintiff.³ But as these objections may also apply to the whole structure of the Bill, and to the discovery sought by it, they need not be farther examined in this place, as they will be fully considered hereafter.⁴

§ 548. It is proper, however, to state, that in many

¹ Mitf. Eq. Pl. by Jeremy, 184, 185; *Morgan v. Harris*, 2 Bro. Ch. R. 12; *Waring v. Mackreth*, Forrest's Ex. R. 129; *Hare on Discov.* 4; Ante § 312, and note (1).

² Ante § 312, and note (1); *Hare on Discov.* 7, 8; Mitf. Eq. Pl. by Jeremy, 184, and notes (m) and (n). In such a case, would not the Bill be open to objection on account of multifariousness?

³ *Hare on Discov.* 4.

⁴ Post § 572, § 575 to § 598, § 599 to § 605.

cases the plaintiff may be entitled to relief, although he may not be entitled to the discovery sought. And, in such a case, a demurrer to the whole Bill would be obviously incorrect; for the plaintiff might be able to maintain his Bill, independently of the discovery.¹ The converse of the rule, therefore, above stated, that a demurrer to the relief is good as to the discovery, if it is good to the relief, does not hold; since there may be relief without discovery.

§ 549. Many of the objections, already stated to Bills for relief, are equally applicable to Bills of discovery. Thus, for example, the following objections, already stated, equally hold to Bills of discovery as they do to Bills of relief. (1.) That the subject is not cognizable in any municipal court of justice; (2.) That the plaintiff is not entitled to the discovery by reason of some personal disability; (3.) That the plaintiff has no title to the character, in which he sues; (4.) That the value of the suit is beneath the dignity of the Court; (5.) That the plaintiff has no interest in the subject-matter, or no proper title to institute a suit concerning it; (6.) That, though the plaintiff has an interest in the subject-matter of the suit, and has a title to institute it; yet he has no right to call upon the defendant to answer his demand; (7.) That the defendant has no interest in the subject-matter of the suit, which entitles the plaintiff to institute it against him; (8.) That the object of the Bill is to enforce a penalty or forfeiture.²

§ 550. Upon many of these grounds of demurrer, it

¹ Mitf. Eq. Pl. by Jeremy, 185; *Attorney General v. Brown*, 1 Swanst. 294.

² Cooper Eq. Pl. 189, 190; Mitf. Eq. Pl. by Jeremy, 185; 2 Story on Eq. Jurisp. § 1489.

seems unnecessary to add to the expositions already given. Upon a few of them, some further observations and illustrations will incidentally occur in treating of other appropriate heads of demurrer to Bills of discovery, technically so called. Let us then proceed to the consideration of these heads of demurrer.

§ 551. (1.) The first is, that the case made by the Bill, is not such, in which a Court of Equity assumes a jurisdiction.¹ Where a Bill prays relief, the discovery, if material to the relief, being incidental to it, a plaintiff, showing a title to relief, also shows a case, in which a Court of Equity will compel a discovery, unless some circumstance in the situation of the defendant renders it improper.² But, where the Bill is for discovery merely, it is necessary for the plaintiff to show by his Bill a case, in which a Court of Equity will assume jurisdiction for the mere purpose of compelling a discovery.³ This jurisdiction is exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the same court, or in some other court.⁴

§ 552. Where the object of a Bill is to obtain a discovery to aid in the prosecution or defence of a suit in the same court, as the Court has already jurisdiction of the subject-matter, it is sufficient to state the pendency of such suit, to give the Court jurisdiction upon the Bill of discovery.⁵ But, where a Bill is brought to aid, by a discovery, the prosecution or defence of a suit instituted in another court, it must plainly be made to appear upon the face of the Bill, that the suit is of such a nature, and for such objects, and under such circumstances, as will

¹ Mitf. Eq. Pl. by Jeremy, 185.

² Ante § 547.

³ Mitf. Eq. Pl. by Jeremy, 185, 186.

⁴ Mitf. Eq. Pl. by Jeremy, 186.

⁵ Ibid.

fully justify the interposition of the Court in compelling the discovery sought.¹

§ 553. In the first place, then, it must appear by the Bill, that the suit, for which this extraordinary aid by discovery is sought, is of a purely civil nature ; for if it be a proceeding not purely of a civil nature, or if it be a criminal proceeding, a Court of Equity will not exercise its jurisdiction to compel a discovery ; and, if it is sought by the Bill, a demurrer will lie.² Thus, for example, a Court of Equity will not entertain a Bill of discovery in aid of a mandamus, or of a *quo warranto*, or of a prohibition, or of an information, or of an indictment, or of any other proceeding of a criminal nature.³ And no

¹ It is not necessary, to maintain a Bill of discovery, that the suit in aid of which it is brought should be a civil suit, pending in a domestic court. On the contrary, Courts of Equity will sustain a Bill of discovery in aid of a civil suit pending in a foreign tribunal, if the suit be in a country with which there is peace, and the suit do not interfere with the known public policy of the country where the Bill is brought. Cooper Eq. Pl. 191 ; Mitf. Eq. Pl. by Jeremy, 186, note (q) ; 2 Story on Eq. Juris. § 1495. But this has been recently denied by the Vice Chancellor in *Bent v. Young*, 9 Simons R. 180 ; Ante p. 54, p. 253.

² Mitf. Eq. Pl. by Jeremy, 186 ; Ante. § 322.

³ *Montague v. Dudman*, 2 Ves. 398 ; *Wigram on Discov.* 4, 5 ; *Attorney General v. Reynolds*, 1 Eq. Abridg. 131 ; *Bishop of London v. Fytche*, 1 Bro. Ch. R. 96 ; Mitf. Eq. Pl. by Jeremy, 186, 197 ; Cooper Eq. Pl. 191, 207 ; *Leggett v. Postley*, 2 Paige R. 601 ; 2 Story on Eq. Jurisp. § 1494. The ground, as to writs of mandamus and writs of prohibition, seems to be, that they are not strictly remedial writs, but mandatory, the power to grant which is vested in the Superior Courts of Law, to be exercised for great public purposes. *Montague v. Dudman*, 2 Ves. 396. Perhaps, too, it may be suggested, the nature of the process in such cases, as well as in that of a *quo warranto*, presupposes in each case some usurpation or omission of duty, in the nature of a charge of a dereliction of a public duty. See *Attorney General v. Reynolds*, 1 Eq. Abridg. 131. In regard to actions at law for torts, in general there seems no reason to doubt, that a Bill of discovery lies in aid of such an action, as well as in aid of actions on contract. But a very different question arises, where the tort is of such a nature, as would involve the party, against whom the discovery is sought, in a discovery of matters indictable or criminating himself. In

discovery will be enforced, not only of the broad leading facts, but of any fact, the answer to which may form a step in aid of a criminal prosecution, or in the defence of it.¹

§ 554. In the next place, Courts of Equity will not interfere in relation even to civil rights, and aid them by a Bill of discovery, unless those rights are in controversy, or are to be litigated in the ordinary tribunals of justice. A Bill of discovery will not, therefore, be sustained in aid of a claim or of a defence in a controversy before arbitrators; for they are the judges of the parties' own

Thorpe v. Macaulay, (5 Madd. R. 218), it was held by the Vice Chancellor, in the case of a Bill for discovery and for a commission to take the testimony of witnesses in aid of a defence to an action at law for a libel, and charging matters criminal and indictable against the plaintiff in the action at law, that the demurrer was good to the discovery, but bad as to the commission; and so it was overruled. The same point seems to have been held in *Shackell v. Macaulay*, 2 Sim. & Stu. 79; S. C. 2 Russ. R. 550, note. The case went to the House of Lords, where the decree ordering a commission was affirmed. The Vice Chancellor, in *Wilmot v. Maccabe* (4 Sim. R. 263), seems to have thought, that the decision before Lord Eldon and in the House of Lords, justified the doctrine, that the party was bound to make the discovery also. His language is, that it was decided "that where a person brings an action for a libel, it follows, as commensurate with the right to bring the action, that the party, who complains, is bound to give the discovery, which the defendant at law claims to have by his Bill." On examining the doctrine held in the case in the House of Lords, I cannot find, that Lord Eldon has any where positively affirmed, that the plaintiff in the Bill was absolutely entitled to a discovery of matters, which would criminate the defendant. It is true, that there are some intimations in his language looking that way. But the point was not before the House; and the sole question was, whether a commission ought to go. See 1 Bligh, N. S. R. 96, 133, 134. In *Leggett v. Postley* (2 Paige R. 601), it was expressly held, that the defendant in action at law could not compel a discovery in equity from the plaintiff at law in aid of his defence, which would criminate him, or subject him to an indictment. Mr. Hare (on Discov. 116), asserts that it is no objection to a Bill of discovery, that the matter in question might have been the subject of an indictment or information. But he relies for this proposition solely on the cases in 4 Sim. R. 264, and 1 Bligh (N. S.) R. 96. But see *Paxton v. Douglas*, 16 Ves. 239; S. C. 19 Ves. 225; *Parkhurst v. Lowten*, 1 Meriv. R. 391; *Southall v. —*, 1 Younge R. 308, 316, 317; *Glynn v. Houston*, 1 Keen R. 329.

¹ Cooper Eq. Pl. 191; *Claridge v. Hoare*, 14 Ves. 65.

choice, and they must submit to the inconveniences of such an imperfect forum.¹

§ 555. In the next place, in cases of a purely civil nature, Courts of Equity will not sustain a Bill for a discovery, in aid of a suit pending in another Court of ordinary jurisdiction, if that Court itself can compel the discovery required ; for, in such a case, the remedy elsewhere is complete, and the interference of a Court of Equity is unnecessary and vexatious. Thus, where a Bill among other things was filed for a discovery of the value of the respective real and personal estates of the inhabitants of a parish, in which certain church rates had been assessed, and how the money collected by means of such rates had been disposed of, a demurrer was allowed ; because the Ecclesiastical Court, in which the suit was depending, and to which the ordinary jurisdiction belonged, was capable of compelling the discovery.²

§ 556. In the next place, Courts of Equity will not lend their aid in favor of a party, seeking a discovery to support an action, which is against public policy.³ Thus, for example, where an action was brought to recover the expenses of entertainments given by the plaintiff, under an agreement with the defendant to introduce him to a woman of fortune, with a view to marriage ; and a discovery was sought in aid of that action, a demurrer to the Bill was allowed.⁴

¹ Story on Equity Jurisp. § 1495 ; Cooper Eq. Pl. 192 ; Hare on Discov. 119, 120 ; Wellington v. McIntosh, 2 Atk. 569 ; Street v. Rigby, 6 Ves. 821.

² Mitf. Eq. Pl. by Jeremy, 186, 187 ; Dunn v. Coates, 1 Atk. 288, 289 ; Cooper Eq. Pl. 191, 192 ; 2 Story on Equity Jurisp. § 1495 ; Gelston v. Hoyt, 1 John. Ch. R. 547, 548.

³ 2 Story on Equity Jurisp. § 1496.

⁴ King v. Burr. 3 Meriv. R. 693. See Brooks v. Bradley, 2 Cas. Ch. 95.

§ 557. So, if an action were brought for expenses, which would amount to maintenance at the common law, a Bill for discovery in aid of it would be demurrable.¹ So, if an action were brought to recover expenses of an election of a member of Parliament, a Bill of discovery in aid of that action would be disallowed, upon the ground of being against public policy.²

§ 558. Secondly; Another objection, which may be taken by demurrer to a Bill of discovery, is, that it is brought in aid of an action in another Court, which action cannot be sustained.³ Hence, if the plaintiff in an action, filing his Bill for discovery, shows no interest in the subject-matter of the action, or the action itself cannot be sustained in point of law (and upon these points a Court of Equity has a right to pass judgment), no discovery will be allowed; for a Court of Equity will not allow its process to be used for purposes not conducive to the administration of substantial rights in litigation in other courts. And the objection may be taken by way of demurrer to the Bill seeking the discovery.⁴ Therefore, where a plaintiff filed a Bill for discovery merely, to support an action, which, he alleged by his Bill, he intended to commence in a court of common law; although by his allegation he brought his case within the jurisdiction of a Court of Equity to compel a discovery; yet the Court being of opinion, that the case stated by the Bill was not such, as could support an ac-

¹ *Wallis v. Duke of Portland*, 3 Ves. 493, 503; *Cooper Eq. Pl.* 194, 195.

² *Walsh v. Lord Clive*, cited 3 Ves. 498; *Cooper Eq. Pl.* 195.

³ *Cooper Eq. Pl.* 194; *Mitf. Eq. Pl. by Jeremy*, 187; *Ante* § 318, 319.

⁴ *Cooper Eq. Pl.* 194; *Hare on Discov.* 43 to 46; *Mitf. Eq. Pl. by Jeremy*, 194; *Lord Kensington v. Mansell*, 13 Ves. 240; *Rondeau v. Wyatt*, 3 Bro. Ch. R. 134; *Macaulay v. Shackell*, 1 Bligh R. (N. S.) 120.

tion, a demurrer was allowed.¹ For, unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a Court of Equity, to obtain from the confession of the defendant evidence of the truth of the case.²

§ 559. And not only is it necessary for the plaintiff, seeking a discovery in aid of an action at law, to show, upon the face of the Bill, that the action is maintainable; but also, that, upon the state of the pleadings, the discovery would be material to sustain his side of the issues raised thereby.³ The nature of the action should appear with reasonable certainty, so as to enable the Court to see the pertinency of the discovery; though, generally, the Court will presume the suit at law to be regularly commenced, where a right to sue appears.⁴

§ 560. The Bill should also state, that the suit is either commenced, or contemplated to be commenced, in regard to the subject-matter of the Bill of discovery; otherwise it is demurrable. For it is a general rule, that

¹ *Debigge v. Lord Howe*, cited 3 Bro. Ch. R. 155; Mitf. Eq. Pl. by Jeremy, 187, 188; Cooper Eq. Pl. 194, 195, 196; Ante § 319. The case of *Debigge v. Lord Howe* is very shortly cited in 3 Bro. Ch. R. 155, as follows; "In *Debigge v. Lord Howe*, 1782, Col. Debigge filed a Bill against Lord Howe, stating, that he had done services for Government, and that Lord Howe had contracted to pay him, and praying a discovery in order to found an action at law. Lord Howe filed a demurrer, and the demurrer was allowed; because the Court was of opinion, that the case would not support the action." Where the want of a good cause of action is apparent on the face of the Bill, it must properly be taken by demurrer, and not by plea; and if taken by plea, the plea will be overruled. *Tweeddale v. Tweeddale*, cited Mitf. Eq. Pl. by Jeremy, 233, 234; Hare on Discov. 43, 44.

² *Mayor of London v. Levy*, 8 Ves. 398; Mitf. Eq. Pl. by Jeremy, 187; Cooper Eq. Pl. 194; Hare on Discov. 43; Ante § 318, § 319; *Lousada v. Templar*, 2 Russ. R. 564; Ante § 260, § 261, § 319.

³ *Macauley v. Shackell*, 1 Bligh (N. S.) R. 96, 120.

⁴ *Cowan v. Phillips*, 3 Anst. 843.

every Bill of discovery must allege, that the discovery is sought in aid of some judicial proceeding, commenced, or at least contemplated ; and Courts of Equity do not lend their aid to gratify mere curiosity, or to ascertain facts not connected with the purposes of the administration of justice.¹

§ 561. Hence the importance, in a Bill for discovery, of the plaintiff's unfolding so much of his title in the action at law, as is sufficient to establish, that it is such, as, if made out, will constitute a good foundation of the action.² Not, that it is necessary, that the discovery asked should be such, as to reach all the points of fact involved in the proof and support of that title ; for, it seems, that a Bill of discovery will lie, to establish any facts in support of the action, although that discovery may not include all the facts necessary to support it.³

§ 562. Where it is merely doubtful, whether the action at law is maintainable or not, and, *à fortiori*, where it is a measuring cast, and upon the cases at law the action is maintainable, a Court of Equity will sustain a Bill of discovery in aid of the action ; for it will not undertake, in circumstances of this sort, to deny to the plaintiff an opportunity of taking the opinion of the court of law upon his case ; and it will take the law to be, as it has been held, until the courts of law have revised it.⁴

¹ Cardale v. Watkins, 5 Madd. R. 10 ; Mitf. Eq. Pl. by Jeremy, 186 ; Cooper Eq. Pl. 191, 192 ; 2 Story on Equity Jurisp. § 1496 ; Hare on Discov. 110 to 119 ; Ante § 321.

² Mitf. Eq. Pl. by Jeremy, 187.

³ Cooper Eq. Pl. 195, 196 ; Mitf. Eq. Pl. by Jeremy, 9, 306, 307 ; Breton v. Gamal, 2 Atk. 241 ; Finch v. Finch, 2 Ves. 492 ; Hare on Discov. 110 ; Wigram on Discov. 4, 5, 25 ; Ante § 319, note (1). See Hare on Discovery, 45, 40, which seems contrary ; but the authority there cited does not support the statement of Mr. Hare.

⁴ Rondeau v. Wyatt, 3 Bro. Ch. R. 154 ; Mont v. Scott, 3 Price R. 477 ; Hare on Discov. 43 to 45.

§ 563. In regard to a plaintiff, seeking the aid of a Court of Equity to assist a defence to an action brought against him at law, similar considerations will apply. He must clearly show upon the face of his Bill, that the defence would be good to the action at law ; for, otherwise, the aid of a Court of Equity would be utterly nugatory.¹ But it does not seem necessary, that he should show, that the action itself is sustainable at law, or, that he has an interest in the action ; for the latter may be presumed in his favor, since he is a defendant ; and the former may be negatived by him, as one point of defence, and yet it might be unsafe for him to rely on that alone, as the court of law might rule it against him.² It will be sufficient, therefore, for him to show, that the point is, or may be material to his defence, though not the sole point of his defence. The party must also state upon the face of his Bill, not only, that the discovery is in aid of a defence good at law ; but also what it is ; and that, upon the state of the pleadings, the defence is actually set up, and the discovery is material upon the state of the pleadings ; for otherwise, the discovery would be merely impertinent.³

§ 564. The objections, here stated, to a Bill of discovery, brought either by the plaintiff, or by the defendant

¹ *Martin v. Nicholls*, 3 Sim. R. 458 ; *Hare on Discov.* 43, 44 ; *Mitf. Eq. Pl. by Jeremy*, 233, 234. See Ante § 259.

² *Hare on Discovery*, 44, 45.

³ *Macauley v. Shackell*, 1 Bligh (N. S.) R. 96, 120. See *Thorp v. Hughes*, 3 Mylne & Craig R. 742. It is obvious, that to maintain a Bill for a discovery, it is necessary to show, that the discovery, if made, can be used in the suit at law. Therefore, if it should appear, that the case has been already decided at law, as, if the application is after a verdict, the Bill will ordinarily be demurrable ; for it then comes too late. *Duncan v. Lyon*, 3 John. Ch. R. 351 ; *Hare on Discov.* 112 to 114 ; *Whitmore v. Thornton*, 3 Price, 241, 248 ; *Mitf. Eq. Pl. by Jeremy*, 131, 132. There must be special circumstances to justify the interposition of a Court of Equity after a verdict at law. *Ibid.* *Field v. Beaumont*, 1 Swanst. R. 206, 209.

to an action at law, in aid of his action or defence, may be resolved into a more general ground of demurrer, namely, that the discovery is immaterial. For immateriality, in its broader sense, includes not only cases, where the evidence, if discovered, would be irrelevant at the contemplated trial; but also cases, where the evidence would be nugatory, if admitted, because there is no proper cause of action. But, generally, immateriality is used in its more restrained sense, as synonymous with irrelevancy.¹

§ 565. It may be affirmed to be a general doctrine in Equity, that, as the object of the Court in compelling a discovery is, either to enable itself, or some other court, to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the Bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff does not show by his Bill such a case, as renders the discovery, which he seeks, material to the relief, if he prays relief; or does not show a title to sue the defendant in some other court; or that he is actually involved in litigation with the defendant; or is liable to be so; and does not also show, that the discovery, which he prays, is material to enable him to support or defend a suit, he shows no title to the discovery; and consequently a demurrer will hold. Therefore, where a Bill, filed by a mortgagor against a mortgagee to redeem, sought a discovery, whether the mortgagee was a trustee, a demurrer to the discovery was allowed. For, as there was no trust declared upon the mortgage, it was not material to the relief prayed, whether there was any

¹ Hare on Discovery, 157, 160, 161; Mitford Eq. Pl. by Jeremy, 107, 191, 192.

trust reposed in the defendant or not. So, where a Bill was filed by the lord of a manor, praying, amongst other things, a discovery, whether a person, applying to be admitted as a tenant, was a trustee, the defendant demurred, it being wholly immaterial to the plaintiff's case, whether the defendant was a trustee, or not.¹

§ 566. And where a Bill was brought for a real estate, and sought a discovery of proceedings in the Ecclesiastical Court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the Ecclesiastical Court being immaterial to the plaintiff's case.² Again, where a Bill, to establish an agreement for a separate maintenance for the defendant's wife, prayed a discovery of ill-treatment of the wife, to make her recede from the agreement, the defendant demurred to the discovery, which could not be material to the case made by the Bill.³

§ 567. But, in general, if it can be supposed, that the discovery may in any way be material to the plaintiff in the support or defence of any suit, the defendant will be compelled to make it.⁴ Thus, where a bishop filed a Bill against the patron of a living and a clerk presented by him, to discover, whether the clerk had given a bond of resignation, and the patron demurred, because the discovery either was such as might subject him to penalties and forfeitures, or it was immaterial to the plaintiff, the demurrer was overruled; the Court declaring a clear opinion, that the bond was not simoniacal; but conceiving, that the discovery might be material to support a defence to a *quare impedit*, upon this ground, "that the

¹ Mitf. Eq. Pl. by Jeremy, 107, 191, 192, and cases there cited; Cooper Eq. Pl. 198, 199.

² Mitf. Eq. Pl. by Jeremy, 192.

³ Mitford Eq. Pl. by Jeremy, 192, 193; Hare on Discov. 161.

⁴ Mitf. Eq. Pl. by Jeremy, 193.

bond put the clerk under the power of the patron, in derogation of the rights of the ordinary.”¹

§ 568. It may be added, that this objection of immateriality may be to the whole Bill, or to a part of the Bill, or to a part only of the interrogatories, or to a particular defendant only. The latter case may often occur, where a defendant is a mere formal party, and where many of the interrogatories and statements in a Bill of discovery may be wholly irrelevant as to him. In such a case, he may demur to the immaterial statements and interrogatories as to himself.²

§ 569. (3.) Thirdly ; Another objection, which may be taken by demurrer to a Bill of discovery, is, that the Bill is brought by or against persons, who are not parties to the action at law. Therefore, where a Bill of discovery was brought by the defendants in an action at law, founded on their acceptance of a Bill drawn by one of their customers, for his own accommodation, on them, and the customer was joined with them as a

¹ Mitf. Eq. Pl. by Jeremy, 193, and note. But probably such a demurrer would now be sustained, as such bonds have been held to be simoniacal. Cooper Eq. Pl. 194, 200 ; S. P. Parkhurst v. Lowten, 1 Meriv. 391 ; Southall v. —, 1 Younge R. 308, 316. In Wright v. Plumptre (3 Madd. R. 486), there was a demurrer for immateriality in the form following ; And for causes of demurrer it showed, “that the said complainants have not, by their said Bill, made such a case as entitles them to any discovery touching the matters contained in the said Bill, or of any such matters, or to the production thereof sought to be obtained ; and that such discovery and production are wholly immaterial to the said complainants, and can be of no avail for the purposes, for which the same are sought in and by the said Bill ; wherefore,” &c.

² Hare on Discov. 159, 160, 161 ; Agar v. Regent’s Canal Company, Cooper R. 212, 215. The defendant may decline also in his answer to answer particular interrogatories ; and if, as to him, they are immaterial, an exception for insufficiency in the answer will be overruled. Agar v. Regent’s Canal Company, Cooper R. 212, 215 ; Richardson v. Hulbert, 1 Anst. 65 ; Rybert v. Barrell, 2 Eden R. 133, 134.

plaintiff in the Bill of discovery, a demurrer for that cause was allowed ; for the only parties to the action at law were the holder on one side, and the acceptors on the other side ; and the holder was a mere stranger to the drawer of the Bill, and sought no remedy against him, and had nothing to do with the private transactions or interests between the acceptors and their customer. The case, therefore, was a clear misjoinder of a party as plaintiff, who had no interest in the suit.¹ The same principle will apply to a like Bill of discovery, where a person is made a defendant to the Bill, who is not a party to the action at law ; for a discovery by such person cannot be truly said, in ordinary cases, to be material for the purpose of the defence at law.² A discovery by him can be material only in the event of the suit being so constituted, as to raise a question as to the equities between the parties.³

§ 570. (4.) Fourthly ; Another objection, which may be taken by demurrer to a Bill of discovery, is, that the defendant has no interest in the subject-matter of the controversy, and is a mere witness. Under such circumstances, as we have already seen,⁴ he is not gene-

¹ *Glyn v. Soares*, 3 Mylne & Keen, 450, 469, 470, 471, 472 ; Ante § 509.

² *Glyn v. Soares*, 3 Mylne & Keen, 450, 468, 469. In *Irving v. Thompson*, 9 Sim. R. 17, the same doctrine was held. But in *Glyn v. Soares*, 1 Younge & Coll. 645, Lord Abinger ruled the contrary, and held, that a party in interest in the suit, though not a party to the suit at law, might be made a party to a Bill of discovery, although he might be used as a witness. Thus, for example, in case of an action at law brought in the name of the agent, who procured a policy in his own name for his principal, he held, that the principal might be made a party to a Bill of discovery in aid of the defence by the underwriter, although he was not a party to the suit, and might be a witness for the underwriter. See also Ante § 226, a.

³ Ibid.

⁴ Ante § 231, § 232, § 262, § 323 ; Hare on Discov. 63 to 86.

rally compellable to answer to a Bill of discovery ; for such a Bill can only be to gain evidence ; and the answer of such a defendant cannot be read against any other person, and not even against another defendant to the same Bill.¹ There are some exceptions to this general rule, which have been already stated, and need not *here be repeated.² If, however, the Bill should [*434] state, that the defendant has, or claims an interest, a demurrer will not lie ; but the objection must be taken in another form, by a plea, or by a disclaimer.³ And here again, it may be remarked, that if the Bill allege an interest in the defendant, that interest must be set forth with reasonable certainty ; otherwise the Bill of discovery will be demurrable for that cause alone.⁴

§ 571. (5.) Fifthly ; Although both the plaintiff and defendant may have an interest in the subject, to which the discovery required is supposed to relate ; yet, as we have seen,⁵ there may not be that privity of title between them, which will give to the plaintiff a right of discovery against the defendant. In such a case a demurrer will lie.⁶ Thus, where a Bill was filed by a person, claiming to be the lord of a manor, against another person, also claiming to be the lord of the same manor, and praying, among other things, a discovery, in what manner he derived title to the manor ; a demurrer, because the

¹ Mitf. Eq. Pl. by Jeremy, 186 ; Cooper Eq. Pl. 200 ; Hare on Discov. 68, 70 to 72 ; Ante § 231, § 232.

² Ante § 235, § 323, § 519 ; and Hare on Discov. 83 to 88 ; Cooper Eq. Pl. 201, 202.

³ Mitf. Eq. Pl. by Jeremy, 188 ; Cooper Eq. Pl. 200, 201 ; Fenton v. Hughes, 7 Ves. 291.

⁴ Cooper Eq. Pl. 202 ; The Mayor of London v. Levy, 8 Ves. 398, 405 ; Ante § 248.

⁵ Ante § 262, § 324.

⁶ Mitf. Eq. Pl. by Jeremy, 189.

plaintiff had shown no right to the discovery, was allowed.¹ For, in general, as we shall presently see more fully, where the title of the defendant is not in privity, but is inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title, under which he claims.²

[*435] *§ 572. (6.) Sixthly ; And this leads us to the more general rule in Equity, that a plaintiff is only entitled to a discovery of what appertains to, or is necessary for, his own title ; and he has no right to pry into the title of his adversary.³ Hence, upon every Bill of discovery, the defendant has a right to resist, by demurrer, any inquiries, which call upon him to disclose the nature and character of his own title to the subject-matter of the controversy. The doctrine has been well summed up in two propositions by a learned author. (1.) It is the right, as a general rule, of a plaintiff in Equity, to exact from the defendant, a discovery upon oath, as to all matters of fact, which, being well pleaded in the Bill, are material to the proof of the plaintiff's case about to come on for trial, and which the defendant does not, by his form of pleading, admit ; (2.) The right of a plaintiff in Equity to the benefit of the defendant's oath is limited to a discovery of such material facts, as relate to the plaintiff's case ; and does not extend to a discovery of the manner, in which the defendant's case is to be ex-

¹ *Adderley v. Sparrow*, cited *Mitf. Eq. Pl. by Jeremy*, 189, 190 ; *Cooper Eq. Pl.* 197.

² *Mitf. Eq. Pl. by Jeremy*, 190, 191 ; *Ivie v. Kekewich*, 2 *Ves. jr.* 679.

³ *Cooper Eq. Pl.* 197 ; *Mitf. Eq. Pl. by Jeremy*, 190, 191 ; *Idem* 9, 52, 53 ; *Hare on Discov.* ch. iv. p. 183 to p. 194 ; *Lady Shaftsbury v. Arrowsmith*, 4 *Ves.* 71 ; *Wigram on Points of Discov.* p. 13 to p. 21, § 18 to § 27 ; 1st edit. ; *Id.* p. 23 to p. 34, § 34 to § 46 ; *Id.* p. 90 to p. 127, § 143 to § 180 ; *Wigram on Points of Discov.* 2d edit. p. 46 to p. 260, § 82 to § 341 ; *Id.* p. 261 to p. 346, § 342 to § 424 ; *Adams v. Fisher*, 3 *Mylne & Craig R.* 526, 544, 546 ; *Post* § 859.

clusively established, or to evidence, which relates exclusively to his (the defendant's) case.¹ These propositions seem equally true, whether the Bill be for discovery only, or for discovery and relief.²

¹ Wigram on Points in the Law of Discovery, 2d edit. London, 1840, p. 15, § 26, § 27; Id. p. 46; Id. 261; Wigram on Discov. 21, 22, 111, 113, 147, 148, 149, 1st edit. The language of these propositions is not exactly the same in both editions. I have here followed that of the second edition.

² Wigram on Discov. p. 5, 6, § 11, 2d edit. 1840; Id. p. 5, 6, 1st edit. Mr. Wigram's learned work, entitled "Points on the Law of Discovery," is principally employed in discussing and elucidating these propositions. It has already reached a second edition, which contains a thorough revision of the text, and a very full exposition of the recent authorities. There are few professional works, which will so well reward the profound examination of students. It abounds in acute observations, and is equally remarkable for its learning and ability. The leading object of his treatise is to assail the decision of the Court in *Hardman v. Ellames*, 5 Sim. R. 640; S. C. 2 Mylne & Keen, 732, where it was held, that if a defendant in his answer states the purport and effect of a document, which is evidence only of his (the defendant's) case, and also, in his answer, refers to such document as in his possession, the plaintiff has a right, on motion, to have it produced for his inspection, although it does not relate to his (the plaintiff's) own title. The learned author supposes this decision to be at variance with the rule in Equity, that a plaintiff is not entitled to a discovery of the defendant's title, or the proofs of it. Mr. Wigram has fully commented on all the cases. See *Sampson v. Sweetenham*, 5 Madd. R. 16; *Crompton v. Earl Grey*, 1 Young & Jer. 154; *Wilson v. Forster*, 1 Younge R. 281, 282; *De Sparks v. Montriou*, 1 Younge & Coll. 103; *Hardman v. Ellames*, 2 Mylne & Keen, 732. In the recent case of *Adams v. Fisher* (3 Mylne & Craig, 526, 548, 549), Lord Cottenham affirmed the doctrine held in *Hardman v. Ellames*. On that occasion his Lordship said; "As to *Hardman v. Ellames*, it is not very pertinent to the present case. It was certainly no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the plaintiff is entitled to see, whether the defendant has rightly stated it. It is, because the defendant chooses to make it part of

§ 573. Upon this ground, where a Bill was filed by an heir *ex parte maternâ* against a general devisee and executor, who had completed, by a conveyance to himself, a purchase of some real estate, contracted for by the testator after the date of his will, alleging, that there was no heir *ex parte paternâ*, but that the devisee set up a title under a release from his father, as heir *ex parte paternâ* of the testator; and praying a conveyance to the plaintiff; and seeking a discovery in what manner the father claimed to be heir *ex parte paternâ*, and the particulars of the pedigree, under which he claimed; a demurrer to the discovery was allowed.¹

§ 574. So, where a Bill was filed by legatees, whose legacies were charged on real estate, for a discovery and

his answer, that the plaintiff is entitled to see it; not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence. But, whether that decision be right or wrong, it is quite distinct from the present case. I apprehend it is a mistake to say, that the documents scheduled are part of the answer: the schedule itself is part of the answer. All that the plaintiff asks is, that the defendant may set forth a schedule of the documents. Can you except, because he has set out the documents in the schedule instead of in the Bill? You did not ask, that they should be set out in the bill. If that had been asked, the defendant must have defended himself in the regular way, and shewn, that he was not obliged to comply with your demand. But if the defendant sets them out in the schedule to his answer, the question is, upon the whole record, whether the plaintiff has such an interest in them as entitles him to call for their production?" In the same case (pp. 544, 545, 546, 547,) the Lord Chancellor in another passage fully admitted the general doctrine contained in Mr. Wigram's two propositions. Mr. Wigram, in the second edition of his work, has commented at large on all the bearings of this case. His observations are too long to be inserted here; and any abridgment of them would have a tendency to impair the force, and obscure the clearness of his reasoning. The learned reader is therefore referred to them in the original work. Wigram on Discov. p. 91 to p. 110, § 154 to § 173, 2d edit. 1840; Post § 859, and note.

¹ *Ivie v. Kekewich*, 2 Ves. jr. 679; *Mitf. Eq. Pl. by Jeremy*, 191. See *Kimberley v. Sells*, 3 John. Ch. R. 472.

production of a deed, by which, it was alleged, the real estates were limited to uses, under which the testator was a tenant in tail only ; but from which, as the plaintiff insisted, it would, if produced, appear, that a small portion only of the estate was so settled, and that of the residue the testator was seised in fee ; a demurrer, on the ground, that the deed in question related to the defendant's *title, and that the plaintiff had no interest in it, was allowed.¹

¹ *Wilson v. Forster*, 1 Younge R. 280. Mr. Wigram (on Discovery), p. 90-146, 1st edit. ; Id. 2d edit. 1840, p. 46 to p. 346, has collected the authorities bearing on this point. Mr. Ch. Kent, in *Kimberley v. Sells*, 3 John. Ch. R. 467, 472, held, that a *bonâ fide* purchaser, in possession of an estate, is entitled to a discovery of the grounds, on which his title is sought to be impeached by the defendants in the Bill, who are attempting to sell the land of the *bonâ fide* purchaser, as the land of another, under whom he derived title. He relied on the case of *Metcalf v. Hervey* (2 Ves. 248, 249), where Lord Hardwicke is reported to have said ; "The question comes to this ; whether any person, in possession of an estate, as tenant or otherwise, may not bring a Bill to discover the title of a person, bringing an ejectment against him, to have it set out, and see, whether that title be not in some other. I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrong-doer against every body." Lord Redesdale cites the same case as authority. (Mitf. Eq. Pl. by Jeremy, 53, 54). Mr. Wigram, (on Discovery, p. 92, note a, first edition. See Id. 2d edition, § 346, p. 264 to § 384. Id. § 379, p. 291 to p. 294), denies the doctrine, and thinks it is restricted by the subsequent cases. See Hare on Discov. 105, 186 to 189, 190, note (m), 194, 203, 211. The case of *Bellwood v. Wetherell*, (1 Younge & Coll. 211,) seems rather to shake the authority of the rule laid down by Lord Hardwicke, as a general rule, though it was distinguished from the general class of cases on this head. In *Bowman v. Lygon* (1 Anst. 1), Lord Ch. Baron Eyre said, that the rule of Lord Hardwicke went very far, and he should not be inclined to follow it to that extent, without examining farther into the authority of the decision. Mr. Hare has fully discussed this subject, and has arrived at a conclusion somewhat different from that of Mr. Wigram. A distinction seems taken in some of the cases between the right of the plaintiff in Equity, when he is the defendant in the suit at law, to insist upon a discovery, whether the defendant in the Bill has any title, and the nature of that title, and the right to a discovery of the evidence and documents in support of the title, which

§ 574. *a.* Even an heir at law has not a right to the inspection of deeds in the possession of a devisee, unless he is an heir in tail; in which latter case he is entitled to see the deeds creating the estate tail; but no further.¹ On the other hand, a devisee is entitled against the heir at law to a discovery of deeds relating to the estate devised.²

§ 574. *b.* The reason of this distinction may not at first view be apparent. But the ground, upon which it is asserted, is this. The title of an heir at law is a plain legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law, unless there are

the defendant asserts. The former he must disclose; the latter he need not. See Wigram on Discovery, 92, note (e), 1st edition. See *Id.* 2d edition, § 346, p. 264. *Id.* § 379 to § 384, p. 291 to 294, 1st edition. See *Id.* 2d edition, § 346, p. 264. *Id.* § 379 to § 384, p. 291 to 294; Hare on Discovery, § 4, p. 203 to 212. Lord Abinger, in *Bellwood v. Wetherell*, 1 Younge & Coll. 216, seems to have recognised the validity of the distinction. Mr. Wigram thinks, that the defendant is bound to answer, whether he has any title or not; but not to disclose the nature of the title, which he asserts. Wigram on Discovery, 92, note (e). 1st edit: *Id.* 2d edit. p. 264. § 346. The present state of the authorities seems to justify the remark of Lord Abinger in *Bellwood v. Wetherell*, 1 Younge & Coll. 215, that, upon looking at the cases, some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them.

¹ Cooper, Eq. Pl. ch. 1, § 4, p. 58, 59; *Id.* ch. 3, § 3, p. 197, 198; *Shaftesbury v. Arrowsmith*, 4 Ves. 71.—In *Shaftesbury v. Arrowsmith* (4 Ves. 71,) Lord Rosslyn explained the ground of the doctrine in favor of the heir in tail; that it was removing an impediment preventing the trial of a legal right. He afterwards added; “Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body, it has been very properly stated, that it may show a title in another person, if the entail is not well barred.” See 2 Story on Eq. Jurisp. § 1491.

² Cooper, Eq. Pl. ch. 1, § 4, p. 59; *Id.* ch. 3, § 3, p. 197, 198; 2 Fonbl. Eq. B. 6, ch. 3, § 2; 2 Story on Eq. Jurisp. § 1491.

incumbrances standing in his way, which, indeed, a Court of Equity would remove, in order to enable him to assert his legal title. But in the case of an heir in tail, a will is no answer to him; though a will established is an answer to an heir at law. An heir in tail has, beyond the general right, such an interest in the deed, creating the entail, that he has a right to the production of it. But an heir at law has no interest in the title deeds of an estate, unless it has descended to him.¹

§ 574. *c.* On the other hand, a devisee, claiming an estate under a will, cannot, without a discovery of the title deeds, maintain any suit at law. The heir at law might not only defeat his suit, by withholding the means to trace out his legal title; but he might also defend himself at law, by setting up prior outstanding incumbrances. And thus he might prevent the devisee from having the power of trying the validity of the will at law.² Whether this distinction is well founded, may, perhaps, be thought to admit of some question. That the devisee should in such a case be entitled to a discovery seems plain enough. That the heir at law is not equally well entitled to a discovery of the deeds, under which the estate is claimed, in order to ascertain the extent, to which he is disinherited, may not appear quite so plain.³

¹ *Shaftesbury v. Arrowsmith*, 4 Ves. 67, 70, 71; 2 Fonbl. Eq. B. 6, ch. 3, § 2, and notes (g) (h); 2 Story on Eq. Jurisp. § 1492.

² *Duchess of Newcastle v. Lord Pelham*, 8 Viner, Abridg. *Discovery*, M. pl. 12; 1 Bro. Parl. Cas. 392; Cooper Eq. Pl. ch. 1, § 4, p. 59; 2 Story on Eq. Jurisp. § 1493.

³ It is obvious, that the distinction is not satisfactory to Mr. Fonblanque. In 2 Fonbl. Eq. B. 6, ch. 3, § 2, note (g), he says; "And an heir at law, though not entitled to come into Equity upon an ejectment Bill for possession; yet he is entitled to come into Equity to remove terms out of the way, which would otherwise prevent his recovering possession at

§ 575. Seventhly ; Another objection, which may be taken by way of demurrer to a Bill of discovery, is, that it may expose the defendant to a penalty or a forfeiture, or that it may compel him to criminate himself.¹ The rule is, that the defendant shall not be obliged to discover, what *may* subject him to a penalty or forfeiture, or criminal accusation, and not what *must* only.² This objection has already been under consideration in

law ; and also has a right to another relief before he has established his title at law ; namely, that the deed and will may be produced, and lodged in proper hands for his inspection ; for any heir at law has a right to discover, by what means and under what deed he is disinherited." For this he relies upon *Harrison v. Southcote*, (1 Atk. 539, 540), where Lord Hardwicke asserts the proposition in the same language ; and *Floyer v. Sydenham* (Select Cas. in Ch. 2), which is directly in point. If it were clear, that, if the will were established, the title of the heir would be gone, the objection to a bill of discovery by him might not be unreasonable ; for then he would have no title to the estate, and of course no title to a discovery of the deeds of it. But it may depend upon the very terms of the instrument, as a settlement, or the boundaries stated in different deeds, where the purchase has been of different parcels at different times, whether he is disinherited or not. In such a case an inspection may be very important to him. See *Cooper Eq. Pl. ch. 3, § 3, p. 198* ; *Aston v. Lord Exeter*, 6 Ves. 288 ; *Hylton v. Morgan*, 6 Ves. 294 ; 2 Story on Eq. Jurisp. § 1493.

¹ *Chauncey v. Tabourden*, 2 Atk. 393 ; *Mitf. Eq. Pl. by Jeremy*, 194, 286 ; *Cooper Eq. Pl.* 204, 206, 207 ; 2 Story on Equity Jurisp. § 1494 ; *Beames Pl. in Eq.* 258 to 271 ; Ante § 521 to § 526. Lord Redesdale has summed up the general result of the authorities on this subject in the following words :—" It is a general rule, that no one is bound to answer, so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment. If, therefore, a Bill requires an answer, which may subject the defendant to any pains or penalties, he may demur to so much of the Bill. As, if a Bill charges any thing, which, if confessed by the answer, would subject the defendant to any criminal prosecution, or to any particular penalties, as an usurious contract, maintenance, champerty, simony. And in such cases if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate." *Mitf. Eq. Pl. by Jeremy*, 194, 195, and the cases there cited. Mr. Raithby, in his learned note to *Bird v. Hardwicke*, 1 Vern. 110, note (1), has collected the great body of the authorities on this subject.

² *Harrison v. Southcote*, 1 Atk. 539.

treating of demurrers to Bill for discovery and relief. But a few additional remarks and illustrations seem proper in this place.

§ 576. This doctrine seems founded on the great principles of constitutional right, settled in early times in England, and brought by our ancestors to America, by which it is established, that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself of any crime. The maxim of the common law is: *Nemo tenetur seipsum prodere*.¹ It constituted one of the just objections to the Court of Star Chamber, *that, in criminal informations, it compelled the [*439] party accused to answer upon oath to the accusation; and thus, in arbitrary times, became an instrument of gross oppression and injustice.² But the Court of Chancery has always steadily refused to compel any man to criminate himself, and by analogy to disclose any fact, which will subject him to a penalty or forfeiture; and it has thus assisted in carrying into complete effect the benign maxim of the common law above alluded to.³ So, that it is the just boast of Lord Hardwicke, that the general rule, established with great justice and tenderness in the law of England, is fully recognised and acted on in Courts of Equity, that no person shall be obliged to discover, what may tend to subject him to a penalty or punishment, or to that, which is in the nature of a penalty or punishment.⁴

§ 577. The doctrine is not confined to cases, where the question or answer has a direct tendency to crimi-

¹ Atty. Gen. v. Duplessis, Parker's Rep. 159.

² Cooper Eq. Pl. 202, 203; Hare on Discov. 131 to 156; Beames Pl. in Eq. 258 to 270.

³ See 3 Black. Comm. 100, 101.

⁴ Harrison v. Southcote, 2 Ves. 394.

nate the defendant, or to expose him to a penalty or forfeiture; but it goes farther, and protects him from answering any question, which may form a link in the chain, by which such a case is to be established.¹ For it has been well observed by an eminent Judge, that in no stage of the proceedings in a Court of Equity can a party be compelled to answer any question accusing himself, or any one of a series of questions, that has a tendency to that effect; the rule in these cases being, that the defendant is at liberty to protect himself against [*440] *answering, not only the direct question, whether he did what was illegal; but also every question fairly appearing to be put with a view of drawing from him an answer, containing nothing to affect him, except that it is one link in a chain of proof, that is to affect him.²

§ 578. It has been also remarked, that it is impracticable to lay down any general rule, as to the extent to which collateral questions, asked in a Bill, may involve the objection last above stated. The varieties of circumstances, which may arise in the course of human transactions, are infinite, and there are few, if any facts, which may not in some conceivable case form a natural or an accidental ingredient in the evidence of a crime.³ In many cases the line of distinction may be very clear between the questions, which are within the reach of the objection, and those, which are without it. But in others the line must be extremely obscure; and the rule to be applied must rest upon the exercise of a sound discretion

¹ *Southall v. —*, 1 *Younge R.* 308, 317; *Paxton v. Douglas*, 16 *Ves. R.* 242; *S. C.* 19 *Ves.* 225; *Mitf. Eq. Pl.* by Jeremy, 194; *Cooper Eq. Pl.* 203, 204; *Chauncey v. Tabourden*, 2 *Atk.* 393.

² Lord Eldon in *Paxton v. Douglas*, 19 *Ves.* 227; *S. C.* 16 *Ves. R.* 239; *Ex parte Symes*, 11 *Ves.* 525; *East India Company v. Campbell*, 1 *Ves.* 246.

³ *Hare on Discov.* 154, 155.

under all the particular circumstances of the case before the Court.¹ Thus, for example, considering to what an

¹ Lord Eldon, in commenting on this subject, in *Paxton v. Douglas* (19 Ves. 228), used the following language:—"I have looked into all the cases; and I find the distinctions between questions, supposed to have a tendency to criminate, and questions, to which it is supposed answers may be given, as having no connexion with the other questions, so very nice, that I can only say, the strong inclination of my mind is to protect the party against answering any question, not only, that has a direct tendency to criminate him, but that forms one step towards it; and that, as these interrogatories are framed, this party cannot be compelled to answer." The Vice Chancellor (Sir A. Hart), in *Green v. Weaver* (1 Sim. R. 426), used the following language:—"Now, that the rule of a Court of Equity is, that a man shall not be compelled to answer to any facts which may tend to criminate him, or subject him to penalties or forfeitures, is undeniable. But the due application of this rule to the circumstances of individual cases, has been, at all times, a matter of much controversy; and so much so, that, I believe, not less than one hundred cases are to be found in the Reports, in which the question was, whether the defendant was, or not, bound to give the discovery sought for. The due application of the rule to the present case, is that, which I have labored to arrive at." He afterwards added—"The reasoning of Lord Eldon, in the cases of the *East India Company v. Neave*, and *Paxton v. Douglas*, imply, that he assents to the principle, that a man may, by his conduct, incur an obligation to discover the facts, although that discovery may, incidentally, subject him to pecuniary obligations. *Paxton v. Douglas* has been a good deal relied upon by the other side; and I am free to confess, that that case did perplex me excessively by some of the *dicta* laid down by that great Judge; for he went there to the extent of stating, not only, that a man should not make a discovery, that would subject himself directly to penalty or criminal prosecution; but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now, when one comes to look at that, as a proposition unexplained, one cannot help seeing, that the true principle of a Bill in Equity is, that every statement of fact in every Bill ought to be incidentally leading to the same conclusion, ultimately, as the prayer of the Bill does lead to; for the fact is either conducive to the general result, or it is unimportant and irrelevant. But I take Lord Eldon to have meant, (and which perhaps is not very fully explained in the Report, and which satisfied my mind a good deal), not that every fact, which may lead to the effect of subjecting a defendant to a penalty, is objectionable; but, where the sole gist or object of the suit is to convict a man in a penalty, where there would be no other purpose, but to have relief in a Court of Equity

extent the doctrine of the Courts of Common Law of late years has gone, with reference to criminality by combination and conspiracy, it would be difficult to extract from the apparent grasp of that doctrine, nine-tenths of the Bills in Equity, which charge combination [*442] *and conspiracy.¹ Yet every such allegation is always answered by the defendants; and indeed seems ordinarily required, as necessary, or at least as proper in every answer. Some illustrations of this difficulty have already been incidentally introduced, and some will occur in the subsequent remarks.

§ 579. With these principles in view let us now proceed to the consideration of the different branches of the foregoing objection. And first in regard to penalties and forfeitures. Here, as we have seen, the objection may be taken by demurrer, not only to a discovery of what may directly subject the party to a penalty or forfeiture, but to a discovery of what may have a tendency to the same effect.² Thus, for example, if a daughter is to forfeit her portion, in case she marries without consent of her parent, or another party; or if a widow is to forfeit her jointure, or other provision under a will, in the event of her marrying again; each of them may demur to a Bill of discovery, brought to discover the fact of a marriage, which would occasion the forfeiture.³

on the footing of penalty, that, as a Court of Equity does not relieve on penalty, it will not give any incidental discovery. That is the way I reconcile and get rid of the *dicta* laid down in *Paxton v. Douglas*. But, however, when one looks at what Lord Eldon did, in point of declaration, in the other cases, and most especially in the case of *Ex parte Dyster*, one cannot help thinking, that he could not have intended to lay down the doctrine in a general, unrestricted manner." See also *Ex parte Symes*, 11 Ves. 525.

¹ *Mayor of London v. Levy*, 8 Ves. 404; *Mitf. Eq. Pl. by Jeremy*, 40, 41; *Ante* § 30, and note (2); *Chetwynd v. Lindon*, 2 Ves. 450.

² *Ante* § 521, § 522.

³ *Cooper Eq. Pl.* 206, 207; *Wrottesley v. Bendish*, 3 P. Will. 236;

§ 580. Upon the same ground, where the lessee is restrained from assigning his lease without license, upon the pain of a forfeiture thereof, a demurrer will lie to a Bill of discovery filed against him, to compel him to discover, whether he has made such an assignment without

Chauncey v. Tabourden, 2 Atk. 393; *Chauncey v. Fenhoulllet*, 2 Ves. 265; *Taylor v. Ruddmen*, 2 Ch. Cas. 241; *Monnins v. Monnins*, 2 Ch. Rep. 68; *Mitf. Eq. Pl. by Jeremy*, 197; *Attorney General v. Duplessis*, *Parker R.* 157 to 160, where many of the cases are collected; *Hare on Discov.* 140 to 144. A very nice distinction has been taken on this subject, viz. between the case of a devise with a condition of forfeiture upon marriage, and a devise with a limitation over in case of marriage. In the former case, the demurrer is good; in the latter (it is said), that it is bad. Thus, where a man by will gave an estate to his wife, whilst she continued a widow, with a limitation over in case of her second marriage; and the remainder-man filed a Bill against the widow to compel a discovery of her second marriage; Lord Talbot overruled a demurrer to the discovery, upon the ground, that it was not a case of forfeiture, but of a conditional limitation. (See the case cited, 2 Atk. 393). Lord Hardwicke seems to have admitted the distinction. *Boteler v. Allington*, 3 Atk. 457; *Mitf. Eq. Pl. by Jeremy*, 197, 198, 286, 287; *Jordan v. Holcombe*, *Ambler R.* 209; *Chauncey v. Tabourden*, 2 Atk. 393; *Lucas v. Evans*, 3 Atk. 259; *Chauncey v. Fenhoulllet*, 2 Ves. 265. But where a devise was to a wife during her widowhood, and if she should marry again then to a daughter, provided that if the wife married and survived the daughter, the estate should return to her; Lord Hardwicke held, that a demurrer to the discovery was good; because the remainder over was in effect limited to a marriage in the life-time of the daughter, and therefore was by way of forfeiture. *Jordan v. Holcombe*, *Ambler R.* 209, 210. The truth is, that in all these cases, the discovery in effect sought to establish a forfeiture; and the limitation over was, in *Chauncey v. Fenhoulllet* (2 Ves. 265) held by Lord Hardwicke not to change the right of the defendant to protect herself from a discovery. I cannot but think with Mr. Beames (*Beames Pl. in Eq.* 265, 266, 267), that the distinction is wholly unsatisfactory. Mr. Raithby seems equally dissatisfied with the distinction. See Raithby's note to *Bird v. Hardwicke*, 1 Vern. R. 110; *Mitf. Eq. Pl. by Jeremy*, 197, 198; *Cooper Eq. Pl.* 207. But a Bill to discover a promise of marriage, in aid of an action for a breach of the promise, does not seem liable to the same objection; for it is merely for the discovery of a contract. *Vaughan v. Aldridge*, *Forrest's Exch. Rep.* 42; *Cooper Eq. Pl.* 204; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Hare on Discov.* 146, 147.

license.¹ So, if a Bill is brought for a discovery of waste done by a tenant, a demurrer will lie, unless the penalty or forfeiture attached thereto is waived.² So, if a Bill should seek a discovery of any matter, which would subject the defendant to the forfeiture or loss of any office or franchise held by him by a process of quo [*444] warrant; ³ *or which would subject him to the loss of a seat in Parliament; ⁴ in either case it would be demurrable.

§ 581. Upon the same ground, where a Bill was brought by an underwriter on a policy of insurance, suggesting a fraudulent loss of a ship, and that the ship was bound from Ireland to a port in France with wool on board, and praying for a discovery of the goods, which were on board; it was held, that as such exportation of wool was within the prohibition of an Act of Parliament, which would subject the defendant to penalties or forfeitures, he was not bound to answer the Bill on this point; because the discovery might have a tendency to criminate himself.⁵

§ 582. So, if a Bill should be brought to set aside an usurious contract, and in the interrogatory part it should ask the defendant, what interest he agreed to take; the defendant would have a right to demur to the discovery thus sought; for he could not set forth, what interest he

¹ Mitf. Eq. Pl. by Jeremy, 197; Cooper Eq. Pl. 207; *Uxbridge v. Staveland*, 1 Ves. 56; *Lansing v. Pine*, 4 Paige R. 639.

² Mitf. Eq. Pl. by Jeremy, 197; *Chauncey v. Tabourden*, 2 Atk. 393; *Boteler v. Allington*, 3 Atk. 457; *Fane v. Atlee*, 1 Eq. Abridg. 77, pl. 15.

³ Cooper Eq. Pl. 207; *Attorney General v. Reynolds*, 1 Eq. Abridg. 131; Mitf. Eq. Pl. by Jeremy, 197.

⁴ Cooper Eq. Pl. 207; *Honeywood v. Selwin*, 3 Atk. 276.

⁵ *Duncalf v. Blake*, 1 Atk. 52; Mr. Raithby's note to *Bird v. Hardwicke*, 1 Vern. 110, note (1); *Id.* 111; Mitf. Eq. Pl. by Jeremy, 285, 286; *Attorney General v. Cresner*, *Parker R.* 279.

agreed to take, without discovering at the same time the very interest he had taken.¹

§ 583. Upon the same ground, a defendant may, in the same manner, demur to a discovery, which may subject him to any thing in the nature of a penalty or forfeiture. As, for example, where (before the Statute of 18 Geo. III., ch. 60), a discovery was sought, whether the defendant was educated in the Popish religion, by which he might have incurred the incapacities stated in *the Statute of 11 & 12 Will. III., ch. 4, the Bill [*445] was held demurrable.² For (it was said), that under the rule, that a man is not obliged to accuse himself, is implied, that he is not bound to discover a disability in himself; and there is no difference between the forfeiture of a thing vested, and a disability to take a thing, inflicted as a penalty.³ Nor is the protection limited to the party himself; but it extends to persons claiming under him, whether they are devisees or are purchasers; for they are entitled to the same privileges, and take the estate under the same circumstances.⁴

§ 584. Upon a similar ground, it has been held, that a demurrer lies to a Bill against a clergyman to discover, whether, after institution to one, he has not been presented to a second living, whereby under the Statute of 21 Henry VIII., the first benefice would have become

¹ *Chauncey v. Tabourden*, 2 Atk. 393; *Earl of Suffolk v. Green*, 1 Atk. 450.

² Mitf. Eq. Pl. by Jeremy, 198, 286; *Jones v. Meredith*, Com. Rep. 661, 670, 671, 672; Raithby's note to *Bird v. Hardwicke*, 1 Vern. 110; *Wynn v. Doughty*, 2 Eq. Abridg. 77.

³ *Smith v. Read*, 1 Atk. 526; *Attorney General v. Duplessis*, Parker's R. 157, 158.

⁴ *Smith v. Read*, 1 Atk. 526; *Harrison v. Southcote*, 1 Atk. 528, 538, 539; S. C. 2 Ves. 389, 395; *Boteler v. Allington*, 3 Atk. 457; *Parkhurst v. Lowten*, 1 Meriv. R. 391.

void ; for it is in the nature of a forfeiture.¹ So, where a Bill is brought against a bankrupt to discover, whether he has not committed acts of bankruptcy, the same objection may be taken by demurrer ; for the proceedings against him under the Bankrupt Laws are in the nature of a penalty ; and he shall not in such a case be compelled to say, whether he intended to defraud his creditors.² But he may be compelled to answer, whether he has traded or not.³

[*446] *§ 585. For the same reason, where a Bill of discovery was brought against a defendant, requiring him to discover, whether he was married, or had any issue male, or gave out, that he had such ; it was held, that the party was not bound to discover, whether he was married, or not ; or whether he had illegitimate issue or not ; for that might subject him to Ecclesiastical censures.⁴ But he was bound to answer, whether he had legitimate issue, or not ; for that would not subject him to any such censures.⁵

§ 586. The same reasoning would seem to apply to the case of a defendant, who should be called upon by a Bill to discover, whether he is an alien, or not, whereby he would be deprived of an estate then vested. And it was accordingly so held by Lord Hardwicke.⁶ But it has been since held otherwise by the House of Lords, upon the ground, that the legal disability or incapacity of an alien is not a penalty or a forfeiture ; for a

¹ *Boteler v. Allington*, 3 Atk. 457 ; Mitf. Eq. Pl. by Jeremy, 198.

² *Chambers v. Thompson*, 4 Bro. Ch. R. 434, and Mr. Belt's note (3).

³ *Ibid.*

⁴ *Finch v. Finch*, 2 Ves. 491, 493 ; Mitf. Eq. Pl. by Jeremy, 197, 285 ; *Cooper Eq. Pl.* 205 ; *Beames Pl. in Eq.* 261, 264, 265 ; *Brownsword v. Edwards*, 2 Ves. 243, 245.

⁵ *Ibid.*

⁶ *Finch v. Finch*, 2 Ves. 494.

penalty or forfeiture is inflicted for some act or neglect; but the disability of an alien to hold lands arises from the policy of the law without any such act or neglect.¹

§ 587. And it is wholly immaterial in cases, in which the objection applies, that the discovery will

¹ *Attorney General v. Duplessis*, Parker R. 144, 158, 163, 164; S. C. 2 Ves. 286; *Mitf. Eq. Pl. by Jeremy*, 286; *De Hourmelin v. Sheldon*, 1 Beavan R. 79, 91. See also *Smith v. Read*, 1 Atk. 527; S. C. cited Parker R. 157. This distinction between the cases of a disability from alienage, and a disability imposed by statute, does not seem to be founded upon grounds entirely satisfactory. In each case, the effect of the discovery is, to seek a forfeiture of an estate already vested. Lord Hardwicke, on one occasion (*Smith v. Read*, 1 Atk. 427), said, "that there is no difference between a forfeiture of a thing vested, and a disability to take inflicted as a penalty." Yet he added in the same case,—“In the cases of aliens, bastards, &c., there is a difference, where the disability arises from the rules of law, and where it is imposed as a penalty.” Is not the forfeiture of an estate taken by an alien, in substance, a penalty for his assuming to purchase and hold real estate? Lord Redesdale (*Mitf. Eq. Pl. by Jeremy*, 197), admits the existence of the distinction, stating, that a discovery may be required of a matter, which would show the defendant incapable of having any interest or title. But that would seem to apply to the case of Papists, as well as of aliens. See also Hare on Discov. 145, 146, 147. Mr. Beames dissents from the doctrine; and makes the following important suggestions:—"This leads us to notice a farther qualification of the general rule, arising out of the discussions, which took place in the case just alluded to. Upon an information on behalf of the Crown in order to discover, whether the defendant were an alien, &c., it was resolved, that the defendant was bound to give the discovery, the legal disability of an alien not being a penalty, or a forfeiture. There are two observations, which obviously present themselves upon this case: the first applicable to the language of it; the second applicable to the doctrine of it. With respect to the language of this decision, it seems not very accurately to express, what it intends to express. It is an obvious proposition, that the legal disability to hold lands is not in itself a penalty, or a forfeiture. To confound cause and effect, the source and its consequence, is not a very uncommon error in old law books. If it be asked, whether waste committed by a tenant for life be a forfeiture, it might logically be answered, that it was not: but if it be asked, whether it will not cause or produce a forfeiture, it would be as logically answered that it would do so. The question then ought to have been, whether the legal disability of an alien would not, in effect, produce

involve the party in a penalty or a forfeiture, whether the discovery be sought in an original Bill in aid of an action at law, or in a cross Bill in aid of a defence to an original Bill in Equity. The defendant, in each case, is equally entitled to resist the discovery.¹

§ 588. But, although the defendant is thus protected from the discovery of any matter, which would subject him to a penalty or a forfeiture, he may, nevertheless, be required to disclose other facts, which will have no such

either a penalty or a forfeiture? With respect to the doctrine of the case in the House of Lords, it is to be observed, that Lord Hardwicke states his own doctrine to have been directly the reverse of it. 'I held she was not bound to discover, whether she was an alien; but that she was, whether her child was an alien.' His Lordship recognises this doctrine in 1752, when the case of *Finch v. Finch* was decided by him. From the report of *Smith v. Read*, Lord Hardwicke seems to have had a similar general idea in 1736. 'There is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty.' It is true, his Lordship in the same case says; 'There is a difference, where the disability arises from the rules of law, and where it is imposed as a penalty.' There certainly is a difference as to the origin of the disabilities in these cases; but as to their effect upon the individual, it is, with unfeigned respect for that very great judge, apprehended, that there can be no difference. The punishment will be neither more nor less, whether inflicted by the common law, or by a statute. It should, however, in conclusion, be subjoined, that the decision in the House of Lords is subsequent in point of date to both of the cases before Lord Hardwicke. There is an old case, deciding, that if the Crown should call for a discovery, in order to give effect to a forfeiture occasioned by outlawry, the defendant could not refuse to afford the discovery of his estate; because the Crown is entitled to the estate by course of law, and the outlawry is in the nature of a gift to the king." See also Mr. Raithby's note to *Bird v. Hardwicke*, 1 Vern. R. 110, note (1), 111. A devise of lands to English subjects, in trust to sell the lands and invest the proceeds in the funds in trust for aliens, would not be open to the objection; for there is nothing in public policy to prevent aliens from holding stock in the public funds. *De Hourmelin v. Sheldon*, 1 Beaman R. 79. But see *Fourdrin v. Gowdey*, 3 Mylne & Keen, 383.

¹ *Honeywood v. Selwin*, 3 Atk. 276; *Chambers v. Thompson*, 4 Bro. Ch. R. 434; *Southall v. —*, 1 Younge R. 308; Mitf. Eq. Pl. by Jeremy, 198.

tendency, although they may be involved in the general result, as it is connected with the fact of penalty or forfeiture. Thus (as we have seen), although a man is not bound to discover, whether he is married, or not; for that might subject him, if answered, to Ecclesiastical censures; yet he may be required to disclose, whether he has a legitimate son.¹ So, although a lessee for life is not bound to discover, whether he has made a lease for the life of another; for that might occasion a forfeiture of his estate; yet he is bound to discover, whether he is tenant for life, or not; for that is a collateral matter, and not to the point of forfeiture.² So, if a Bill should be brought for a discovery of waste against a person, charging him *to be tenant for life, and also charging, that he [*449] had committed waste, the defendant would be bound to discover whether he was tenant for life or not, though he might demur to the discovery of the waste.³ So, although a bankrupt is not bound to discover, whether he has committed any acts of bankruptcy; yet he may be required to discover, whether he has traded or not.⁴

§ 589. We have already also had occasion incidentally to take notice of another exception to the general doctrine of the protection of a defendant from a discovery of any thing, which may involve him in a penalty or a forfeiture. It is, that the defendant may, by contract, expressly preclude himself from the objection.⁵ So, it is

¹ Ante § 585; *Finch v. Finch*, 2 Ves. 491; *Mitf. Eq. Pl. by Jeremy*, 285, 286; *Cooper Eq. Pl.* 205.

² *Weaver v. Earl of Meath*, 2 Ves. 108, 109; *Mitf. Eq. Pl. by Jeremy*, 286.

³ *Weaver v. Earl of Meath*, 2 Ves. 108, 109; *Mitf. Eq. Pl. by Jeremy*, 286, 287. See *Harrison v. Southcote*, 1 Atk. 539; *Southall v. —*, 1 Younge R. 308; Ante § 580.

⁴ *Chambers v. Thompson*, 4 Bro. Ch. R. 434, 436, and Mr. Belt's note; Ante § 584.

⁵ Ante § 521.

said, he may by a natural or necessary implication, arising from a contract, in like manner waive the objection. As, where the relation of principal and agent exists, and thereby incidentally, and by implication, a right of discovery results from the high moral obligation of the agent to discover the acts done by him in regard to his principal. Thus, for example, where a Bill of discovery was brought by his principal, against a broker in the city of London, in aid of an action at law, for a discovery of acts of misconduct by the broker, it was held, that the broker was bound to make the discovery of the acts, although by so doing he would subject himself to the penalty of a bond, which he had given to the city, upon condition for his official good conduct.¹

¹ *Green v. Weaver*, 1 Sim. R. 404. In this case, the Vice Chancellor (Sir A. Hart) went into an elaborate review of the cases, and came to the conclusion, which is stated in the text. "If," said he, on that occasion, "if I decide, that the defendants are bound to answer, it may be said, that my decision is inconsistent with the doctrine laid down by great judges in former cases. If I decide, that the defendants are not bound to answer, I may render those acts of Parliament, especially framed for the purpose of protecting principals from the dishonesty of their agents, a cover to their agents in the grossest and most scandalous frauds. For, stripped of the effect of the statutes, as inflicting penalties, it would be the common course of the Court of Equity to compel each of these defendants to state, on oath, whether they were employed as brokers and agents of the plaintiff, and whether they acted in that capacity, and to set forth every particular of each of the defendant's dealings as agent or broker of the plaintiff, and to produce every entry in his books, and every document relating to these transactions. If a Court of Equity, in this case, protected him from the discovery, the plaintiff's proceeding at law must be quite nugatory; for the materials of evidence must necessarily rest, almost exclusively (as I have observed) in their possession. I hope this question may be decided without my falling into the dilemma of impeaching any anterior decision. I have looked through every case on this subject, that was cited; and, most especially, I have applied myself to those, which were before Lord Eldon, which have been relied on. I have looked through a great variety of those cases, and I believe I have looked through and considered every case, that a diligent search in the

§ 590. A distinction also exists, and should be constantly borne in mind, between cases of a penalty or a forfeiture, strictly so called, and cases, where the party

books has enabled me to find, that has any bearing on this question. Upon those cases, that I do not now rely on, it may be sufficient to say, they establish the general principle, and must protect the defendant against the discovery. But, from the current of authority, I think this result may be derived, as established by a series of decisions, travelling through a long series of years, namely, that a man, by the effect of his own acts, may exclude himself from the benefit of that rule of a Court of Equity ; or, to adopt the expression of a very great judge, he may contract himself out of the protection afforded by the principle of the Court." Then, after reviewing the cases, he added ; " I think, from this series of decisions, there is sufficient authority for me to decide, that a man may contract, so as to incur the obligation to make the discovery of all the facts relative to that contract, although the effect of that discovery may, incidentally, subject him to pecuniary penalties." Then, proceeding to the direct question before him, he said ; " Then the next question is, inasmuch as the objection to make the discovery arose, in the cases I have referred to, from the stipulations of instruments under seal, can the solemnity of the seal make that obligation to discover more obligatory in a Court of Equity than the moral obligation resulting from principal and agent, when one reposes and another accepts the confidence so reposed ? The reasoning of the judgment, in the case of the East India Company v. Atkins, I think shows, conclusively, an opinion, that such was the moral obligation, that, on that ground, the discovery ought to be made. Although *Strange* is not a book we can place much confidence in ; yet, in this particular instance, it appears to be a very able and sound judgment, and well reported. I should say, that a Court of Equity knows no difference between a mere moral obligation, and one resulting from stipulation by deed. If we contrast the circumstances of this case with those of the decisions I have referred to, I think we shall find, that this case creates a higher moral obligation to give the discovery than any of those cases. In each of those cases, the parties dealt at arm's length. The employer contemplated a breach of the contract by the agent, and stipulated for his own damages in case a breach of contract should take place. In the present case, the employer surrendered himself, unconditionally, to the agent, whom he employed, in the confidence, that the agent sustained the character, that he publicly assumed. The employer had no reason to suspect, nor had any means of detecting the misrepresentation of the fact, whether they were, or not, duly constituted legal brokers. Much less could he apprehend, that they were daily and hourly living in the violation of the law of the country in so acting, and that they kept this violation lurking in the back-ground, to be brought forward, by way of

has contracted to pay a sum, as stipulated damages, for any act done, or omitted to be done by him. In the latter cases, the objection is not strictly applicable, and cannot therefore be valid. What are properly to be deemed cases of stipulated damages, and what are cases in the nature of a penalty or a forfeiture, may in many [*452] instances be *a matter of very nice and critical inquiry.¹ For it is certain, that merely giving the name of stipulated damages in a transaction, where it is in reality a penalty, will not change the nature of the objection; but it will be still available.²

§ 591. In the next place, in regard to the other branch of the rule, that no person shall be bound to criminate himself, or to furnish evidence for any step in the process, by which a criminal accusation or punishment can be sustained. Whenever the point of discovery has a direct tendency to criminate the party, the case is very clear. But the rule is equally applicable to questions, which have an indirect tendency to the same end, and are connected with the other questions.³ The defend-

defence, against the just demands of those, whose confidence they invited and abused. If a Court of Equity gives effect to a defence so constituted, I do not know, that there can be any reason, why an executor or administrator, who has made oath duly to administer the assets, and executed a bond for that purpose, may not allege those matters in answer to a Bill of discovery, charging him with fraudulently rendering an account of the assets. This is the ground, upon which I act." See *Hare on Discovery*, 153, 154; *Id.* 141, 142. Where a defendant submits to be examined on matters, which will subject him to a penalty, Courts of Equity will not interpose. 1 *Sim. R.* 429; *Hare on Discov.* 143, 144.

¹ *Hare on Discovery*, 144; *East India Company v. Neave*, 5 *Ves.* 183, 185; *Jones v. Green*, 3 *Y. & Jerv.* 298; *Ray v. Duke of Beaufort*, 2 *Atk.* 193, 194; *Hardy v. Martin*, 1 *Cox*, 26; *Rolf v. Paterson*, 6 *Bro. Parl. Cas.* 470; *S. C. Bro. Parl. Cas.* by *Tomlins*, 426.

² *Ibid.*

³ *Paxton v. Douglas*, 16 *Ves.* 242, 243; *S. C.* 19 *Ves.* 225; *Southall v. —*, 1 *Younge R.* 308, 316, 317; *Cooper Eq. Pl.* 203, 204; *Ex parte Symes*, 11 *Ves.* 525.

ant is not compellable to answer, either the broad, leading fact, or any other fact, the answer to which may form a step in the prosecution.¹ Thus, for example, where a Bill was brought to discover, whether a bureau, which was delivered to the defendant for the purpose of being repaired, was not found by the defendant to contain a secret drawer with money in it, which he converted to his own use; upon a demurrer, stating the ground, that the discovery sought would subject the defendant to a criminal prosecution, the objection was allowed; *for the charge amounted to a charge [*453] of felony.² So, if a pocket-book, containing bank notes, should be left in the pocket of a coat, sent to a tailor to be mended; and he should take the pocket-book out of the pocket, and convert the bank notes to his own use; or if a pocket-book should be left in a hackney coach, and the coachman, not knowing to whom of the people, who were in the coach in the course of the day, it belonged, should open and take the contents to his own use; and a Bill for a discovery of the facts in either case should be brought; it would be a clear case for a demurrer; for the party would be guilty of a felony, and would by his answer be called upon to criminate himself.³

§ 592. Upon the same ground, where a Bill was brought for a discovery, stating, that the son of the plaintiff had been charged, with being guilty of an embezzle-

¹ *Claridge v. Hoare*, 14 Ves. 59; *Cooper Eq. Pl.* 204; *Mitf. Eq. Pl. by Jeremy*, 194, 195.

² *Cartwright v. Green*, 8 Ves. 405, 406; *Cooper Eq. Pl.* 203.

³ *Cartwright v. Green*, 8 Ves. 409, 410; *Cooper Eq. Pl.* 203. For the like reason, a married woman may demur to a discovery, which would subject her husband to a criminal prosecution. *Cartwright v. Green*, 8 Ves. 405; *Cooper Eq. Pl.* 204.

ment, as clerk of the defendants, and that the plaintiff had transferred certain stock to the defendants to satisfy the deficiency, and to prevent a prosecution against his son ; and it prayed for a discovery of the facts, and re-transfer of the stock ; it was held, that the transaction, as charged, in effect amounted to the composition of a felony ; and, therefore the defendants were not bound to answer it.¹

§ 593. And it will make no difference in cases of this sort, whether the charge is such, as will subject the party to punishment by the common law, or only to Ecclesiastical punishments and censures ; for, in each [*454] case, the *party is entitled to the same protection. Thus, for example, if a Bill should be brought for the discovery of the fact of a marriage by the plaintiff with a particular woman, who was his sister, or sister-in-law ; he would not be bound to make the discovery ; for the marriage would be incestuous ; and the discovery of that would be one link in the chain of evidence to convict the defendant.²

§ 594. So, where a Bill was brought by the executors of a counsellor at law in England for a sum in gross, agreed to be given to the testator for his advice and services ; on a demurrer by the defendant, because if he should answer the Bill, it would subject him to the statutes against maintenance, it being against the course of justice for a counsellor at law to make a contract for

¹ *Claridge v. Hoare*, 14 Ves. 59 ; *Cooper Eq. Pl.* 203, 204 ; *Guiborn v. Fellowes*, 8 Vin. Abridg. 543.

² *Claridge v. Hoare*, 14 Ves. 55 ; *Cooper Eq. Pl.* 204 ; *Brownsword v. Edwards*, 2 Ves. 243, 245 ; Mr. Raithby's note to *Bird v. Hardwicke*, 1 Vern. 110, note (1) ; *Chetwynd v. Lindon*, 2 Ves. 451 ; *Franco v. Bolton*, 3 Ves. 369, 371 ; *Ex parte Symes*, 11 Ves. 525 ; *Baker v. Pritchard*, 2 Atk. 389 ; *Hare on Discov.* 152 to 156.

a gross sum, to be paid to him upon the event of a cause, the demurrer was held good.¹ So, where a Bill was brought, charging, that a perjury had been committed by the procurement of the defendant, and praying a discovery, the Bill was held demurrable.²

§ 595. It was formerly thought, that the same rule applied to cases, where the defendant was called upon to make a discovery of any act of moral turpitude. And, accordingly, it has been laid down by Lord Redesdale, that it should seem, that a demurrer will hold to any discovery, which may tend to show the defendant to be guilty of any moral turpitude; such as the birth of a *child born out of wedlock.³ But that doctrine has[*455] been since overturned; and it is now held, that the defendant may be compelled to make a discovery of any act of moral turpitude, which does not amount to a public offence, or an indictable crime.⁴ The boundaries, indeed, between matter, which is indictable, and that which amounts to a mere private fraud, are often very nice, and obscure, and difficult to be distinguished.⁵ Thus, for example, the mere charge of a conspiracy in a common Bill against all the defendants, is not objectionable; but if such a conspiracy is charged, as is indictable, the discovery cannot be compelled, and the objection to it by demurrer will be good.⁶

¹ *Penrice v. Parker*, Rep. Temp. Finch, 75. See also *Sharp v. Evans*, 3 P. Will. 375; *Wallis v. Duke of Rutland*, 3 Ves. 494.

² *Baker v. Pritchard*, 2 Atk. 388, 389; *Selby v. Crow*, 2 Anst. 504.

³ Mitf. Eq. Pl. by Jeremy, 196; *Attorney General v. Duplessis*, Parker R. 163; *Chetwynd v. Lyndon*, 2 Ves. 450, 451; *Franco v. Belton*, 3 Ves. 369, 371, 372; *King v. Burr*, 3 Meriv. R. 693.

⁴ *Hare on Discov.* 142; *Chetwynd v. Lindon*, 2 Ves. 451.

⁵ *Chetwynd v. Lindon*, 2 Ves. 451; Mitf. Eq. Pl. by Jeremy, 40, 41; Ante § 30, note (2).

⁶ *Chetwynd v. Lindon*, 2 Ves. 451; Mitf. Eq. Pl. by Jeremy, 40, 41; Ante § 30, and note (2); *Mayor of London v. Levy*, 8 Ves. 404; *Dunn-*

§ 596. Upon this ground it is, that if the Bill charges fraud in the party defendant, although involving the basest moral turpitude, he is bound to make the discovery. Nothing is more common than to bring Bills for discovery and relief, founded exclusively upon [*456] *charges of fraud. And it has been stated by Lord Eldon, that in the Exchequer the underwriters upon policies of insurance often brought Bills against the assured, to obtain a discovery and relief, in respect to the assured's actions against them, by pleading frauds, which frauds would have been indictable.¹ But, certainly, it is inconsistent with the general principle already stated, to compel a discovery of any indictable frauds. As to other frauds, not indictable, there does not seem any just ground to withhold the discovery.

§ 597. An exception to the general rule, already stated, has been intimated to exist in a case involving considerations of a criminal character. Thus, it has been suggested, that if a suit is brought by a plaintiff at law, founded upon a libel, which imputes to him a criminal offence; and a justification is put in, affirming the charge; a Bill for a discovery may be filed against the defendant, to compel him to discover, whether the

her *v.* Corporation of Chippenham, 14 Ves. 245, 251, 255; *Oliver v. Haywood*, 1 Anst. R. 82, 83. In *Oliver v. Haywood* (1 Anst. R. 82), a Bill was brought by a Rector for tithes against the defendants, his parishioners, stating, that the right to take them in kind from the different defendants, accrued at different periods, and praying a discovery, whether the defendants have not combined together, to support one another against the plaintiff, as parson. On a demurrer to the discovery, Hotham, Baron, said; "Either the combination is criminal, or it is not. If it is, then the discovery cannot be granted, as subjecting the defendants to a penalty. If it is not criminal, then the discovery is useless and impertinent; and therefore the demurrer must on either ground be allowed."

¹ *Macaulay v. Shackell*, 1 Bligh R. (N. S.) 121, 122, 133, 134; S. C. 2 Russ. R. 550, note.

charge is true, or not; upon the ground, that when a party brings an action for a libel, he is bound to give the discovery, which the defendant at law insists upon, to sustain his defence.¹ This doctrine seems utterly inconsistent with the rule, that no man is bound to criminate himself.² And if it be true, in regard to defences to be made to actions at law, it must be equally true in regard to defences of a similar nature in Equity, which are sought to be supported by a cross Bill of discovery. Yet there is no question, that a demurrer would lie in the *latter cases to a discovery of any fact, subjecting [*457] the party to a criminal prosecution, or to a penalty or a forfeiture.³

→ § 598. Where a penalty or a forfeiture has at one time

¹ *Wilmot v. Maccabe*, 4 Sim. R. 263.

² *Chambers v. Thompson*, 4 Bro. Ch. R. 434; *Thorpe v. Macaulay*, 5 Madd. R. 218, 229.

³ *Honeywood v. Selwin*, 3 Atk. 276; *Southall v. —*, 1 Younge R. 308, 316. This subject has been already discussed in an antecedent note (Ante § 553, note 3); and I know no authority, which distinctly sustains the proposition, that the defendant is bound to make the discovery. The case of *Chambers v. Thompson* (4 Bro. Ch. R. 434), is a direct authority against it; and so is *Thorpe v. Macaulay* (5 Madd. R. 210). What fell from Lord Eldon in *Shackall v. Macaulay* (1 Bligh R. N. S. 96, 121, 122), can hardly be applied in a just sense to such a purpose. The language of Lord Eldon was mainly directed to the only question then before the Court, viz. whether a Court of Equity would grant a commission abroad to take testimony in aid of a defence to a civil action for a libel, which involved a charge of a criminal offence. The Court very properly held, that it would; for in such an action, it was only in aid of a civil right. In the recent case of *Glynn v. Houston* (1 Keen R. 329), which I had not seen, when the text was written, it was held by the Court, that, to a Bill of discovery, in aid of an action brought by the plaintiff for an assault and false imprisonment, a demurrer was good; because it was personal tort, and would subject the defendant to penal consequences. And where the whole object of a Bill of discovery is criminatory, a general demurrer will be good, notwithstanding some of the interrogatories, separately considered, may relate to matters not directly criminatory. *Ibid.*

attached to a particular act, of which a discovery is sought ; and the penalty or the forfeiture, either by lapse of time, or the death of the party, by or against whom it may be enforced, or otherwise, has ceased to attach to it, the objection to the discovery is thereby removed ; and the Bill is no longer demurrable.¹ Thus, for example, if the statute limitation of a penalty or a forfeiture has expired before the suit is brought, or pending the suit, before the discovery is given, the defendant is bound to answer ; for he is no longer within the reach of the perils, against which the protection is allowed.²

→ [*458] *§ 599. Eighthly ; Another objection, which may be taken by way of demurrer to a Bill of discovery, is, that it seeks the discovery of a fact from one, whose knowledge of the fact (as appears on the face of the Bill), was derived from the confidence reposed in him, as counsel, attorney, solicitor, or arbitrator.³ The privilege of secrecy, which is thus afforded to professional men, in regard to communications passing between them and their clients, is in truth not so much the privilege of the adviser, as of his client. And it is quite possible, that the client may be compellable to disclose the facts, when his professional adviser would be bound to withhold them,⁴ The privilege is founded upon a great public policy ; for otherwise, it might not only be hazardous,

¹ Hare on Discov. 147.

² *Parkhurst v. Lowten*, 1 Meriv. 400 ; *Corporation of Trinity House v. Burge*, 2 Sim. 411 ; *Williams v. Farrington*, 3 Bro. Ch. R. 38 ; *Anon.* 1 Vern. 60.

³ Mitf. Eq. Pl. by Jeremy, 288, and cases there cited ; Hare on Discov. 163 to 182 ; *Cooper Eq. Pl.* 295, 300 ; 2 Story Eq. Jurisp. § 1457.

⁴ *Preston v. Carr*, 1 Younge & Jerv. 175, 179 ; Hare on Discov. 174 175. This whole subject is discussed in a most elaborate manner by Lord Brougham, in *Greenough v. Gaskell* (1 Mylne & Keen, 100), where the distinction here noticed is adverted to. It may be further added, that though the client may be bound to disclose facts ; yet it does not follow,

but even ruinous to a client, to consult professional advisers, or to disclose to them the facts, which may be essential to the just support or defence of his rights, and of the suits, which may involve them.¹

that he is bound to disclose his own statements and communications made to his professional advisers. Lord Lyndhurst and Lord Brougham have held the contrary. *Greenough v. Gaspell*, 1 Mylne & K. 100. In this case, Lord Brougham said—"To compel a party himself to answer upon oath, even as to his belief, or his thoughts, is one thing. Nay, to compel him to disclose, what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified, if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel, or attorneys, or solicitors, to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of." Post § 825, note (1.) See also *Desborough v. Rawlins*, 3 Mylne & Craig, 815.

¹ *Greenough v. Gaskell*, 1 Mylne & K. 100 to 103; *Parkhurst v. Lowten*, 2 Swanst. R. 216; *Id.* 221, 222; *Richards v. Jackson*, 18 Ves. 472. Lord Brougham has stated this doctrine with great energy and clearness in *Greenough v. Gaskell* (1 Mylne & K. 103). "The foundation of this rule," said he, "is not difficult to discover. It is not (as has sometimes been said), on account of any particular importance, which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover, why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance. A man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt

§ 600. In regard to such professional privilege, it does not appear, that the protection is qualified by any reference to proceedings pending, or in contemplation. If counsel receive a communication in their professional capacity, touching matters that come within the ordinary scope of professional employment, either from a client, or on his account, and for his benefit, in the transaction of his business; or, which amounts to the same thing, if [*460] they *commit to paper, in the course of their employment on his behalf, matters, which they know only through their professional relation to the client; they are not only justified in withholding such matters, but they are bound to withhold them; and they will not be compelled to disclose the information, or to produce the papers in any Court of Law or Equity, either as a party, or as a witness. If this protection were confined to cases, where proceedings had been commenced, the rule would exclude the most confidential, and, it may be, the most important, of all communications,—those made with a view of being prepared, either for instituting, or for defending a suit, up to the instant, that the process of the Court was issued. If it were confined to proceedings begun, or in contemplation, then every communication would be unprotected, which a party

such precautions, as might eventually render any proceedings successful, or all proceedings superfluous.” The subject of the nature and extent of this professional privilege, was much discussed also in the case of *Desborough v. Rawlins*, 3 Mylne & Craig, 515, 519 to 525, by Lord Chancellor Cottenham. The same public policy governs in the case of arbitrators stated in the text; for, as on the one hand, Courts of Equity will not compel a resort to an arbitration; so, on the other hand, they will not disturb the decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon an allegation of fraud; for, *Interest Republicæ, ut sit finis litium*. See Anon. 3 Atk. 444; 2 Story on Eq. Jurisp. § 1457; Cooper Eq. Pl. 295, 300.

makes with a view to his general defence against attacks, which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would still be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally, than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, if it could be doubted, whether or not, an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw.¹

§ 601. There are exceptions, or rather cases, which *are apparently exceptions, but which are in re- [*461] ality excluded from the scope of the rule. Thus, the person, called as a witness, or made a defendant to a Bill, must have learned the matter in question only as counsel, or attorney, or solicitor, and not in any other way. If, therefore, he were a party to the transaction, and especially if he were a party to a fraud (and the case may be put of his becoming an informer, after being engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from the discovery; for in such a case, his knowledge would not be acquired solely by his being employed professionally.²

§ 602. The apparent exceptions are, where the com-

¹ *Greenough v. Gaskell*, 1 Mylne & K. 101 to 103; *Hare on Discov.* 163 to 166; *Id.* 175; *Desborough v. Rawlins*, 3 Mylne & Craig R. 515.

² *Ibid.*

munication was made, before the attorney was employed as such, or after his employment had ceased ; or, where, though consulted by a friend, because he was an attorney ; yet he refused to act as such ; and was therefore only applied to as a friend ; or, where there could not be said, in any correctness of speech, to be a communication at all ; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases) ; or, where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure ; or, where the thing disclosed had no reference to the professional employment, though disclosed, while the relation of attorney and client subsisted ; or, where the attorney made himself a subscribing [*462] *witness, and thereby assumed another character for the occasion ; and, adopting the duties, which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain, that the attorney is not called upon to disclose matters, which he can be said to have learned by communication with his client, or on his client's behalf ; or matters, which were so committed to him in his capacity of attorney ; or matters, which in that capacity alone he had come to know.¹

¹ Lord Brougham, in *Greenough v. Gaskell*, 1 Mylne & K. 104, 105 ; *Bolton v. Corporation of Liverpool*, 3 Sim. R. 467 ; S. C. 1 Mylne & K. 96 ; *Hare on Discov.* 172 to 182 ; *Desborough v. Rawlins*, 3 Mylne & Craig, 515. The objection equally applies, whether the party is called as a witness, to disclose the secrets of his client, or is made a party defendant to a Bill of discovery, in aid of a suit at law, or to a Bill for disco-

§ 603. Ninthly; Another objection, which may be taken by way of demurrer to a Bill of discovery, is, that the defendant has an equal equity with the plaintiff, and is therefore entitled to be protected from a discovery, which will endanger, or disturb, or destroy, his present rights. Therefore, if a defendant has in conscience a right equal to that claimed by a person, filing a Bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant *renders it improper for a Court of Equity to [*463] compel him to make any discovery, which may hazard his title. And, if the matter appears clearly on the face of the Bill, a demurrer will hold. The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim. Upon the same principle, a jointress may, in many cases, demur to a Bill, filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the Bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the Bill; although, ordinarily, advantage is taken of this defence by way of plea.¹

very and relief. In the latter cases, the Bill would ordinarily be demurrable on another account, viz. that the party is a mere witness, against whom there can be no decree. See Hare on Discov. 166 to 170; Ante § 519, § 570. The objection also is not confined to the statement of facts, but also to the discovery and production of documents confided professionally to the party, unless indeed they are such as his client might be compelled to produce. Hare on Discov. 171 to 182; *Kington v. Gale*, Rep. Temp. Finch. 259, 260; *Stanhope v. Nott*, 2 Swanst. 221, note (a); *Greenough v. Gaskell*, 1 Mylne & K. 99, 100; *Fenwick v. Reed*, 1 Meriv. R. 114, 124; *Preston v. Carr*, 1 Young & Jerv. 175; *Bolton v. Corporation of Liverpool*, 3 Sim. R. 467; S. C. 1 Mylne & K. 88; *Hughes v. Biddulph*, 4 Russ. R. 190; *Belwood v. Wetherell*, 1 Younge & Coll. 219.

¹ Mitf. Eq. Pl. by Jeremy, 199, 274, 288; Cooper Eq. Pl. 197, 207, 208, 284; *Jerrard v. Saunders*, 2 Ves. jr. 454; Hare on Discov. 89 to 104.

§ 604. It has been remarked, that this singularity in the jurisprudence of England is produced by the establishment of the extraordinary jurisdiction of Courts of Equity, distinct from the ordinary jurisdiction of Courts of law, which necessarily creates a distinction between legal rights and equitable rights.¹ Where the Courts of Equity are called upon to administer justice, upon grounds of Equity, against a legal title, they allow a superior strength to the legal title, when the rights of the parties are in conscience equal. And where a legal title may be enforced in a court of ordinary jurisdiction, to the prejudice of an equitable title, the Courts of Equity will refuse assistance to the legal against the equitable title, where the rights in conscience are equal.² However true this remark may be, as to the mode of administering and enforcing the rights of the parties in the Courts of Equity in England, the principle itself, upon which [*464] *those courts act, seems founded in the clearest dictates of universal justice, and is probably, therefore, to be found recognised in the actual jurisprudence of most civilized nations. It stands upon the maxim, that, where the Equity is equal, the party in possession shall prevail. *In æquali jure melior est conditio possidentis.*³

→ § 604. a. There never has been any well-founded doubt, as to the doctrine, in cases where the plaintiff sets up an equitable title against an equitable title or a legal title of the defendant, acquired by a *bonâ fide* purchase

¹ Mitf. Eq. Pl. by Jeremy, 199, 200; *Wortley v. Birkhead*, 2 Ves. 373, 374.

² *Ibid.*

³ 1 Story on Eq. Jurisp. § 57, a. p. 75; *Jones v. Powles*, 3 Mylne & Keen, 581; *Sugden on Vendors*, 10th edit. vol. iii. ch. 22, §§ 1, 2, 3, 4, 5, pp. 417, 418; *Id.* ch. 24, §§ 1, 2, 3, 4, pp. 488, 489; *Id.* § 17 to § 23. p. 494. p. 495.

without notice ; for in such a case, if the title of each party be equitable, the maxim must apply with its full force ; and if the title of the defendant be a legal title, equity ought not to deprive him of the protection of that title, as it is under such circumstances the superior title.¹ The point of doubt has been, whether the defence ought to apply to a case, where the plaintiff founds his Bill upon a legal title, seeking to support it by a discovery, and the defendant relies solely on an equitable title to protect himself from the discovery. Upon this point the authorities are at variance ; but upon principle it would seem difficult to resist the reasoning, by which the doctrine, that the purchaser is in such a case entitled to protection, is supported.²

→ § 605. These are the principal grounds of demurrer to Bills of discovery, upon which it seems necessary to comment in this place. If the objection appears upon the face of the Bill, it is proper, whether it applies to the whole of the Bill, or to particular discoveries only, that the objection, as far as it extends, should be taken by demurrer.³ If the objection does not appear upon the face of the Bill, it must (as we shall presently see) be taken by plea.⁴ And this distinction is the more important to be observed, because in many cases, if the objection is not so insisted on, it is in effect waived. For

¹ Sugden on Vendors, 10th edit. vol. iii. ch. 24, § 17 to § 22, pp. 494, 495, 496.

² Ibid. 1 Story on Eq. Jurisp. § 57 a, p. 75, and note. In the late case of *Collins v. Lambe* (1 Russ. & Mylne, 284), the Master of the Rolls held it no protection ; and in *Payne v. Compton*, 2 Younge & Coll. 457, Lord Abinger seems to have held, that it was. See also 2 Story Equity Jurisp. § 1502, § 1503, and notes ; Wigram on Discovery, 2d edit. § 135, p. 81, 82.

³ Mitf. Eq. Pl. by Jeremy, 107, 216. Post. § 607.

⁴ Mitf. Eq. Pl. by Jeremy, 14, 107, 218.

it is a general rule, subject to some exceptions, which will come more fully under consideration hereafter, that the defendant must answer fully all the allegations and charges in the Bill, and all the interrogatories founded upon and incidental to them, from which he does not specifically protect himself by way of demurrer or by way of plea, as the case may require.¹

→ [*465] *§ 606. Thus, if the matter relied on by the defendant constitute a defence to the relief or purpose sought by the Bill, whether that relief be at law or in Equity; or if the defence be, that the plaintiff has no title to equitable relief; or that the plaintiff has no interest in the subject-matter;² or that the defendant is a *bonâ*

¹ Hare on Discov. 247, 296, 297; Mitf. Eq. Pl. by Jeremy, 107, 108, 307, and note (h); Dodder v. Huntingfield, 11 Ves. 283; Methodist Epis. Church v. Jaques, 1 John. Ch. R. 65; Phillips v. Prevost, 4 John. Ch. R. 205; Somerville v. Mackay, 16 Ves. 382; Cooper Eq. Pl. 315, 316; Mazareddo v. Maitland, 3 Madd. 71, 72, and note (b); — v. Harrison, 4 Mad. R. 252; Post § 607, § 609. The language of Ld. Redesdale on this subject, is somewhat obscure and involved. He says; "If the grounds, on which a defendant might demur to a particular discovery, appear clearly on the face of the Bill, and the defendant does not demur to the discovery, but, answering the rest of the Bill, declines answering to so much, the Court will not compel him to make the discovery. But, in general, unless it appears clearly by the Bill, that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant, unless he can protect himself by plea, must answer." Mitf. Eq. Pl. by Jeremy, 200. Although Lord Redesdale, in the first sentence, is manifestly referring to cases of a particular discovery sought by the Bill; yet even this requires some qualifications, for there are many cases, in which a defendant, answering in part, will be compelled to answer a particular discovery which he might, by demurrer or by plea, have objected to. This is, indeed, sufficiently apparent from the succeeding sentence of Lord Redesdale. The true exposition of this whole passage is probably the fact, that at the time, when it was written, the doctrine on this subject was in a very unsettled state. See Hare on Discov. 247 to 255.

² In Mazareddo v. Maitland (3 Madd. R. 72), the Vice Chancellor (Sir John Leach), decided, "that a defendant cannot, by answer, deny the

fide purchaser for a valuable consideration without notice;¹ or that the Bill does not declare a purpose, for which Courts of Equity will compel a discovery; or that the plaintiff is under some disability; in these and the like cases, though the defence extends to the entire subject of the suit, it seems now settled, that the objection must be taken by way of plea or demurrer; for if the defendant submits to answer, he must answer fully.²

plaintiff's title, and refuse to answer as to facts, which may be useful in support of that title. He cannot answer in part. If he answers at all, he must answer the whole Bill." Mr. Hare deems this distinction of great practical importance. Hare on Discov. 251.

¹ Ovey v. Leighton, 2 Sim. & Stu. 235; Portarlington v. Soulby, 7 Sim. R. 28.

² Hare on Discov. 255 to 262. See also Dolder v. Huntingfield, 11 Ves. 283; Shaw v. Ching, 11 Ves. 303; Faulder v. Stuart, 11 Ves. 296; Post § 846, § 847; Rowe v. Teed, 15 Ves. 376, 377, 378. The whole subject is elaborately examined, and the cases collected in Mr. Hare's work on Discovery, p. 247 to p. 298. There has been no small diversity of opinion among the learned Chancery judges upon this subject, and Mr. Hare has given an historical review of the cases. The doctrine asserted in the text is, however, that, which seems, on the whole, to be settled in England by the weight of authority, though not beyond all doubt. Mr. Chancellor Kent has also reviewed the principal authorities in the case of *The Methodist Episcopal Church v. Jaques*, 1 John. Ch. R. 65; and in the case of *Philips v. Provost*, 4 John. Ch. R. 205. He arrived at a conclusion not quite coincident with the text; for, while he admits the general rule, he seems to insist, that it is subject to exceptions and modifications according to the circumstances of the case. And he states as one exception, where the defendant objects by answer to a discovery, because the plaintiff has no title; and also as another exception, the case of a defendant disclaiming all interest in the subject-matter of the controversy. This last case seems justified by what is said by Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 188, 283, 318). And Mr. Hare admits, that, in cases of a disclaimer of interest, and that the defendant is a mere witness, and in cases of a purchaser for a valuable consideration without notice, there is a great conflict in the authorities. Hare on Discov. 256 to 262. In the late case of *Ovey v. Leighton*, 2 Sim. & Stu. 234, the Vice Chancellor held, that if a purchaser without notice, answers at all, he must answer fully. The same point was decided in the still more recent case of *Portarlington v. Soulby*, 7 Sim. R. 28. See also the cases in 1 John. Ch. R. 65, and 4 John. Ch. 205. The rule,

→ § 607. The rule, however, is, as has been already suggested,¹ subject to some uncontroverted exceptions;

that, where a defendant answers at all, he must answer fully, does not prevail in the Court of Exchequer; but only in the Court of Chancery; founded (as it should seem) upon the difference in the practice of these Courts as to the mode of disposing of exceptions to answers for this supposed defect. In the Court of Chancery the exceptions are referred to a Master; in the Court of Exchequer they are not. See Hare on Discovery, 247, 248; *Id.* 250, 257, note (v); *Id.* 298, to 391. In *Rowe v. Teed*, 15 Ves. 377, Lord Eldon expounded, at some length, the grounds of the difference. "The question is," said he, "whether this is an answer, bringing forward such one short fact, or such a series of circumstances, establishing, in the result, one fact, that would be an answer to the prayer of discovery and relief; and therefore, whether this is a case, in which the Court should decide that point, which has been long the subject of litigation: to what extent a defendant is bound to answer, who has averred a circumstance, which, if truly averred in another form, and sufficiently proved, would be an answer to the whole prayer for discovery and relief. I repeat, that I should not shrink from the decision of that question, if it was fairly before me; and I should be relieved from the apprehension of an erroneous judgment by the reflection, that it is much better, that there should be a decision, than that such a point should remain in uncertainty. It is not my purpose, on this occasion, to repeat all, that is to be found upon this subject in the late cases. But I must repeat, that whenever this question comes to a decision, it will be infinitely better to decide, that in this Court the objection should be made by plea, rather than by answer. In the Court of Exchequer, exceptions come before the Court in the first instance. That is not the course here. The office of a plea, generally, is, not to deny the Equity; but to bring forward a fact, which, if true, displaces it: not a single averment, as the averment in this answer, that no bill of sale was executed; but perhaps a series of circumstances, forming, in their combined result, some one fact, which displaces the Equity. There is this difference between Law and Equity; that here, for the sake of convenience, that is, of justice, the denial of some fact alleged by the Bill, in some instances, with certain averments, has been considered sufficient to constitute a good plea; though not perhaps precisely within the definition of good pleading at law. If each case is to be considered upon its own circumstances, it is desirable, that this point should be brought before the Court by plea, rather than by answer; as an answer *prima facie* admits, that the defendant cannot plead. And, with the exception of the cases, in which it is settled, as general law, that the party is not to answer a particular circumstance, as, that he is not to criminate himself, the case of a purchaser for a valuable

¹ Ante § 605.

among which may be stated to be the objection, that the discovery would make the defendant liable to a penalty or a forfeiture, or have a tendency thereto;¹ or would compel him to criminate himself; or would involve him in a breach of professional confidence as counsel, solicitor, or attorney; or, that the discovery would be immaterial; or that it will compel him to discover matters not applicable to the plaintiff's title, but *solely applicable to his own title.² Some of [*468] these exceptions will again come under review in the subsequent pages.³

→ § 608. It has been remarked by Lord Redesdale, that not only is a demurrer the proper mode of taking such an objection;⁴ but he has added in another place, that after a demurrer has been overruled, a new defence may be made by a demurrer less extended, or by a plea, or by an answer; and that, after a plea has been overruled, a new defence may be made by a demurrer, by a new plea, or by an answer; and the proceedings upon the new defence will be the same, as if it had been

consideration, &c., this Court does not trust the Master, generally, with the determination, how much of the answer considered as a plea, would be a good defence. The Master is, therefore, almost under a necessity of admitting an exception; and, when the propriety of his judgment comes to be argued here, it would be most incongruous, that the Court, admitting his judgment not to be wrong, should yet give a different judgment, considering the answer as a plea." See also *Somerville v. Mackay*, 16 Ves. 387; *Leonard v. Leonard*, 1 B. & Beatt. R. 324, 325.

¹ If the defendant in an answer means to avail himself of the objection, that his answer to a particular matter of discovery will expose him to a penalty or forfeiture, he must in his answer specially set up that objection. *Slowman v. Kelly*, 3 Younge & Coll. 673; Post § 846.

² *Hare on Discov.* 262, 264, 266 to 278; *Id.* 290; *Id.* 149; *Parkhurst v. Lowten*, 1 Meriv. R. 401. See also *Philips v. Provost*, 4 John. Ch. R. 205, and cases there cited; *Rowe v. Teed*, 15 Ves. 376 to 379; *Leonard v. Leonard*, 1 B. & Beatt. 324, 326.

³ Post. § 824, § 825.

⁴ *Mif. Eq. Pl. by Jeremy*, 14, 16, 107, 218.

originally made.¹ And it has also been said, that where a demurrer is overruled, that does not deprive the party of his Equity ; for the same thing may be insisted on in [*469] his *answer.² These propositions require qualification ; for, however true in general they may be in regard to Bills of relief, we should be misled in applying them to Bills of discovery.³ In the cases of Bills of relief, to which the general rule extends, that he, who submits to answer, must answer fully, the overruling of a demurrer or of a plea, though it is not conclusive upon the title to relief, is conclusive upon the question of discovery ; for it amounts to a decision, that the matter is proper for a judicial inquiry, and the defendant can no longer refuse to the plaintiff the means of prosecuting that inquiry.⁴

¹ Lord Redesdale's language (Mitf. Eq. Pl. by Jeremy, p. 16) is as follows ; " If a demurrer or plea is overruled upon argument, the defendant must make a new defence. This he cannot do by a second demurrer of the same extent, after one demurrer has been overruled ; for although, by a standing order of the Court, a cause of demurrer must be set forth in the pleading, yet, if that is overruled, any other cause appearing on the Bill, may be offered on argument of the demurrer, and, if valid, will be allowed ; the rule of the Court affecting only the costs. But after a demurrer has been overruled, a new defence may be made by a demurrer less extended, or by plea, or answer ; and after a plea has been overruled, defence may be made by demurrer, by a new plea, or by an answer ; and the proceedings upon the new defence will be the same, as if it had been originally made." In *Finch v. Finch*, 2 Ves. 492, Lord Hardwicke is also reported to have said ; " It is not like a second demurrer on discovery, or a second plea, which cannot be put in a second time, if overruled ; yet, notwithstanding, the Court frequently allows the defendant, after a plea has been overruled, to insist upon the same matter by answer, which was overruled as a plea." See also Hare on Discov. 289, 293 ; Mitf. Eq. Pl. by Jeremy, 216, 217 and note (x) ; Ante § 460.

² *Bishop of Sodor and Man v. Derby*, 2 Ves. 357 ; *Attorney General v. Brown*, 1 Swanst. R. 304, and note.

³ Hare on Discovery, 289, 290.

⁴ *Ibid.* 290. Although this is the general rule ; yet the Court, upon overruling a demurrer to a Bill of discovery, will by its discretion, in a fit

→ § 609. The foregoing remarks have been principally addressed to cases, where the objection to a discovery applies to the entire claim of the plaintiff. But they are equally applicable to cases, where the objection applies only to special and particular discoveries sought by the Bill. In the latter case, equally as in the former, the defendant, if he means to make any objection to the discovery, must do so by a demurrer, or by a plea; for the same general rule, subject to the exceptions already stated, governs, that the defendant, if he answers at all, must answer fully.¹

→ § 610. Before closing this head of demurrers to Bills

case, give leave to the defendant to insist by way of answer, that he is not bound to make the discovery required, or will give him liberty to file another demurrer less extensive. Mitf. Eq. Pl. by Jeremy, 217, and note (x); *Baker v. Mellish*, 11 Ves. 68; *Thorp v. Macauley*, 5 Madd. R. 218; *Earl of Suffolk v. Green*, 1 Atk. 450; *Hare on Discov.* 290, 293, 294; *Portarlington v. Soulby*, 6 Sim. 356; Ante § 460. Mr. Hare has added an important qualification to the language of the text. "Upon the *special objections* to discovery," says he, "the overruling a demurrer or plea, whether general, or of partial extent, is not decisive. The effect of the decision against the demurrer or plea, with regard to such objections, is, that they cannot be taken by a second demurrer or plea without the leave of the Court. But they may still be taken by answer, as they might have been, if no previous defence had been attempted." *Hare on Discovery*, 290, 293, 295. Lord Eldon, in *Baker v. Mellish*, 11 Ves. 73, used the following language on the same point; "As to particular questions upon this record, the defendant should not be called upon to answer; for he is put precisely in the same situation, as if he had answered; and, notwithstanding a demurrer to the whole Bill overruled, the defendant may object to answer a question, if it is not lawful to ask it; and may by answer protect himself from answering such a question. But, whether he should be in that situation, is a very different consideration; for if he says, he is not bound to answer, the plaintiff may immediately contest with him, whether he has sufficiently answered. But he is not in that state, if at liberty to demur again, until that demurrer is disposed of; and then the question as to the sufficiency of the answer upon the other points is to commence. Finding this question not settled by decision, and *dicta* both ways, the best opinion I can form is, that the defendant, having demurred to the whole Bill, shall not demur to a part without leave."

¹ *Hare on Discovery*, 127, 128, 129, 130, 255, 256, 262.

of discovery, it is proper to add, that, where the sole object of a Bill is to obtain a discovery, some grounds of demurrer, which, if the Bill prayed for relief, would extend to discovery, as well as to the relief, will not hold.¹ Thus, a demurrer to a Bill for a discovery merely will not hold for want of parties; for the plaintiff seeks no decree; nor, in general, for want of Equity in the plaintiff's case, for the same reason; nor, because the Bill is brought for the discovery of part of a matter; for that is merely a demurrer, because the discovery would be insufficient.² But it should seem, that a demurrer would hold to a Bill for discovery of several distinct matters against several distinct defendants.³ For, though a defendant is always eventually paid his costs upon a Bill of discovery, if both parties live, and the plaintiff, by an amendment of his Bill, does not extend it to pray relief; [*471] yet the Court ought not to permit the defendant to be put to any unnecessary expense, as either the plaintiff or the defendant may die pending the suit.⁴

§ 610. *a.* We have already had occasion to state, that in a Bill of discovery, in aid of an action or defence at law, no person should be made a party to the Bill, although he has a substantial interest in the action or defence at law, who is not a party of record in the action; if he should be, the Bill will be demurrable.⁵

¹ Mitf. Eq. Pl. by Jeremy, 200, 201; Hare on Discov. 124, 125, 126; Post § 745. It was said by Lord Chancellor Eldon, in *Cholmondeley v. Clinton*, 2 Meriv. R. 74, that there is no instance of a Bill of discovery merely being allowed to be amended by adding new parties as plaintiffs; and he added, that he would not make a precedent, for which there was no foundation in the principles or practice of the Court. It is to be understood, however, that his Lordship was here speaking of a Bill of discovery in aid of an action at law, where the persons, sought to be made parties, were not plaintiffs in the suit at law. See *S. P. Glyn v. Soares*, 3 Mylne & K. 450; Ante § 541.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ante § 226, § 541, § 544; *Glyn v. Soares*, 3 Mylne & Keen, 450; *Irving v. Thompson*, 9 Simons R. 17, 29.

CHAPTER XII.

DEMURRERS TO BILLS NOT ORIGINAL.

§ 611. HITHERTO our attention has been limited to the consideration of demurrers to original Bills, either of relief or of discovery only. It is proper, therefore, to add a few words in regard to demurrers to Bills not original. As every other kind of Bill is a consequence of an original Bill, many of the causes of demurrer, which will apply to an original Bill, will also apply to any other kind of Bill.¹ But the peculiar form and object of each kind of Bill afford distinct causes of demurrer to each; and upon these we shall accordingly proceed to make some remarks.

§ 612. And, first, in regard to demurrers to supplemental Bills, and to Bills in the nature of supplemental Bills. A demurrer to a supplemental Bill, or to a Bill in the nature of a supplemental Bill, may be filed, whenever it appears upon the face of the supplemental Bill, that the plaintiff has no right to file that species of Bill, either from want of title, or from mistake in pleading.² Thus, in general, if a Bill is filed by a tenant in tail, who dies, the issue in tail, or the remainder-man in tail, claiming under a new limitation, will be entitled to the benefit of the proceedings had in the suit of the first tenant in tail, by merely filing a supplemental Bill.³ But where a subsequent remainder-man in tail files such a

¹ Mitf. Eq. Pl. by Jeremy, 201; Cooper Eq. Pl. 210.

² Cooper Eq. Pl. 212. 213.

³ Ibid.

Bill, if it appears, that the suit by the first tenant in tail was founded upon a contract made by him, and was not, in respect of charges, created by the donor; or, if there is any particular difference in the interests derived from the *donum*, out of which both estates tail are carved; or, if there are any other special circumstances, under which the estate is held, existing in the case, the subsequent remainder-man in tail will not be permitted to file such a Bill.¹ The case is still stronger against holding such Bill to be sufficient, if the new remainder-man in tail happens to be the defendant, instead of the plaintiff in the suit, and has any special facts to state in addition to, or different from those, which constituted the former defence. In such cases, more especially, the Court will not give to a supplemental Bill the effect of binding him by the shape of the defence already made.²

§ 613. But except in special cases of this sort, a supplemental Bill is maintainable by persons standing in priority of title with the original plaintiff. Therefore, where a decree, on the suit of a feme covert by her next friend against her husband and trustees, had declared a right to a settlement by the husband on her and her children; and the wife died before the Master could make his report; a supplemental Bill being filed by the children to have a provision made for them, the defendants demurred, both on the form, and on the want of merits. But the Court decreed the right of the children to the provision sought; and thought, that if they had such right by the judgment in the former suit, it being subsequent to the institution of the proceeding in that suit, they might maintain a supplemental Bill; and therefore overruled the demurrer.³

¹ Cooper Eq. Pl. 212, 213; Id. 75, 76.

² Cooper Eq. Pl. 213, 214; Id. 74. Such a Bill, though called in *Murray v. Elibank* (10 Ves. 83), a supplemental Bill, is, properly speaking, an original Bill in the nature of a supplemental Bill. See *Ante* § 345.

³ *Ibid.*

§ 614. It is a general rule, that the Court will not permit a supplemental Bill to be filed except upon new matter ; because the same end can generally be answered by an amendment of the original Bill.¹ If, therefore, a supplemental is brought upon matter, arising before the filing of the original Bill, where the suit is in that stage of the proceedings, in which an amendment will be allowed, the defendant may demur.² And even if a supplemental Bill, upon matter arising subsequent to the filing of the original Bill, is brought against a person, who was not a party to the original Bill, and who claims no interest arising out of the matters in litigation in it, the defendant to the supplemental Bill may also demur; especially, if the supplemental Bill prays, that he may answer the matters charged in the original Bill.³ So, if a supplemental Bill is brought against a person not a party to the original Bill, praying, that he may answer the original Bill, and no reason is assigned, why he could not be made a party to the original Bill by amendment, he may demur.⁴ These, however, are grounds of demurrer, arising rather from the plaintiff's having mistaken his remedy, than from his being without one.⁵

§ 615. Upon another, and a distinct ground, if new facts or events shall have arisen subsequently to the filing of the original Bill, but those new matters are immaterial to the relief sought under the original Bill, or are such, as may come before the Master under the proper decretal order in the original cause, a demurrer will lie. For if the new facts or events are not material, they are irrelevant ; and if material, and yet they are now pro-

¹ Cooper Eq. Pl. 214 ; Mitf. Eq. Pl. by Jeremy, 202, 203, 207 ; *Usborne v. Baker*, 2 Madd. 387 ; *Baldwin v. Mackown*, 3 Atk. 817 ; *Stafford v. Harlett*, 1 Paige R. 200 ; *Colclough v. Evans*, 4 Sim. R. 76.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

perly within the reach of the Court, or before the Master under the original cause, there is no ground, why the record should be incumbered with superfluous matter.¹

§ 616. Another distinct ground of demurrer is, that the Bill is not properly supplemental; but that it seeks to make a new and different case from the original Bill, upon new matter; for that, in a proper stage of the cause, might be the fit subject of an amendment; or, at all events, of an original Bill.² Therefore, if the purpose, for which a supplemental Bill is brought, is not properly supplemental to the matters already in litigation between the parties to the original Bill, and in respect to which the relief is sought, a demurrer will lie. Thus, where a Bill was brought against the surviving executors, to have the testator's estate administered according to the trusts of the will; and impeaching certain accounts settled between the defendants and a deceased co-executor; and the plaintiff, without making the representative of the deceased executor a party, went on to a hearing; and a decree was made at the hearing, restricting the account to the receipts of the defendants, and directing, that the account settled with the deceased executor should not be disturbed; and afterwards the plaintiff filed a Bill, purporting to be a supplemental Bill, bringing before the Court the representative of the deceased

¹ *Adams v. Dowding*, 2 Madd. R. 53; *Milver v. Harewood*, 17 Ves. 144; Mitf. Eq. Pl. by Jeremy, 63, note (o); *Ib.* 202, note (q); *Hare on Discov.* 158.

² *Colclough v. Evans*, 4 Sim. R. 76; *Dias v. Merle*, 4 Paige R. 259. It is proper here to remark, that the case, put in the text, is, where the matter is not properly supplemental. For, if the plaintiff, when his cause is in such a state, that he cannot amend his Bill, discovers new matter, which may tend to vary the relief prayed, or to show, that the plaintiff is entitled to the relief prayed, by the original Bill, that is properly the subject of a supplemental Bill. Ante § 336, § 337. *Crompton v. Wounbwell*, 4 Sim. R. 628.

executor, and also the assignees of one of the surviving executors, who had become a bankrupt; and praying, that the accounts and inquiries, directed by the former decree, might be prosecuted, and that an account might be taken of the receipts of the deceased executor; upon a demurrer by the assignees, it was held, that the supplemental was not sustainable; because, though supplemental to the rest of the defendants, it was an original Bill, so far as regarded the representative of the deceased executor. There was nothing at all properly supplemental in its nature, or in aid of what had been already done by the Court. But on the contrary, the former decree of the Court excluded this very account of the deceased executor.¹

§ 617. Secondly. Demurrers to Bills of revivor, and to Bills in the nature of Bills of revivor. If a Bill of revivor, or a Bill in the nature of a Bill of revivor, does not show a sufficient ground for reviving the suit, or any part of it, either by or against the person, by or against whom it is brought, the defendant may, by demurrer, show cause against the revival.² Indeed, though the defendant does not demur; yet, if the plaintiff does not show a title to revive, he will take nothing by his suit at the hearing.³ A demurrer to a Bill of revivor, or to a Bill in the nature of a Bill of revivor, may be either for want

¹ *Wilson v. Todd*, 1 Mylne & Craig, 42. See also *Colclough v. Evans*, 4 Sim. R. 76.

² Mitf. Eq. Pl. by Jeremy, 201, 202.

³ Mitf. Eq. Pl. by Jeremy, 202, 289, 290. In all cases, where the defendant means to object to the Bill of revivor, he ought to do so by demurrer; for, in many cases, if he does not object, but answers, it will be a waiver of the objection, and amount to an admission, that it is a good Bill of revivor. *Nanny v. Totty*, 11 Price R. 117, 121. See 1 Mont. Eq. Pl. 324; Mitf. Eq. Pl. by Jeremy, 289; *Harris v. Pollard*, 3 P. Will. 348; S. C. 2 Eq. Abridg. 2.

of privity, or for want of sufficient interest in the party, seeking to revive, or for some imperfection in the frame of the Bill.¹

§ 618. First; for want of privity. We have already had occasion to consider, in what cases a Bill of revivor, technically so called, may lie; and it was then stated, that it is confined to cases of representation of the party deceased by the mere appointment and operation of law.² Thus, the executor or administrator alone is the party by or against whom, a Bill of revivor, technically so called, will lie as to matters touching the personalty of the deceased; and by or against the heir at law of the deceased as to matters touching the realty.³ This is properly a privity by operation of law. On the other hand, there may be a privity of right and title under the deceased, by a transfer or conveyance of that right and title to a person, who is not in by mere operation of law, and is not the personal or real representative of the deceased. In such a case, a Bill of revivor will not lie by or against such person; but a Bill in the nature of a Bill of revivor will.⁴ In each of these cases, if the appropriate Bill is not brought by the party, seeking to revive, a demurrer will lie.

§ 619. Thus, if an administrator *de bonis non* should seek, by a pure Bill of revivor, to revive a decree, obtained by a former administrator, a demurrer would lie; for the administrator *de bonis non* comes not in in privity with the former administrator, who obtained the decree; but paramount to him, and purely as the representative

¹ Cooper Eq. Pl. 210.

² Ante § 364, § 377.

³ Ante § 364, § 377, § 379.

⁴ Ante § 377, § 378, § 379, § 380.

of the intestate.¹ So, if a Bill of revivor should be filed by or against the assignees of a bankrupt or an insolvent, or the committee of a lunatic's estate, or a purchaser, or a devisee of the estate in question, a demurrer would lie for the want of the proper right of representation in such a Bill.² Other examples, to which the same principles apply, have been already mentioned; and they need not be here repeated.³

§ 620. Secondly; for want of interest. We have already seen, that, ordinarily, a Bill of revivor will not lie for costs merely, unless such costs have been taxed, and a report made in the lifetime of the party, who is to pay them.⁴ If, therefore, a Bill of revivor should be brought in a case, where the suit is not according to the practice of the Court entitled to be revived, it would be demurrable.⁵

§ 621. Ordinarily, also, a defendant is not entitled to a Bill of revivor, unless, indeed, he has an interest in the further proceedings; or can derive a benefit from them; as, for example, after a decree to account; or after a verdict on an issue of legitimacy directed in the cause; for, in such cases, the benefit of the revivor to him is manifest.⁶ But, where the proceedings have not gone to any decree, but merely to decretal orders; and the defendant has no other interest in the farther prosecution of the suit, than merely to dissolve an injunction obtained under an interlocutory order, and to proceed at law; a demurrer

¹ Cooper Eq. Pl. 64, 76, 210, 211; Ante § 382.

² Cooper Eq. Pl. 211; Ante § 377 to § 386; Post § 626.

³ Ante § 354, § 364 to § 386.

⁴ Ante § 371; Cooper Eq. Pl. 211, 212; Mitf. Eq. Pl. by Jeremy, 202, and cases there cited.

⁵ Ibid.

⁶ Cooper Eq. Pl. 68, 69, 212; Williams v. Cooke, 10 Ves. 406; Horwood v. Schmides, 12 Ves. 311; Ante § 372.

will lie ; for he has no interest in the further proceedings ; and he has another remedy to put an end to the suit in Equity, and to dissolve the injunction.¹

§ 622. Thirdly ; for some imperfection in the frame of the Bill. Thus, if the proper parties are not made to the Bill of revivor, it is demurrable.² As, if there is a suit by tenants in common, and one of them dies, the representative of the deceased tenant in common cannot exhibit a Bill of revivor, without making the surviving tenant in common a party to the Bill, either as a co-plaintiff, or as a co-defendant.³

§ 623. So, upon a Bill of discovery, if the defendant has answered, and the suit afterwards abates by his death, a Bill of revivor will not lie ; for the object of the Bill has been already obtained ; and the plaintiff has no further interest to revive it.⁴

§ 624. But a demurrer will not lie to a Bill of revivor for want of a party, who was not before the Court at the time of the abatement of the suit by the death of a person, who was then a party, although the suit might have been imperfect without such new party ; for it is not the office of a demurrer to a Bill of revivor to correct such an imperfection ; but merely to put the cause in the same plight and condition, in which it was at the time of the abatement.⁵

¹ Cooper Eq. Pl. 212 ; *Horwood v. Schmedes*, 12 Ves. 311, 316, 317. It seems, that the proper remedy would be by motion or petition, that the executors or administrators might revive the suit, or that the injunction might be dissolved. See *Horwood v. Schmedes*, 12 Ves. 315, 316. See *Troward v. Bingham*, 4 Sim. R. 483.

² *Fellowes v. Williamson*, 11 Ves. 306 ; Cooper Eq. Pl. 212 ; Ante § 358.

³ *Ibid.*

⁴ *Gould v. Barnes*, 1 Dick. 133 ; 1 Mont. Eq. Pl. 309 ; 2 Mont. Eq. Pl. 510, not (21.)

⁵ *Metcalf v. Metcalf*, 1 Keen R. 74. It seems that the proper Bill would have been a Bill of revivor and supplement. *Metcalf v. Metcalf*, 1 Keen R. 80 ; Ante § 387 ; *Pendleton v. Fay*, 3 Paige R. 204.

§ 625. Upon the same ground of imperfection in the frame of the Bill, if the material facts to support the revivor are not stated, the Bill will be demurrable.¹ Thus, if an executor, seeking to revive, should not state in his Bill, that he has proved the will in the proper Ecclesiastical Court ; or if a person, seeking to revive as administrator, should not state, that he has taken out administration ; the Bill would be demurrable.²

§ 626. A Bill of revivor should also set forth so much of the original Bill, as will show, that the plaintiff has a right to revive the suit, and that the defendants are the proper parties, against whom the revival is to be.³ Therefore, if it should appear, that the plaintiff is not the proper person to revive, or that the defendant is not the proper party, against whom it should be revived, because he is not in the chain of representation, a demurrer will lie.⁴

¹ Cooper Eq. Pl. 212; *Phelps v. Sproule*, 4 Sim. R. 318.

² *Humphreys v. Ingledon*, 1 P. Will. 753; S. C. 1 Dick. R. 38; *Stone v. Baker*, cited in note to 1 P. Will. 753; Cooper Eq. Pl. 212.

³ *Phelps v. Sproule*, 4 Sim. R. 318; Ante § 374, § 386; *Harrison v. Ridley*, Com. R. 590; S. C. 2 Eq. Abridg. 2.

⁴ *Phelps v. Sproule*, 4 Sim. R. 318. See also 2 Eq. Abridg. 2 pl. 5, in margin. Matters of scandal and impertinence are not generally subjects of demurrer; but of reference to a Master to ascertain the fact. Ante § 206; Cooper Eq. Pl. 19; Mitf. Eq. Pl. by Jeremy, 48; Gilb. For. Rom. 91. Gilbert, in his *Forum Roman.* p. 209, 210, has made some remarks upon the proper frame of a Bill of revivor, which may well be cited in this place. After having remarked, that impertinences are, where the records of the Court are stuffed with long recitals, he adds:—"As where a man brings a Bill of revivor, grounded upon an original Bill and proceedings, he needs to set forth no more thereof, and the best draftsmen in the age have in that case gone no further than thus, viz. 'That your orator in or about such a time, exhibited his original Bill of complaint in this honorable Court, to be relieved touching certain matters and things therein contained, as by the said Bill duly filed, and remaining of record in this honorable Court, appears (and carry it no further); that the defendant on such a day put in his answer, as by the said answer remaining

§ 627. Thirdly ; Demurrers to Bills in the nature of Bills of revivor and supplement. Upon this part of the subject, little need be said, since they are liable to objections of the same sort, as may be made to the kinds of original Bills, of whose nature they partake.¹ What has already been said on the subject in a preceding page will be sufficient to show the proper frame and character of such Bills ; and at the same time to point out the defects, for which a demurrer will properly lie.²

§ 628. Fourthly ; Demurrers to cross Bills. A cross Bill having nothing in its nature different from an original Bill, with respect to which demurrers in general have been already considered, except that it is occasioned by a former Bill, there seems to be no cause of

of record appears, that witnesses being examined, publication passed, and the cause being at issue, came on to be heard on such a day, when it was ordered and decreed, so and so.' And here are taken in the words of the ordering part of the decree very shortly, and no more than what is material to the revivor ; and the register's recital of the Bill and answer is wholly omitted, as being altogether foreign to the matter of the revivor. And if this should be in the Bill of revivor, it would be impertinent to the highest degree ; because when a decree is enrolled, it is never done from the register's recitals, which are very often mistaken, and in no case regarded. For, notwithstanding these recitals, the Bill and answer must be always read, if any dispute arises thereon. And it is from the original Bill and answer upon record, that every decree is enrolled, and not from the register's recital in the decree, which in no case is regarded. Or if, this short method is not pursued by the drawer of the Bill of revivor ; yet he must take care, that in the recital of the former proceedings, he does them in the shortest manner possible (the shorter the better), since they can be of no use to his client ; for the records of the Court are the same, whether truly or falsely recited, and from them alone the fact must be determined. But if they are set forth in *hæc verba*, they are highly impertinent, and will be found so, and must be expunged with costs ; for all the defendant hath to do by answer to the Bill of revivor is, only to set forth, that he believes there was such a suit, decree, and proceedings, and refer to the records."

¹ Mitf. Eq. Pl. by Jeremy, 206 ; Cooper Eq. Pl. 214, 215.

² Ante § 387.

demurrer to such a Bill, which will not equally hold to an original Bill.¹ But the converse of this proposition is not universally true. Thus, for example, a demurrer for want of Equity will not hold to a cross Bill, filed by a defendant in a suit against the plaintiff in the same suit, touching the same matter. For, being drawn into the Court by the plaintiff in the original Bill, he may avail himself of the assistance of the Court, without being put to show a ground of Equity to support its jurisdiction ; as a cross Bill is generally considered as a matter of defence.²

§ 629. But wherever the cross Bill seeks relief, it is indispensable, that it should be equitable relief, otherwise it will be demurrable ; for to this extent it is not (as we have seen), a pure cross Bill ; but it is in the nature of an original Bill, seeking the farther aid of the Court, beyond the purposes of defence to the original Bill ; and under such circumstances, the relief should be such as in point of jurisdiction the Court is competent to administer.³

¹ Ante § 389 to § 400 ; Ante § 466 to § 544.

² Mitf. Eq. Pl. by Jeremy, 203 ; Cooper Eq. Pl. 81, 215 ; Ante § 398, § 399 ; *Doble v. Potman*, Hard. R. 160 ; *Burgess v. Wheate*, 1 W. Black. 132 ; 1 Mont. Eq. Pl. 328 ; 2 Mont. Eq. Pl. 561, note (69). Even a cross Bill for equitable relief would not seem to be in all cases maintainable. Thus, in *Hilton v. Barrow* (1 Ves. jr. 284), where a Bill was filed by the vendor against the vendee, for the specific performance of a contract for the purchase of real estate ; and the vendee, by his answer, insisted, that the vendor could not make a good title ; and also filed a cross Bill for the delivering up of the contract ; it was held by Lord Loughborough, that the cross Bill, insisting solely upon the ground of a want of title in the vendor, and not upon any fraud, was not entitled to maintain such a cross Bill ; for if there was no title in the vendor, he could never enforce the contract at law. But it may admit of question, whether, notwithstanding, the vendee was not entitled to the relief, since he might be harassed with subsequent suits at law on the contract. See 2 Story on Equity Jurisp. § 694 ; Mitf. Eq. Pl. by Jeremy, 81, note (y).

³ Ante § 398 ; Cooper Eq. Pl. 86, 215 ; *Calverley v. Williams*, 1 Ves. jr. 213.

§ 630. A cross Bill, when it seeks relief, which is of an equitable nature, should also contain all the proper allegations, which confer an equitable title to such relief upon the party ; for, otherwise, it will be open to a demurrer.¹ Thus, if an original Bill should be brought to enforce a security ; and the defendant should file a cross Bill to have the security given up, upon the ground that it is an usurious security ; if the cross Bill should not contain an offer to pay the sum really due, a demurrer would be allowed.²

§ 631. A cross Bill being, as has been already said, a matter of defence, is confined to the matters in litigation in the original suit. And, therefore, if it seeks to bring before the Court other distinct matters and rights, it is no longer entitled to be deemed a cross Bill, but is an original suit. Without such a restriction, new matters might be introduced into litigation by cross suits, without end.³ If, therefore, such a Bill should be filed, affecting to be a mere cross Bill, but containing other distinct and independent matters, it would seem to be open to a demurrer for this cause. And, at all events, no decree, founded on such matters, would be made upon the hearing of the original cause.⁴

§ 632. A cross Bill also will be open to a demurrer, if it is filed contrary to the practice of the Court, and under circumstances, in which a pure cross Bill is not allowed.⁵ Thus, for example, if it is filed after the publication of the testimony in the original suit, and it seeks to take new testimony to the matters already in issue in the original suit ; or if it does not contain an agreement

¹ *Mason v. Gardiner*, 4 Bro. Ch. R. 436 ; *Cooper Eq. Pl.* 215 ; *Benfield v. Solomons*, 9 Ves. 84 ; 1 Mont. Eq. Pl. 328.

² *Ibid.*

³ *Galatian v. Erwin*, Hopk. R. 49, 59 ; S. C. 8 Cowen R. 531.

⁴ *Ibid.*

⁵ *Cooper Eq. Pl.* 87.

on the part of the defendant, filing the Bill, to go to a hearing upon the depositions and proofs already published;¹ or if it seeks to bring into question facts, which the party has admitted in his answer to the original Bill; it will be demurrable.²

§ 633. A cross Bill, which is filed by the special direction of the Court, for the purpose of obtaining its decree, touching some matter not in issue by a former Bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the Court, upon the hearing of another cause, there is little probability, that such a Bill should be liable in substance to any demurrer.³

§ 634. Fifthly; Demurrers to Bills of review, and to Bills in the nature of Bills of review. The constant defence to a Bill of review for error apparent upon a decree, has been said to be by a plea of the decree, and a demurrer against opening the enrolment.⁴ There seems, however, to be no necessity for pleading the decree, if fairly stated in the Bill. The Books of Practice contain the forms of a demurrer only to such a Bill; and there are authorities to the same effect.⁵

¹ Ante § 395, and note (2); Cooper Eq. Pl. 87; *White v. Buloid*, 2 Paige R. 164; *Field v. Schieffelin*, 7 John. Ch. R. 250.

² *Berkley v. Ryder*, 2 Ves. 533, 537.

³ Mitf. Eq. Pl. by Jeremy, 203; Ante § 396.

⁴ *Gould v. Tancred*, 2 Atk. 534; Mitf. Eq. Pl. by Jeremy, 203; Cooper Eq. Pl. 215; *Dancer v. Evett*, 1 Vern. 392, 393; *Smith v. Turner*, 1 Vern. 273; *O'Brien v. Conner*, 2 Ball & Beatt. 146; *Webb v. Pell*, 3 Paige R. 368.

⁵ Mitf. Eq. Pl. by Jeremy, 203, 204, and note (x); Cooper Eq. Pl. 215, 216; *Slingby v. Hale*, 1 Ch. Cas. 122; 1 P. Will. 139; *Jones v. Kenrick*, 5 Bro. Parl. R. 248, Tomlin's edit.; 1 Harris Ch. Pr. by Newl. 88; *Barton's Suit in Eq.* 218. Lord Redesdale has added, in this connexion, the following passage:—"On argument of a demurrer to a Bill of review, where several errors in the decree have been assigned, if the plaintiff should prevail only in one, the demurrer must be overruled, as one error will be sufficient to open the enrolment; and, on argument of a demurrer to a Bill of review for error apparent in the decree, the Court has

§ 634. *a.* A Bill of review must be founded, as we have already seen, upon some error upon the face of the Bill, answer, and pleadings in the case, and the facts embodied in the decree, upon which the Court founds it. The party, who brings a writ of review, cannot go into the evidence at large, not stated in the decree, to found an objection to the decree from a supposed mistake of the court in its inferences from the evidence.¹ Neither can a party to a decree bring a Bill of review, and claim a reversal of the decree, for a supposed error, unless he is aggrieved thereby, whatever might have been his right to insist upon the error at the original hearing, or upon an appeal.² The Bill also must be brought after a final decree upon the merits of the controversy, and does not lie upon a merely interlocutory decree.³ If, therefore, the Bill of review be defective in relating these particulars, and the objection be apparent on the record, it is demurrable.⁴

[*485] *§ 635. It has been already stated, that a Bill of review for errors apparent upon the record must be brought within the time prescribed for the bringing of writs of error; for it is governed by analogy to the limitation of writs of error at law.⁵ And this limitation is to be counted, not from the time of the enrolment of the decree, but from the time of pronouncing it.⁶ It has

ordered the defendant to answer, saving the benefit of the demurrer to the hearing, and on the hearing, has finally allowed the demurrer." *Mif. Eq. Pl.* by Jeremy, 204. The case referred to is *Denney v. Filmer*, 2 *Freem.* 172; *S. C.* 1 *Vern.* 135.

¹ *Whiting v. Bank of the United States*, 13 *Peters R.* 6, 13, 14; *Ante* § 404, § 405, § 407.

² *Whiting v. Bank of U. States*, 13 *Peters R.* 6, 14.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ante* § 410; *Cooper Eq. Pl.* 91, 92, 93, 216.

⁶ *Smith v. Clay*, 3 *Bro. Ch. R.* 639, note by Belt; *S. C. Ambl. R.* 645; *Ante* § 410.

been said, that this objection must be taken by plea to the Bill of review, even if it is apparent upon the face of the Bill, that it is brought after the prescribed period; for that, otherwise, the plaintiff would not be enabled to avail himself of the exceptions, provided in the statute for cases of disability, such as infancy, coverture, or the like.¹ But there is great reason to doubt the propriety of this doctrine; and the more reasonable doctrine is, that a demurrer will lie in such a case; and if such an exception exists, it is the duty of the plaintiff to set it forth in his Bill of review, in order to repel the objection.²

*§ 636. A Bill of review upon the discovery [*486] of new matter, and a supplemental Bill of the same nature, being exhibited only by leave of the Court, the ground of the Bill is generally well considered, before it is brought; and therefore, in point of substance, it can rarely be liable to a demurrer. But if it is brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer; although the relevancy ought to be

¹ Cooper Eq. Pl. 216; Mitf. Eq. Pl. by Jeremy 204, 205; *Gregor v. Molesworth*, 2 Ves. 109.

² Mitf. Eq. Pl. by Jeremy, 204, 205, note (a); *Edwards v. Carroll*, 2 Bro. Parl. R. by Tomlins, 98; *Sherrington v. Smith*, 2 Bro. Parl. R. by Tomlins, 62. This last is manifestly the opinion of Lord Redesdale, in Mitf. Eq. Pl. by Jeremy, 204, and it is also confirmed by the note cited in p. 205, note (a). It is also sustained by the analogy in the like cases of original Bills, in which it is held, that if the objection from lapse of time, prescribed by the statute of limitations, appears on the face of the Bill, it may be taken by demurrer. Ibid. Ante § 484, § 503, note (4). See also *Cook v. Arnham*, 3 P. Will. 284; Mr. Cox's note B; *Foster v. Hodgson*, 19 Ves. 180; Mitf. Eq. Pl. by Jeremy, 212, note (c); *Id.* 271, 272.

considered at the time, when leave is given to bring the Bill.¹

§ 637. Bills in the nature of Bills of review do not appear subject to any peculiar cause of demurrer, unless the decree, sought to be reversed, does not affect the interest of the person filing the Bill. If, upon argument of a demurrer to a Bill of review, the demurrer is allowed, the order allowing it, being enrolled, is an effectual bar to another Bill of review.² The same principle would seem to apply to a Bill in the nature of a Bill of review.

§ 638. It is also a good cause of demurrer to a Bill of either sort, that it is not brought according to the course of the Court, or that it does not, in its form and structure, appropriately belong to either. Therefore, where, after a decree, directing encumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a Bill to have the advantage, which it would give him by way of priority over the demands of some of the defendants, a demurrer was allowed; because such Bill was against the usual course of the Court. For, though it was a Bill to vary a decree; yet it was neither a Bill of review, nor a Bill in [*487] the nature of a Bill of Review, which are the only kinds of Bills, that can be brought to affect or alter a decree, unless the decree has been obtained by fraud.³

¹ Mitf. Eq. Pl. by Jeremy, 205; Cooper Eq. Pl. 216.

² Mitf. Eq. Pl. by Jeremy, 205, 206.

³ Cooper Eq. Pl. 217; *Wortley v. Birkhead*, 3 Atk. 809, 811; S. C. 2 Ves. 571, 576; *Read v. Hawley*, 1 Ch. Cas. 44; Mitf. Eq. Pl. by Jeremy, 206. The case of *Coker v. Bevis*, 1 Ch. Cas. 61, which has been already alluded to, Ante § 427, note (1), seems to fall under this predicament. It is given by Lord Redesdale, as an instance of an interference of a Court of Equity in suspending or avoiding the operation of a decree

§ 639. Sixthly; Bills to impeach decrees for fraud. If a Bill is filed for this object, and the circumstances stated in the Bill do not amount to a fraud; or if it is alleged, that the decree was obtained without making those parties to the suit, whose rights are affected thereby; and it is therefore fraudulent; but it appears on the Bill, that sufficient parties were before the Court to bind all other persons interested, such as a first tenant in tail, or the like; in such a case the defendant may demur.¹

§ 640. Seventhly; Demurrers to Bills to suspend, or to avoid the operation of decrees. These bills are of very rare occurrence; and indeed, the only instance, cited by Lord Redesdale, to illustrate this class, is one, which may be thought open to much remark, if not of questionable authority.² But, as it is admitted, that this whole *class of cases depends on special circum- [*488] stances of a very peculiar nature, it seems impracticable to lay down any rules, as to demurrers to them.

§ 641. Eighthly; Demurrers to Bills to carry decrees into execution. Bills of this sort are open to few peculiar causes of demurrer. Where, upon the face of a

under special circumstances, and was sustained on its own circumstances. See *Mitf. Eq. Pl. by Jeremy*, 94, and note (i).

¹ *Cooper Eq. Pl.* 217, 218; *Ante* § 426 to § 429.

² *Mitf. Eq. Pl. by Jeremy*, 94; *S. C.*, cited *Ante* § 421, note (1), and § 636, note (1); *Cocker v. Bevis*, 1 Ch. Cas. 61. See also *Venables v. Foyle*, 1 Ch. Cas. 2, 3; *Whorewood v. Whorewood*, 1 Ch. Cas. 250; *Wakelin v. Walthal*, 2 Ch. Cas. 8. The whole passage of Lord Redesdale's work, was intended to be cited at large, immediately after § 427, note, and § 428, but was accidentally omitted. It is no otherwise important, than as suggesting in its proper order, this class of Bills, under the enumeration stated in *Ante* § 388. The note of Lord Redesdale, as to this class of cases, contains a very salutary caution, as to the nature of the relief granted by the Court, as having been somewhat affected by the turbulent and extraordinary character of the times. *Mitf. Eq. Pl. by Jeremy*, 94, note (i).

Bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may avail himself of the objection by demurrer.¹ Where a decree is clearly erroneous, it is not (as has been already stated) a matter of course for the Court to enforce it. But, on the contrary, the Court will, in many cases, refuse to enforce it, if it would be prejudicial to the rights and interests of third persons, who ought to have been made, but were not made, parties to the original decree. For the party, who comes into a Court of Equity to have the benefit of a former decree, is bound to show, that, upon its face, it was a right decree; and, if it be palpably erroneous, it ought not to be carried into execution.²

[*489] *§ 642. We have thus gone over the general grounds, as well as the peculiar grounds of demurrer, applicable to the different kinds of Bills, original, and not original. We may conclude this subject with the suggestion, which has, indeed, already occurred, incidentally, under some of the preceding heads, but seems proper

¹ Mitf. Eq. Pl. by Jeremy, 206; Cooper Eq. Pl. 218.

² Ante § 430; Mitf. Eq. Pl. by Jeremy, 95, 96; Cooper Eq. Pl. 99; *Hamilton v. Houghton*, 2 Bligh Rep. 169. The case of *Hamilton v. Houghton*, 2 Bligh R. 169, affords a strong illustration of the principles stated. There, a Bill was originally filed by one creditor to obtain payment out of a trust fund, created under an assignment for the payment of debts generally, without making the other creditors parties; and a decree was had accordingly. On a Bill to enforce this decree, brought by persons claiming under the same creditor, the House of Lords held the decree palpably erroneous, among other things, for not decreeing a general execution of the trust in favor of all the creditors, and making them all parties to the Bill, or bringing them all before the Court in the proceedings before the Master; and they refused to carry it into effect, notwithstanding the lapse of forty years after the decree. It was also held, that, upon a Bill to carry into effect a decree, the Court might examine, impeach, or vary the decree. The House of Lords, however, in this case, gave the plaintiff liberty to amend his Bill, and to introduce the other parties in interest, and to shape the Bill for the proper purposes.

to be here repeated in a more general form, that, in addition to the several particular causes of demurrer, applicable to particular kinds of Bills, any irregularity in the frame of a Bill of any sort, may be taken advantage of by demurrer.¹ A few illustrations of this, may, perhaps, be appropriate in this place, although some of them have already been stated.²

§ 643. Thus, for example, if a Bill is brought contrary to the usual course of the Court, a demurrer will hold. As, where, after a decree, directing encumbrances to be paid according to their priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a Bill to have the advantage it would give him by way of priority over the demands of some of the defendants, a demurrer was allowed. This was a Bill to vary a decree ; and yet it was neither a Bill of review, nor a Bill in the nature of a Bill of review ; which are the only kinds of bills, which can be brought to affect or alter a decree, unless the decree has been obtained by fraud.³

§ 644. So, where a Bill was preferred to establish the plaintiff's right of common, and to set aside several former decrees, the defendant demurred to the whole Bill, and the demurrer was allowed ; for if there was any errors in the former decrees, they ought to have been *brought before the Court by a Bill of review, [*490] and not by this method.⁴ So, where a decree was passed, settling the rights of the parties upon all the

¹ Mitf. Eq. Pl. by Jeremy, 206, 207.

² Ante § 528, note (3).

³ Mitf. Eq. Pl. by Jeremy, 206, 207 ; Ante § 636 ; *Wortley v. Birkhead*, 3 Atk. 809, 811 ; *Fletcher v. Tollet*, 5 Ves. 3.

⁴ *Granville v. Ramsden*, Bumb. R. 56 ; *Darlington v. Pultney*, 3 Ves. 384, 386.

points raised in the cause ; and, afterwards, an original Bill was brought to supply some omissions in the original decree ; it was deemed a valid objection, that it was contrary to the practice of the Court to allow such an original Bill upon the same matter, as was put in issue in the original cause, even supposing, that a direction, which ought to have been given at that time, was omitted.¹

§ 645. So, where a Bill was brought, seeking a decree, inconsistent with a former decree, which had been rendered on the same matters between the parties ; it was held, that the former decree could not be thus impeached collaterally, but only upon a Bill of review, or a Bill to set it aside for fraud.² And if the objection appeared on the face of the new Bill, it would be demurrable.

§ 646. Upon a similar ground, (as has been already stated), if a supplemental Bill is brought against a person, not a party to the original Bill, praying, that he may answer the original Bill ; and no reason is suggested, why he could not be made a party to the original Bill by amendment ; he may demur. If an irregularity arises in any alteration of a Bill by way of amendment, it may also be taken advantage of by demurrer. As, if a plaintiff amends his Bill, and states a matter, arisen subsequent to the filing of the Bill, which consequently ought to be the subject of a supplemental Bill, or of a [*491] *Bill of revivor. But if a matter, arisen subsequent to the filing of the Bill, and properly the subject of a supplemental Bill, is stated by amendment, and the defendant answers the amended Bill, it is too late

¹ *Darlington v. Pultney*, 3 Ves. 384, 386.

² *Ogilvie v. Herne*, 13 Ves. 563.

to object to the irregularity at the hearing. For, as the practice of introducing, by supplemental Bill, matter arisen subsequent to the institution of a suit, has been established merely to preserve order in the pleadings, the reason, on which it is founded, ceases, when all the proceedings to obtain the judgment of the Court have been had without any inconvenience arising from the irregularity.¹

¹ Mitf. Eq. Pl. by Jeremy, 207, and cases there cited; Ante § 528, note (3).

CHAPTER XIII.

PLEAS.

§ 647. HAVING thus considered the nature and office of a demurrer, and the various objections, which may be taken thereby to the different kinds of Bills, we shall next proceed to the consideration of the mode of defence by plea in Equity. We have already seen, that a demurrer lies only, when the objection to the Bill is apparent upon the face of it; either from the matter contained in it; or from the defects of its frame; or in the case made by it;¹ and that, generally speaking, this is not only the appropriate, but, in many cases, it is the sole mode, in which the objection can be taken.² But, when the objection is not apparent on the Bill itself, or, as the technical phrase is, when it arises from matter *dehors* the Bill, if the defendant means to take advantage of it, he ought to show the matter, which creates the objection, to the Court, either by plea, or by answer.³ In some cases, the objection can be taken only by plea; in others, again, it may be taken by plea or by answer; and in others, again, it can be taken only by answer.⁴

¹ Mitf. Eq. Pl. by Jeremy, 218; Ante § 448, § 449.

² Ante § 453; Billings v. Flight, 1 Madd. R. 230; Cozine v. Graham, 2 Paige R. 177.

³ Mitf. Eq. Pl. by Jeremy, 219; Id. 13, 14; Beames Pl. in Eq. 2.

⁴ Ante § 439. Some cases, exhibiting this diversity, have been already incidentally stated. Many objections to the form and frame of a Bill can be taken only by demurrer. Mr. Cooper says; "that in most cases, what is a good defence by way of plea, is held to be also good by way of

§ 648. In conformity to the method, which has been already pursued in regard to demurrers, we shall now proceed, in the first place, to make some observations upon the true nature, office, and frame of a plea; and in the next place, proceed to state the cases, in which this is an appropriate mode of defence; or, in other words, what objections may be taken, and usually are taken by way of plea.

§ 649. In the first place, then, as to the true nature, office, and frame of a plea. A plea has been usually described to be a special answer, showing or relying upon one or more things, as a cause, why the suit should be

demurrer, if the matter sufficiently appears on the face of the Bill; though the rules of pleading, in Lord Hardwicke's time, required, that many grounds of defence should be taken advantage of by way of plea only." See also Mitf. Eq. Pl. by Jeremy, 216; *Aggas v. Pickerill*, 3 Atk. 226. If a plaintiff in a Bill of revivor is not entitled to revive, the defendant must, in general, take the objection by demurrer, or by plea. If he does not, he cannot take it by answer, although if, at the hearing, it appears, that the plaintiff has no title to revive, the Bill will be dismissed. *Harris v. Pollard*, 3 P. Will. 348; *Cooper Eq. Pl.* 302. Lord Ch. Baron Gilbert, in his *For. Roman*. 53, has given another illustration. "The second sort of demurrer," says he, "is, where a plaintiff goes into a Court of Equity for damages, which are uncertain, and not to be settled but by a jury; there, the defendant may demur to the relief, after having first answered to the damages, because it is *alieni fori*, since the Court cannot settle the damages. But this must be *ante litem contestationem*; for if he answers, and contests with the plaintiff, there he can take no advantage of it at the hearing; for he has submitted to the jurisdiction of the Court, and the Court will try at law the quantum of the damages, by a feigned action of *quantum damnificatus*. So on the demurrer *ante litem contestationem*, if the plaintiff will go on for the damages confessed, the Court will retain the Bill, *quoad* those damages, allowing the demurrer as to any further relief." See also *Gilb. For. Rom.* 219. See *Beames Pl. in Eq.* 7, 8; *Rowe v. Teed*, 15 Ves. 377, 378. If a matter, which has arisen subsequent to filing of a Bill, and which ought to be the subject of a supplemental Bill, or a Bill of revivor, is introduced by way of amendment, it cannot be taken advantage of by answer; but only by demurrer. Mitf. Eq. Pl. by Jeremy, 116; *Ante* § 528, note (3).

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either dismissed, delayed, or barred.¹ Lord Bacon, in his Ordinances, has said, that a plea is of foreign matter, to discharge, or stay the suit.² Lord Redesdale has also judicially said, that a plea is a special answer to a Bill, differing in this from an answer in the common form, as it demands the judgment of the Court in the first instance, whether the special matter, urged for it, does not debar the plaintiff from his title to that answer, which the Bill requires.³

§ 650. In this view, a plea bears a very close resemblance to an exception in the civil law ; which has been described thus ; *Exceptio dicta est, quasi quædam exclusio, quæ (inter) opponi actioni cujusque rei solet ad excludendum id, quod in intentionem condemnationemve deductum est.*⁴

§ 651. All these statements are sufficiently descriptive of the general nature and office of a plea. But that of Lord Bacon is far from being accurate, according to the present doctrine on this subject ; for it is by no means true, that pleas are confined to foreign matter, dehors the Bill, to discharge or stay the suit. On the contrary, pleas are now usually divided into two sorts ; one commonly called pure pleas, which rely wholly on matters dehors the Bill, such as a release, or a settled account ; and another, called in contradistinction to the other pleas, not pure, or anomalous pleas, and sometimes negative pleas, which consist mainly of denials of the substantial matters set forth in the Bill.⁵ Thus, for exam-

¹ Mitf. Eq. Pl. by Jeremy, 219 ; Cooper Eq. Pl. 223 ; Wyatt Pr. Reg. 324 ; Curs. Cancell. 180 ; Harris. Ch. Pr. by Newl. 218.

² Beam. Ord. in Ch. 26 ; Beam. Pl. Eq. 1.

³ Roche v. Mergell, 2 Sch. & Lefr. 725 ; Beam. Pl. in Eq. 1. Throughout this whole chapter, I have freely used the materials collected in Mr. Beames's excellent work on Pleas in Equity.

⁴ Dig. Lib. 44. tit. 1, l. 2 ; Beam. Pl. in Eq. 2 ; Gilb. For. Rom. 50.

⁵ Post § 667.

ple, if a Bill should admit a release to have been made by the plaintiff, or an account to have been settled, and should aver, that either was procured by fraud; the defendant may plead the release, or account settled, in bar, negating in his plea the averment of fraud, and supporting the plea by an answer, denying all the facts and circumstances, charged as matters of fraud in the Bill.¹ This subject will come more fully under consideration, in other connexions in the subsequent pages.²

¹ Beam. Pl. in Eq. 2 to 7; Mitf. Eq. Pl. by Jeremy, 239 to 243; Bayley v. Adams, 6 Ves. 594, 595; Lord Redesdale has alluded to this subject in the following passage. (Mitf. Eq. Pl. by Jeremy, 221). "Pleas in bar are commonly described as allegations of foreign matter, whereby, supposing the Bill, so far as it is not contradicted by the plea, to be true, yet the suit, or the part of it, to which the plea extends, is barred. But this description, perhaps, does not comprise every kind of plea, or does not mark the distinctions between the different kinds with sufficient accuracy." Lord Redesdale has fully explained the origin of this second species of plea, in a note to his work on Equity Pleading, where he is treating of the subject of fraud, alleged in a Bill to set aside a decree. Mitf. Eq. Pl. by Jeremy, 243, note (e). This subject will be examined more fully hereafter. Mr. Beames too has discussed, at large, the propriety of allowing these pleas, and stated the reasons, on which they are founded, and the practice has been allowed. Beames Pl. in Eq. 2 to 7. Indeed, as long ago as the time of Lord Talbot, a plea of this sort was pleaded, and an objection taken to it upon the ground. *non potest adduci exceptio ejusdem rei, cujus petitur dissolutio*. But the Lord Chancellor said, that it was every day's practice; and that otherwise, no release or award could be pleaded to a Bill, which was brought to set aside the same. Pusey v. Desbouvrie, 3 P. Will. 317. See also Bayley v. Adams, 6 Ves. 594, 595. The question, whether a mere negative plea, denying the title of the party, as alleged in the Bill, (such for example, as that he was heir), was formerly matter of considerable doubt, and diversity of judgment. But it is now well settled (as will be shown hereafter), that such pleas are good. Faulder v. Stuart, 11 Ves. 302; Shaw v. Ching, 11 Ves. 305; Drew v. Drew, 2 Ves. & B. 159, 162; Sanders v. King, 6 Madd. R. 61; S. C. 2 Sim. & Stu. 276; Thring v. Edgar, 2 Sim. & Stu. 274. See Mitf. Eq. Pl. by Jeremy, 230 to 233, and notes *ibid*; Id. 244, 245, and note (g); Hardman v. Ellames, 2 Mylne & Keen, 740; Hall v. Noyes, 3 Bro. Ch. R. 483; 2 Daniell's Ch. Pract. 99, 100, 110, 111.

² Post § 667 to § 680.

§ 652. But every defence, which may be a full answer to the merits of the Bill, is not, as of course, to be considered as entitled to be brought forward by way of plea. It has been well observed by Lord Hardwicke, that it is not very good defence in Equity, that is likewise good as a plea. For, where the defence consists of a variety of circumstances, there is no use in a plea; the examination must still be at large; and the effect of allowing such a plea will be, that the Court will give their judgment upon the circumstances of the case, before they are made out by proof.¹ The true end of a plea is to save to the parties the expense of an examination of the witnesses at large. And the defence proper for a plea is such, as reduces the cause, or some part of it, to a single point; and from thence creates a bar or other obstruction to the suit, or to the point, to which the plea applies.² Hence, a plea, in order to be good, whether it

¹ *Chapman v. Turner*, 1 Atk. 54; Mitf. Eq. Pl. by Jeremy, 219; Cooper Eq. Pl. 223; 2 Daniell's Ch. Pract. 97, 99, 102, 103.

² Mitf. Eq. Pl. by Jeremy, 295, 296, 297; Cooper Eq. Pl. 223; *Chapman v. Turner*, 1 Atk. 54; *Ritchie v. Aylwin*, 15 Ves. 82; *Rowe v. Teed*, 15 Ves. 378; *Whithead v. Brockhurst*, 1 Bro. Ch. R. 404, and note (1), and *Id.* 405, note (g) by Belt; S. C. 2 Ves. & B. 153, note; *Wood v. Rowe*, 2 Bligh R. 595, 614. In *Rowe v. Teed*, 15 Ves. 377, 378, Lord Eldon, in speaking of the case, where matter was brought forward by the answer, for the same purposes as a plea, said—"The office of a plea, generally, is, not to deny the Equity, but to bring forward a fact, which, if true, displaces it: not a single averment; as the averment in this answer, that no Bill of sale was executed; but perhaps a series of circumstances; forming in their combined result some one fact, which displaces the Equity. There is this difference between law and Equity; that here, for the sake of convenience, that is, of justice, the denial of some fact alleged by the Bill, in some instances with certain averments, has been considered sufficient to constitute a good plea; though not perhaps precisely within the definition of good pleading at law. If each case is to be considered upon its own circumstances, it is desirable, that this point should be brought before the Court by plea, rather than by answer; as an answer

be affirmative or negative, must be either an allegation or a denial of some leading fact, or of matters, which, taken collectively, make out some general fact, which is a complete defence.¹ But, although a defence, offered by way of plea, should consist of a great variety of circumstances ; yet, if they all tend to a single point, the plea may be good.² Thus, a plea of title derived from the person, under whom the plaintiff claims, may be a good plea, though consisting of a great variety of circumstances ; for the title is a single point, to which the

prima facie, admits, that the defendant cannot plead ; and, with the exception of the cases, in which it is settled, as general law, that the party is not to answer a particular circumstance, as, that he is not to criminate himself, the case of a purchaser for valuable consideration, &c., this Court does not trust the Master, generally, with the determination, how much of the answer, considered as a plea, would be a good defence. The Master is, therefore, almost under a necessity of admitting an exception. And, when the propriety of his judgment comes to be argued here, it would be most incongruous, that the Court, admitting his judgment not to be wrong, should yet give a different judgment ; considering the answer as a plea. Another circumstance, deserving attention, is the great difference of expense in bringing forward the objection by plea, rather than by answer. There is but one more material, general observation to be added to those, which are to be found in the cases reported ; that, generally, admitting there are exceptions, the practice of this Court requires, that the Bill and the answer should form a record, upon which a complete decree may be made at the hearing. If, for instance, this plaintiff is a part-owner of the ship, he has a right to an answer, that will enable him, if a certain sum is admitted to be due, to obtain a decree for that sum ; if he is satisfied with that ; and does not desire an account. With that general observation, in addition to those to be found in the other cases, I conclude, that this is not a case, in which I can say, there is one clear fact, or such a combination of facts, giving, as the result, one clear ground, upon which the whole equity of this Bill may be disposed of. First, it is very difficult upon this answer to say, there is a positive affirmation, that there was no bill of sale. Next, it is argumentative."

¹ Robinson v. Lubbock, 4 Sim. R. 161 ; Saltus v. Tobias, 7 John. Ch. R. 2 4 ; Beam. Pl. in Eq. 10 to 14 ; 2 Daniell's Ch. Pract. 102, 103, 104.

² Mitf. Eq. Pl. by Jeremy, 296 ; Cooper Eq. Pl. 225 ; 2 Daniell's Ch. Pract. 103, 104.

cause is reduced by the plea.¹ So, a plea of a conveyance, fine, and non-claim would be good, as amounting to but one title.²

§ 653. Upon this account, it is a general rule, that a plea ought not to contain more defences than one, and that a double plea is informal and multifarious, and therefore improper.³ For, if two matters of defence may be thus offered, the same reason will justify the making of any number of defences in the same way ; by which the ends intended by a plea would not be obtained ; and the Court would be compelled (as has been already stated), to give instant judgment upon a variety of defences with all their circumstances, as alleged by the plea, before they are made out in proof ; and consequently would decide upon a complicated case, which might not exist.⁴

¹ Mitf. Eq. Pl. by Jeremy, 296, 297 ; Cooper Eq. Pl. 225 ; *Whitbread v. Brockhurst*, 1 Bro. Ch. R. 404, 415, note (9) by Belt ; S. C. 2 Ves. & B. 153, note ; *Ritchie v. Aylwin*, 15 Ves. 82 ; *Beam. Pl. in Eq. 18*.

² Cooper Eq. Pl. 225 ; *Beam. Pl. in Eq. 18*.

³ See 2 Daniell's Ch. Pract. 102, 103, 104 ; *The State of Rhode Island v. The State of Massachusetts*, 14 Peters R. 210, 259.

⁴ Mitf. Eq. Pl. by Jeremy, 295, 296 ; Cooper Eq. Pl. 223, 224 ; 2 Daniell's Ch. Pract. 102, 103, 104 : *Whitbread v. Brockhurst*, 1 Bro. Ch. R. by Belt, 404, 415, note (9) ; *Nobkissen v. Hastings*, 4 Bro. Ch. R. 253 ; S. C. 2 Ves. jr. 84 ; *Goodrich v. Pendleton*, 3 John. Ch. R. 427 ; *Cooth v. Jackson*, 6 Ves. 12, 17. Mr. Beames's reasoning (*Beam. Pl. in Eq. 10 to 18*), on this subject of duplicity, is very satisfactory ; but it is too long to be cited in this place. Mere surplusage will not prejudice a plea in equity by rendering it multifarious or double. *Beam. Pl. in Eq. 19, 20*. What constitutes duplicity or multifariousness in a plea, is sometimes a matter of great nicety upon the footing of authority. Thus, where to a Bill for a specific performance of an agreement, the defendant put in a plea, which averred two facts ; first, that there was no agreement in writing ; and secondly, that there had been acts done in part performance. Lord Thurlow overruled the plea as double, it containing two different points, and therefore proper for an answer. *Whitbread v. Brockhurst*, 1 Bro. Ch. R. 404. But it has been greatly doubted, whether a plea of this sort, properly drawn, is objectionable for duplicity, as it contains but a single point of defence. See Mr. Belt's note to 1 Bro. Ch. R. 404, note (1), and *Beames Pl. in Eq. 27 to 32* ; *Id.* 171 to 177, and the cases cited by the learned author. So, in *Beachcroft v. Beachcroft*, cited 14 Ves. 63,

Therefore, where to a Bill, praying a conveyance of four estates, the defendant put in a plea of a fine as to one estate; and in the same plea, he put in a disclaimer as to the other estates, the plea was overruled; for the disclaimer was wholly disconnected with the plea of the fine; and the plea was therefore double.¹

§ 654. It may then be laid down as a rule, that various facts can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant means to rest his defence; for, otherwise, it will be open to the charge of duplicity and multifariousness.² Therefore, where a Bill was brought by the Corporation of London, for the purpose of establishing a claim of exemption, on behalf of its individual members, from certain tolls, a plea, stating, that the plaintiffs, who claimed as citizens of London, never were residents or housekeepers there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying the exemption claimed, was held a double plea, and therefore overruled. The averment, that the plaintiffs were not residents or housekeepers being one defence; and the averment of their having been admitted freemen by fraud being another independent and complete defence; a colorable admission to such a franchise, for a collateral purpose, being void.³

where to a Bill for a legacy there was a plea of release, with an averment, that it had been acted upon; the plea was overruled for duplicity. But Lord Eldon, in *Wood v. Strickland*, 14 Ves. 66, doubted that decision, and thought the averment, that the release had been acted on, mere surplusage. See also upon the subject of duplicity, 2 Mont. Eq. Pl. 95, note A. L. Id. 97, 100.

¹ *Watkins v. Stone*, 2 Sim. R. 49. See also *Cowne v. Douglas*, McLell. & Younge, 321.

² *Whitbread v. Brockhurst*, 1 Bro Ch. R. 404, 415, by Belt, note (9); S. C. 2 Ves. & Beam. 154, note; 2 Daniell's Ch. Prac. 102, 103, 104.

³ *Cooper* Eq. Pl. 224; *Corporation of London v. Corporation of Liverpool*, 3 Anst. R. 738.

§ 655. Upon an analogous ground, where an action at law was founded upon a great variety of circumstances put together, a plea to a Bill of discovery, which attempted to show, that the action could not be maintained, by confessing and avoiding some of the circumstances, and denying the rest, was held not to be good; because, in effect, it took to pieces all the several single grounds, which, put together, were asserted as the grounds, upon which the Bill was maintainable; and by avoiding some, and traversing others, it reduced the plaintiff to the necessity of proving in a Court of Equity, without a discovery, that he had a right to maintain his action at law.¹

§ 656. The objection is still stronger, where two facts are pleaded, which are inconsistent with each other.² Thus, where the plaintiff stated in his Bill a loan of money to the defendant, for which he had given a bond; but that an agent of the plaintiff had delivered up the security to the defendant; and the Bill prayed a discovery and redelivery of the bond; and the defendant pleaded, that the discovery would subject him to the penalties of a statute, and also an impeachment exhibited against him by the House of Commons; the plea was held inconsistent and bad; because, pending the impeachment, there could be no proceeding under the statute; and the impeachment, decided one way or other, equally put a stop to such prosecution under the act. So, where the defendant pleaded to a Bill of discovery, in support of an action under the statute 9 Ann, c. 14, for money lost at play, by the assignees of the loser, who had become a bankrupt, "that the action at law was not commenced, and the Bill of complaint was not exhibited against the defendant within three months

¹ *Robertson v. Lubbock*, 4 Sim. R. 161. ² 2 Daniell's Ch. Pr. 103, 104.

after the money was lost;" it was held informal, from coupling the commencement of the action with the time of filing the Bill, and therefore overruled.¹

§ 657. The reasoning, as to duplicity in a plea, does not, perhaps, in its full extent, apply with equal force to the case of two several bars, pleaded as several pleas, though to the same matter; and it may be said, that such pleading is admitted at Law, and ought, therefore, to be equally so in Equity. But it should be considered (as has been already suggested), that a plea is not the only mode of defence in Equity; and that, therefore, there is not the same necessity, as at law, for admitting this kind of pleading.² But, although the ordinary course

¹ Cooper Eq. Pl. 224, 225; *Nobkissen v. Hastings*, 4 Bro. Ch. R. 253; S. C. 2 Ves. jr. 84; *Brandon v. Sands*, 2 Ves. jr. 514, 517.

² Mitf. Eq. Pl. by Jeremy, 245, 296, and note (n); Cooper Eq. Pl. 226; Ante § 652; *Jones v. Frost*, 3 Madd. R. 8; *Salas v. Tobias*, 7 John. Ch. R. 214. Lord Thurlow, in *Whitbread v. Brockhurst*, 1 Bro. Ch. R. 404, 415, note (9), by Mr. Belt; S. C. 2 Ves. & Beam. 154, 155, note, gives the reason of this practice more fully. "The reason," says he, "why a defendant is not permitted to plead two different pleas in Equity, though he is permitted to plead them at law, is plain. It is, because at law the defendant has no opportunity, as he has here, of answering every different matter stated in the Bill. The reason of pleading in Equity is, that it tends to the forwarding of justice, and saves great expense, that the matter should be taken up shortly upon a single point. But that end is so far from being attained, if the plea puts as much in issue, as the answer could do, that on the contrary it increases the delay and expense. But why, it may be asked, should not the defendant be permitted to bring two points, on which the cause depends, to issue, by his plea? The answer is, because, if two, he may as well bring three points to issue; and so on, till all the matters in the Bill are brought into issue upon the plea; which would be productive of all the delay and inconvenience, which pleading was intended to remedy." Mr. Cooper says:—"It is said in a manuscript of Lord Nottingham, 'that no man shall be permitted to two several dilatories at several times, nor several bars; because he may plead all at once. But after a plea in disability, as outlawry, or excommunication, or a plea to the jurisdiction, he may be admitted to plead in bar; because it was not consistent with those pleas to plead in bar at the same time.' This passage certainly imports, that in the opinion of Lord Nottingham,

of practice in Courts of Equity does not admit of several pleas ; yet, where great inconvenience might otherwise be sustained in a particular case, the Court will sometimes, in its discretion, allow several pleas.¹

both several dilatory pleas, and several pleas in bar, might be pleaded, so that they were pleaded at the same time. And it may be said, that such pleading is admitted at law, and ought, therefore, now to be equally so in Equity. But it should be considered, that a plea is not the only mode of defence in Equity, and that, therefore, there is not the same necessity, as at law, for admitting this kind of pleading." Cooper Eq. Pl. 226, 227. Mr. Chancellor Kent, in *Saltus v. Tobias*, 7 John. Ch. R. 214, 215, refers to the same passage in Lord Nottingham's manuscript. See also Beam. Pl. in Eq. 15, 16, 17, where the learned author doubts the doctrine of Lord Nottingham. Bohur's Cursus. Canc. 187.

¹ *Gibson v. Whitehead*, 4 Madd. R. 241 ; *Hardman v. Ellames*, 5 Sim. R. 640 ; S. C. 2 Mylne & Keen, 732, 734, 735 ; *Saltus v. Tobias*, 7 John. Ch. R. 214 ; 2 Daniell's Ch. Pract. 103, 104. In *Kay v. Marshall*, 1 Keen R. 190, 197, Lord Langdale allowed two pleas to be filed, and stated his reasoning on the subject as follows :—" Upon the subject of double pleas there has been considerable argument at the bar. It has been said, that a double plea is only allowed in cases, where there is a sort of double or alternative claim in the Bill. In the case cited for the purpose of supporting that proposition, there is such an alternative claim ; but there is nothing to show, that this is the principle, still less the only principle, upon which the Court proceeds in allowing double pleas. It appears to me, that the principle, upon which the Court proceeds, depends very much upon the extraordinary inconvenience, that might arise, if the defendant were not allowed, in many cases, to plead double. How far, and in what cases, a defendant may, if he answer, protect himself against answering fully, has been a subject much controverted, and upon which judges have differed. A defendant, denying the principal fact, upon which the plaintiff rests his claim to discovery, is entitled to protect himself by plea against answering ; and if his plea be accompanied by an answer, the answer must be so framed as to support, but not to overrule the plea. Lord Thurlow's objection to bringing two points in issue by plea, has been adverted to in the argument. 'Why,' says Lord Thurlow, 'it may be asked, should not the defendant be permitted to bring two points, on which the cause depends, to issue by his plea ? The answer is, because, if two, he may as well bring three points to issue ; and so on, till all the matters in the Bill are brought into issue upon the plea.' This objection is not applicable to the modern practice of allowing double pleas ; because, though a defendant may file a single plea without an application to the Court, he cannot put in a double plea without such an application ; and the liberty, if sought to be abused,

§ 658. Having made these observations in regard to the nature and office of a plea, let us now proceed to the consideration of the proper frame and form thereof; or, in other words, to the consideration of the proper requisites of a good plea in Equity. And here, it may be stated, that in pleas in Equity there must in general be the same strictness and exactness, as in pleas at law; though not in matters of form, at least in matters of substance.¹ We shall first refer to those rules of pleading, which are properly applicable to pure pleas, most of which are equally applicable to pleas not pure, or anomalous pleas, according to the distinction already mentioned; and then we shall examine the rules, which are peculiarly applicable to the latter.

is easily restrained. The general rule, that, if the defendant answers, he must answer fully, however established, is, no doubt, a rule, that, in many cases, occasions great hardship to the defendant. The only other defence is a demurrer, or a plea. A demurrer is not a convenient mode of defence, by reason of the admission, which it involves, if the case made by the Bill, and the rules, as to pleas in this Court, are of such exceeding nicety and difficulty, that it is almost impossible for parties, who have a right to plead, to take full advantage of their right. The only way of saving defendants from the hardship, to which, in many cases, they would be subjected by making a full discovery, is, by affording to them such facilities as can, by the rules of the Court, be afforded with respect to pleas. I do not think a great indulgence is sought from the Court, where, by obtaining it, the defendants will obtain only that, which the Court thinks right. With respect to this particular case, if it be a matter of indulgence, I think the defendants, under all the circumstances, are entitled to it. The defendants are required by the Bill to set forth accounts of extraordinary length, at a great expense, and at the risk, though this does not appear, of making an inconvenient exposure of their affairs. This application, therefore, must be granted; but, according to the course of the Court, upon the condition of the defendants paying the costs."

¹ Beames Pl. in Eq. Preface, 8, 9; Mitf. Eq. Pl. by Jeremy, 294; Dobson v. Leadbeater, 13 Ves. 230, 233; Story v. Lord Windsor, 2 Atk. 630, 632; Moore v. Hart, 1 Vern. 114; Carlton v. Leighton, 3 Meriv. R. 667, 670; Carew v. Johnston, 2 Sch. & Lefr. 305; 2 Mont. Eq. Pl. 101, note A. N.; 3 Black. Comm. 446.

§ 659. In the first place, then, a plea in bar must follow the Bill, and not evade it, or mistake the subject of it. If a plea does not go to the whole Bill, it must express to what part of the Bill the defendant pleads. And, therefore, a plea to such parts of the Bill as are not answered, must be overruled, as too general. So, if the parts of the Bill, to which the plea extends, are not clearly and precisely expressed; as, if the plea is general, with an exception of matters after-mentioned, and is accompanied by an answer, the plea is bad. For the Court cannot judge, what the plea covers, without looking into the answer, and determining, whether it is sufficient or not, before the validity of the plea can be considered.¹ But, if the plea excepts clearly and definitively certain portions of the property, respecting which the suit is brought, as for example, certain real estate, describing it, so that no reference to any other parts of the record is necessary to make it intelligible, it is not open to the objection, although it is stated in the plea by words of exception.²

§ 660. Another requisite of a pure plea, in general, is, that it should be founded on new matter, not apparent on the Bill. For, if the matter is apparent on the Bill, it is the proper subject of a demurrer, and not of a plea.³ In other words, a plea must aver facts, to which the plaintiff may reply; and not, in the nature of a demurrer, rest on facts stated in the Bill.⁴ However, this doctrine is to be understood with the qualification, that the

¹ Mitf. Eq. Pl. by Jeremy, 294; *Salkeld v. Science*, 2 Ves. 107; *Howe v. Duppa*, 1 Ves. & Beam. 511; *Cooper Eq. Pl.* 229.

² *Howe v. Duppa*, 1 Ves. & Beam. 514.

³ *Beames Pl. in Eq.* 44, 45; *Roberts v. Hartley*, 1 Bro. Ch. R. by Belt, 57, and note; *Billing v. Flight*, 1 Madd. R. 230; *Cozine v. Graham*, 2 Paige R. 177.

⁴ Mitf. Eq. Pl. by Jeremy, 297.

plea is not of a purely negative character; for if it is, then the plea puts in issue the very fact asserted in the Bill. Thus, if a Bill calls for an account of partnership transactions, and alleges a partnership between the plaintiff and the defendant, the latter may by a negative plea, deny there was any partnership; and the plea will be good.¹

§ 661. Another requisite of a pure plea, is, that it *should not only reduce the cause to a single [*505] point; but it should also be such a point, as is issuable, and also such as is material to delay, dismiss, or bar the Bill; for if the issue tendered is immaterial, it can never finally dispose of the cause.²

§ 662. Another requisite of a pure plea is, that it should be direct and positive, and not state matters, by way of argument, inference, and conclusion, which have a tendency to create unnecessary prolixity and expense. In this respect the rules of pleading in Equity are analogous to the rules at law.³ Upon this ground, where there was a charge of facts, as constructive notice of the plaintiff's title in a Bill, and the defendant in his plea averred, that to the best of his knowledge and belief, he had not any notice, either constructive or actual, the plea was held bad.⁴ The defendant should have

¹ Post § 668 and note, § 669, § 672, § 673, § 674; 2 Daniell's Ch. Pract. 98, 99, 108, 109, 110, 111, 113; Mitf. Eq. Pl. by Jeremy, 296, 297; *Evans v. Harris*, 2 Ves. & Beam. 361; *Drew v. Drew*, 2 Ves. & Beam. 159; *Hall v. Noyes*, 3 Bro. Ch. R. 483; *Sanders v. King*, 6 Madd. R. 61; S. C. 2 Sim. & Stu. 274; *Thring v. Edgar*, 2 Sim. & Stu. R. 274. See *Denys v. Locock*, 3 Mylne & Craig R. 205, 234, 235, where Lord Cottenham commented at large on *Thring v. Edgar*. See also 2 Daniell's Ch. Pract. 115 to 128; Wigram on Discov. 136 to 157, 2d edit.

² Beames Pl. in Eq. 20, 21; *Morison v. Turnour*, 18 Ves. 175.

³ Beames Pl. in Eq. 21, 22; Mitf. Eq. Pl. by Jeremy, 297; *Carew v. Johnston*, 2 Sch. & Lefr. 305, 306; *Hardman v. Ellames*, 5 Sim. 440; S. C. 2 Mylne & Keen, 732.

⁴ Ibid.

denied the facts charged in the Bill, from which the constructive notice was deducible; and not have assumed to himself the province of the Court, to whom it belongs to draw the conclusion.¹ He should also have denied the notice positively, fully, and precisely, even though it were not charged on the other side.² However, where the facts are not charged to be within the defendant's own knowledge (as, if they occurred in the time of his testator or ancestor), there, it will be sufficient for him to negative the averment according to his best knowledge and belief.³

§ 663. So, where, to a Bill for the specific performance of an agreement made at an auction for the sale of lands, the defendant pleaded the statute of frauds, with averments, that no writing was signed by him, or by any person authorized by him, "for that, upon the estate being knocked down to the plaintiff, but before the memorandum was signed by the auctioneer, he, the defendant, in the presence of both the auctioneer and [*506] *the plaintiff, revoked all authority whatsoever, which he had before given to the auctioneer;" the plea was ordered to stand for an answer; the Court observing, that it was novel in form, and that the defendant ought to have stated the facts, which he implied in the term "revoked." It seems, however, that an allegation in a plea, which allegation is mere surplusage, will not support an objection to a plea as multifarious.⁴

¹ Beames Pl. in Eq. 21, 22; *Jerrard v. Saunders*, 2 Ves. jr. 187; S. C. 4 Bro. Ch. R. 322; *Cooper Eq. Pl.* 225, 226, 283; *Galatian v. Cunningham*, 8 Cowen R. 361; Post § 805, 806.

² *Galatian v. Cunningham*, 8 Cowen R. 361.

³ *Bolton v. Gardner*, 3 Paige R. 273; *Hart v. Corning*, 3 Paige R. 566; Post § 664.

⁴ *Cooper Eq. Pl.* 226.

§ 664. In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief; as, that an account is just and true; and in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion.¹ Unless, however, the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it; and the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true.²

§ 665. Another requisite of a pure plea, is, that it should clearly and distinctly aver all the facts necessary to render the plea a complete equitable defence to the case made by the Bill, so far as the plea extends; so that the plaintiff may, if he chooses, take issue upon it.³ Averments are also necessary to exclude intendment, which would otherwise be made against the pleader; and the averments must be necessary to support [*507] the plea.⁴ And here, again, Equity follows the analogies of the law;⁵ for, at law, the rule prevails, *Ambiguum placitum interpretari debet contra proferentem*.⁶

¹ Ante § 662.

² Mitf. Eq. Pl. by Jeremy, 297, 298; *Drew v. Drew*, 2 Ves. & Beam. 159; *Beames Pl. in Eq.* 25, 26; — *v. Southall*, 1 Younge R. 330, 331; *Bolton v. Gardner*, 3 Paige R. 273.

³ Mitf. Eq. Pl. by Jeremy, 298; *Beames Pl. in Eq.* 23, 24, and cases there cited; *Allen v. Randolph*, 4 John. Ch. R. 693.

⁴ Mitf. Eq. Pl. by Jeremy, 298, &c., as before cited; *Brownsword v. Edwards*, 2 Ves. 245, note; *Roche v. Morgell*, 2 Sch. & Lefr. 727; *Morrison v. Turnour*, 18 Ves. 182; *Beames Pl. in Eq.* 26.

⁵ *Beames Pl. in Eq.* 23, 26.

⁶ *Beames Pl. in Eq.* 26, cites *Com. Dig. Pleader*, E. 6.

§ 666. It was upon an analogous ground, that, where a plea stated, that the title, if any, of the plaintiff or of the party, through whom the plaintiff by his Bill claimed the estates in controversy, accrued in 1759, and that the possession of the same estates had ever since been adverse to the plaintiff, and the persons, through whom, by his Bill the plaintiff claimed, the plea was overruled; because it did not state particularly the facts, on which the defendant meant to rely, as constituting the adverse possession; and, therefore, the plaintiff could not know, what case he had to meet.¹

§ 667. Let us, in the next place, proceed to the consideration of the peculiarities in the frame and form of pleas, called pleas not pure, or anomalous pleas. This designation, as has been already suggested, is applied to them, because they differ from pure pleas in this, that, whereas pure pleas rely for a defence upon matters altogether dehors the Bill, pleas, not pure, rely altogether upon matters stated in the record, and upon denials and negations of matters of fact contained therein, which denials and negations, if true, constitute a sufficient defence against further proceedings in the suit, either peremptorily, or at least in its present form.²

§ 668. It was formerly a question of no inconsiderable difficulty, and, from the apparent contrariety of the authorities, subject to much discussion and vexatious [*508]* controversy in Courts of Equity, whether a purely negative plea to a Bill was a legitimate mode of defence in Courts of Equity, as it unquestionably is at law. As, for example, it was a question, whether a defendant could allege, in opposition to the claims of the plaintiff, as heir

¹ *Hardman v. Ellames*, 5 Sim. R. 640; S. C. 2 Mylne & Keen, 732.

² *Ante* § 651; 2 Daniell's Ch. Pract. 97, 98, 90, 110, 111, 112; *Id.* 132, 133, 139.

at law, that the plaintiff was not heir at law. But that doubt has been dissipated ; and it is now firmly established that such a plea is good.¹ It has been applied to

¹ Mr. Beames (Pl. in Eq. 123 to 128) has given the reasoning, upon which this doctrine is maintained. "Whether," says he, "a defendant could allege, in opposition to the claims of the plaintiff in the character of heir, that she was not heir ; in other words, whether a purely or directly negative plea be good in Equity, was, for some time, *vexata questio*, notwithstanding the old cases alluded to. Lord Thurlow in two cases held, that a plea of not heir was bad. But his lordship observed, in a subsequent case, alluding, as it is generally understood, to the latter of these two cases, 'that though he had held, on a former occasion, that a negative plea was bad, he believed he was wrong in holding so ; for that, wherever the plea will reduce the question to one point, it is admissible.' We are told, by the highest authority, that 'the original opinion of Lord Thurlow was, that the negative plea was bad, and there ought to be an affirmative plea, stating who was heir. His lordship changed his opinion afterwards, on the ground, that the defendant, though he could prove, that the plaintiff was not heir, might not be able to prove, who was the heir.' Lord Thurlow's original opinion, that the plea should state affirmatively, 'who was heir,' proceeded no doubt upon the ground of this being in the nature of a plea in abatement at law, and that, as such, it should afford the plaintiff that information, which was tantamount to giving him a better writ at law. The difficulty of stating 'who was heir,' might be great. But it may be asked, whether a correspondent difficulty is not struggled with at law in this species of plea, and if it have produced any exception, that avoids it ? On the other hand, the propriety of reasoning this particular plea in Equity on a strict analogy to the form of a legal plea in abatement may seem questionable, especially as other pleas in Equity have not been tried by any such rule. The analogy in principle between pleas in Equity to the relief, and pleas at law, is sufficiently uniform, and may generally be appealed to ; but that is not the case with respect to the forms of pleas. Whatever doubt, however, may formerly have been entertained on the subject, it is apprehended, that a negative plea in Equity is not necessarily bad ; but on the contrary, under given circumstances at least, perfectly available. We speak of a plea directly negative, and not of a plea indirectly so, or a plea reaching the point of negation through an affirmative proposition. It will probably elucidate this part of the subject, if we consider, on what grounds this doctrine may rest, independently of positive decision. Every Bill seems to be founded on two propositions, one of which it expressly, and the other it tacitly, assumes in *limine*, namely ; first, that the Court, in which the Bill is filed, has competent jurisdiction over the matter ; and, secondly, that the plain-

many cases, where the negative plea goes to the foundation of the suit, and the title of the plaintiff; as, for example, a plea that the defendant was not a partner,

tiff is of legal ability to sue. It is true, pleas to the jurisdiction in effect negative the first proposition; but the mode is not by a direct denial of the power of the Court to decide the matter, but by affirmatively stating some other tribunal, where the subject should be investigated. With respect to pleas to the person of the plaintiff, outlawry, &c., they, in effect, deny the second proposition, tacitly assumed by the Bill. The mode, however, is less in the nature of a direct negative of the plaintiff's ability to sue, than by affirmatively stating the cause of disability. A distinction obviously presents itself between those pleas, in effect negative, which bring forward some affirmative proposition, and, through the medium of that proposition, reach negation, and those pleas, which are purely negative. An instance of the first kind would be a plea, stating the existence of a person, as whose administrator the plaintiff filed his Bill. Such a plea would bear some analogy to the principle of the common plea in Equity to the person. But that plea, which consists of a direct and simple negation of the substantive character, in which the plaintiff sues, peculiarly termed the 'negative plea,' does not appear to be founded on any analogy to any other plea in Equity. It rests, however, and, as it is apprehended, satisfactorily rests (independently of decision in its favor), first, on its answering the high purposes of justice, and, secondly, on its analogy to legal pleading. As to the first point, it may be observed, that courts of Equity would be instruments of the greatest oppression, and sources of incalculable mischief, if they aided a plaintiff in virtue of a character, which did not belong to him. If the plaintiff possess not the character, he is not entitled to the relief, which, as possessing the character, he would have been entitled to. This species of plea prevents an evil of the worst kind; and, if it did not exist, 'any person might, by alleging a title, however false, sustain a Bill in Equity against any person for any thing, so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst purposes.' With respect to the second point, the plea of the general issue at law is always a negative plea. In fact, it is a total denial of the whole declaration. But, if there be no plea in Equity, which corresponds with the general issue at law, the negative plea in Equity corresponds with the legal plea, denying the existence of the plaintiff, a species of plea, which we have already noticed. Its analogy, however, to that legal plea, which negatives the representative character of a plaintiff, is, perhaps, still more striking." See also *Mitf. Eq. Pl.* by Jeremy, 230, 231, and notes; *Jones v. Davis*, 16 Ves. 265; *Cooper Eq. Pl.* 249, 250; *Faulder v. Stewart*, 11

has been held good to a Bill, seeking an account of partnership transactions.¹

§ 669. The reasoning, by which such a plea is supported seems, in a just sense, unanswerable ; for it would otherwise follow, as a necessary consequence, that any person, falsely alleging a title in himself, might compel any other person to make any discovery, which that title, if true, would enable him to require, however injurious it might be to the person, thus improperly brought into court.² So that any person might, by alleging a title, however false, sustain a Bill in Equity against any person for any thing, so far as to compel an answer. And thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family, might be exposed ; and this might be done in the name of a pauper, at the instigation of others, and for the worst purposes.³ To avoid this inconvenience, a defendant has, in some cases, been permitted to negative the plaintiff's title by a special answer or plea ; and thus to protect himself against the required discovery.⁴ But in other cases, this has not been allowed ; and, until the recent *authorities had settled the matter, [*511] there was great room for doubt and difficulty upon this subject.

§ 670. We may, therefore, dismiss the further consideration of this part of the subject, and proceed to the examination of the other class of pleas, not pure, which

Ves. 296 ; *Shaw v. Ching*, 11 Ves. 303, 305 ; *Drew v. Drew*, 2 Ves. & B. 159 ; *Sanders v. King*, 6 Madd. 61 ; S. C., cited in *Thring v. Edgar*, 2 Sim. & Stu. 274 ; *Hardman v. Ellames*, 2 Mylne & Keen, 740, 745 ; *Armitage v. Wadsworth*, 1 Madd R. 196 ; *Foley v. Hill*, 3 Mylne & Craig, 475 ; 2 Daniell Ch. Pract. 97, 98, 99, 100, 108 to 112 ; *Wigram on Discovery*, 2d edit. p. 110 to 118 ; Ante § 651, note (1).

¹ Ibid. Ante § 660.

² Mitf. Eq. Pl. by Jeremy, 231. Lord Redesdale uses the word "answer" only ; but the sense seems to me to require "special answer or plea."

³ Ibid.

⁴ Ibid.

may be truly called, with reference to legal proceedings, anomalous ; but which, at the same time, are now as well established in Equity, as any other class of pleas. This class of pleas has two peculiarities ; in the first place, it relies wholly upon matters stated in the Bill, (as we have seen) negating such facts as are material to the rights of the plaintiff ;¹ and, in the next place, it requires an answer to be filed, which is subsidiary to the purposes of the plea. A pure plea never requires any such answer.²

§ 671. It was formerly thought, that there was something incongruous in a plea and an answer in support of the plea. But this objection seems to have arisen from a supposition, that the answer in such a case formed a part of the defence set up by the plea. It is, correctly considered, no part of the defence. But it is properly a discovery of that evidence, which the plaintiff has a right to require, and to use, in order to invalidate the defence made by the plea upon the argument of the sufficiency of the plea, before other evidence can be given.³

¹ Ante § 651, § 667.

² Beames Pl. in Eq. 34, 35 ; 2 Daniell Ch. Pract. 99, 100.

³ Mitf. Eq. Pl. by Jeremy, 244, note (f). See Beames Pl. in Eq. 34, 35 ; Hare on Discov. 25, 26 ; *Foley v. Hill*, 3 Mylne & Craig, 475 ; 2 Daniell Ch. Pract. 99, 100, 110, 111. Lord Eldon, in *Bayley v. Adams* (6 Ves. 594 to 597), in commenting on this class of cases, and upon some decisions in the Exchequer, in which it was held (contrary to the present established doctrine), that where an award was sought to be impeached by a Bill, on account of fraud, the plea should nakedly plead the award, without noticing the facts of fraud, and the answer only should deny those facts, said ; “ If the result of the opinion, stated in Mitford (Eq. Pl. by Jeremy, 240 to 245), is accurate, it is very difficult to reconcile the two cases in the Court of Exchequer with that result from the former cases. Those two cases in the Exchequer seem to import, that this is the rule of pleading in Equity ; that, if a Bill is brought to set aside an award, upon grounds admitting the award made, but seeking to cut down the effect of it by alleging grounds of partiality and corruption, the defendant may plead the thing, the dissolution of which is sought by the

§ 672. The whole difficulty in cases of this sort, in relation to the supposed incongruity of a plea and an

Bill; putting it in this form; that the plea shall merely aver the existence of it, and contain no allegation in the body of the plea as to the circumstances, upon which the award is impeached; but the defendant may express, what his conscience suggests as to those circumstances, not in the body of the plea, but in an answer. The first difficulty upon that is, how to consider that record, filed by the defendant, consisting partly of what is called plea, partly of what is called answer, as in a correct sense either a plea or an answer. The office of a plea in bar at law is to confess the right to sue: avoiding that by matter dehors; and giving the plaintiff an acknowledgment of his right, independent of the matter alleged by the plea. The plea alleges some short point; upon which, if issue is joined, there is an end of the dispute. In this Court, in general cases, not classed among those, where certain averments seem to have been required both by the plea and the answer, but where the defendant *pro hac vice* for the sake of the argument, admits the whole Bill, I have understood the rule to be the same here as at law, that the plea admitting the Bill interposes matter, which if true destroys it; and upon the truth of which the plaintiff is at liberty to take issue. Cases have arisen, in which it has been thought necessary both to plead, and to repeat the assertions of the plea in an answer. That is, as it is technically expressed, the plea is supported by an answer. Those cases are very various; and I own, I should have entertained an idea, before I heard of those cases in the Court of Exchequer, that, if a Bill was filed to set aside an award upon special circumstances, the first difficulty would be upon the maxim referred to by the Report: '*Exceptio ejusdem rei, cujus petitur dissolutio.*' But it is true, that, not only upon awards, but releases, judgments, &c., the Court has admitted a plea, called a plea, though in its nature very different from the character of a plea in general cases; for it is not, strictly speaking, admitting the fact stated, and by the effect of new matter, introduced by the defendant, getting rid of it; but admitting one fact in the Bill, and either by plea, or by answer, or by both, setting up again that, which the Bill seeks to impeach, by denying, either in the plea, or the answer, or both, all the circumstances, which the plaintiff admits, if truly denied, are sufficient to bar the relief. The cases in the Exchequer are confined to the plain case of an award; in which case, it is said, you are at liberty to plead the award; in that sense alleging something, that meets the effect of the Bill by the plea. But can that be said, if you only admit the existence of the instrument stated by the Bill; which, by the effect of the other circumstances stated by the Bill, is impeached? If this were *res integra*, I should have thought it more difficult to say, the defendant was bound to set out all the circumstances by averment in the plea; and

answer, may be entirely overcome, or at all events, essentially diminished, by considering the true nature and

could fortify it by an answer, denying those circumstances. Such a record is neither plea nor answer; but something like a mixture of both, and very inaccurate. That this was the general idea, is evident from the book, that has been referred to; which is a production of a very diligent and learned man, not at once given to the world, or hastily, but after search and research into every record, and again given to the world by him. There is hardly one point of equitable proceedings with regard to pleas, with which it is not exceedingly difficult to reconcile these two cases in the Exchequer. For instance, what is said in Mitford, as to a Bill brought to impeach a decree on the ground of fraud, used in obtaining it; that 'the decree may be pleaded in bar of the suit, with averments,' (in the plea, it appears by the context), 'negating the charges of fraud, supported by an answer fully denying them.' So of a judgment: 'If there is any charge of fraud, or other circumstance, shown as a ground for relief, the judgment or sentence cannot be pleaded, unless the fraud or other circumstance, the ground, upon which the judgment or sentence is sought to be impeached, be denied, and this put in issue by the plea, and the plea supported by a full answer to the charge in the Bill.' In the case of a stated account also; 'If error or fraud are charged, they must be denied by the plea, as well as by way of answer.' So with regard to an award; which is the subject these cases in the Exchequer more particularly allude to; 'if fraud or partiality are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer, showing the arbitrators to have been incorrupt and impartial.' Upon the Statute of Limitations: 'where a particular special promise is charged, to avoid the operation of the Statute, the plaintiff must deny the promise charged by averment in the plea, as well as by answer to support the plea.' So as to a purchase for valuable consideration: 'The special and particular denial of notice or fraud must be by way of answer; that the plaintiff may be at liberty to except to its sufficiency. But notice and fraud must also be denied generally by way of averment in the plea; otherwise the fact of notice or of fraud will not be in issue.' This is laid down here distinctly, and in many other books; for I have lately looked into the point for another purpose; and I think I may say, whatever doubt may be expressed as to the necessity of denying by plea and answer, that there is no countenance for that upon the old authorities. Sir John Mitford's idea is, that if you are to call this defence a plea, it must be such, that issue may be taken upon it as a plea; and if it is substantiated by evidence as a plea, there is an end of the cause. Where the defendant, not stating merely matter *dehors*, but admitting part of the charge, gets

objects of Bills in Equity, and especially of Bills, which present questions of this sort. Every Bill presents a statement of facts, and a claim of right, on the part of the plaintiff, in regard to which he seeks relief; and it further seeks a discovery from the defendant, in order to establish, or to aid in the proof of, such facts and claim of the plaintiff. Now, to such a discovery, at least so far as the facts and claim, constituting the plaintiff's case, are concerned, he has an unquestionable right. The rule has been laid down by a very able writer in the following terms. It is the right, as a general rule, of the plaintiff in Equity (as we have seen), to examine the defendant upon oath, as to all matters of fact, which being well pleaded in the Bill, are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit.¹ The answer of the defendant, if he puts in one, consists of two parts; (1) his own defence upon the merits of the case stated; and (2) his discovery as to the facts, as to which he is interrogated, or, in other words, his examination on oath to all the material facts, of which a discovery is sought.² In such a case, the examination is merely evidence in the cause; and is altogether independent of the matter of the defence. Now, if, instead of a general answer, the defendant puts in a plea, negating the material facts, on * which the claim to relief is founded, if there [*515] were no answer accompanying it, which should contain

rid of it by circumstances, I do not know, that it might not be called a plea and answer. But that is a record of a character very distinct from that, which is usually called a plea."

¹ Wigram on Points in Discov. 23, 1st edit.; Id. 2d edit. p. 10, 11; 2 Daniell Ch. Pr. 114, 115, 116 to 119. Ante § 572.

² Wigram on Discovery, 10, 11, 12, 13, 1st edit.; Id. p. 10, 11, 2d edit.

a discovery and response to the facts charged in the Bill, the plaintiff would be deprived of the very discovery sought, and perhaps also of all the proof, which he could bring forward to sustain the allegations of the Bill. The answer, therefore, is strictly matter in support of the plea, and proof, to the discovery of which the plaintiff is entitled, notwithstanding the plea. The plea, without it, cannot correctly be said to be a complete answer to the Bill; for, though it repels the facts stated by the plaintiff, it does not repel the right to a discovery of the facts, from the conscience of the defendant.¹

§ 673. The discovery, which a Court of Equity gives, is not the mere oath of the party to a general fact, as a partnership, or no partnership; but it is an answer upon oath to every collateral circumstance, charged as evidence of the general fact.² Where a defendant, therefore, pleads the general fact, as a bar to the whole discovery, as well as to relief, either the plaintiff in the particular case must lose the equitable privilege of discovery, or some special rule must be adopted, by analogy, in order to preserve to him that privilege. If a plaintiff comes into Equity to avoid a legal bar upon the ground of some alleged equitable circumstances, as in the case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery, as to the alleged equitable circumstances. He may, indeed, plead his release; but he must, in his plea, generally deny the Equity

¹ See *Mitf. Eq. Pl.* by Jeremy, 239 to 244; 2 *Daniell Ch. Pract.* 114 to 139; *Wigram on Discovery*, 2d edit., 32, 33; *Id.* 46, 55 to 67; *Hare on Discovery*, 28 to 31.

² *Wigram on Discovery*, 2d edit., 62 to 67; *Id.* 142 to 157; 2 *Daniell Ch. Pract.* 121 to 131; *Hare on Discovery*, 28 to 31; *Id.* 34 to 36.

charged in the Bill; and must also accompany his plea with a distinct answer and discovery, as to every equitable circumstance alleged. In such a case, the issue tendered by his plea is not the fact of his release; for that fact is admitted *by the Bill; but the issue [*516] is upon the equitable matter charged. Yet, inasmuch as the principles of a Court of Equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find, that, notwithstanding the defendant pledges his oath, that there is no truth in the equitable matter charged, he is, nevertheless, compelled to accompany his plea by an answer and discovery, as to every circumstance alleged, as evidence of the Equity.¹

§ 674. The cases, therefore, in which an answer is required by way of discovery to accompany the plea, are; (1) where the plaintiff admits by his Bill the existence

¹ *Sanders v. King*, 6 Madd. R. 61; S. C. cited *Thring v. Edgar*, 2 Sim. & Stu. 279; *Hare on Discovery*, 28 to 31; *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. 683; *Wigram on Discovery*, 2d edit., p. 62 to 67; *Id.* 142 to 157; 2 *Daniell's Ch. Pract.* 114 to 132. This explains the reason, why no answer occupies a pure plea; for that being an averment of matters, dehors the Bill, it is impossible, that it can be required by any discovery of those matters. It would not be responsive to the Bill. Mr. Beames (Pl. in Eq. 33, 34), alluding to the same subject, says:—"An answer in support of a plea, seems, in those cases, where it is necessary, to be required on several grounds: First, with a view beneficial to the plaintiff, either in aid of proof, and in order to give him an opportunity of obviating the bar to be set up, or, in other words, to enable him to except to the traverse of the facts charged in the Bill. If these facts were merely denied by way of averment in the plea, as the plaintiff could not except to such averment, he would be totally precluded from objecting to the insufficiency of that denial, however general in its terms. Secondly, with a view beneficial to the defendant, in order to give him an opportunity of excluding intendment, which might otherwise be made against him: because 'upon argument of a plea, every fact stated in the Bill, and not denied by answer in support of the plea, must be taken to be true.' But it is not, perhaps, quite clear, why this latter object might not be effected in most instances by averments simply."

of a legal bar; but charges some equitable circumstances to avoid its effect; (2) where the plaintiff does not admit the existence of any legal bar; but charges some circumstances, which may be true, and to which there may be a valid ground of plea, and also charges other circumstances, which are inconsistent with the substantial [*517] *validity of the plea.¹ In the first case, the defendant may insist, by way of plea, upon the legal bar, denying the circumstances, which would avoid it; and he must accompany the plea with an answer, making a discovery, as to all the circumstances so charged in the Bill, in support of his plea.² In the latter case, the defendant must distinguish those facts, which, if true, would not invalidate or disprove his plea; and plead to the discovery sought with regard to them. And he must then accompany the plea with an answer to the facts, and to those only, which, if true, would disprove, or invalidate his plea, and to all the matters, which are specially alleged as evidence of those facts.³

§ 675. The first case may be easily illustrated by the common case of a release, charged in the Bill to have been obtained by fraud, the circumstances whereof are specially charged. In such a case, the plea must rely on the release, and deny the fraud; and the accompanying answer must also make discovery as to all the circumstances, charged as proofs of the same.⁴ The second case may be illustrated by a Bill for an account of the dealings and transaction of a partnership, charging a

¹ Hare on Discov. 30, 31; 2 Daniell's Ch. Pract. 113, 114.

² Hare on Discov. 31 to 34.

³ Hare on Discov. 34 to 36; Crow v. Tyrell, 2 Madd. R. 409.

⁴ Hare on Discov. 32, 33; Sanders v. King, 6 Madd. 61; S. C. cited 2 Sim. & Stu. 274.

partnership, and various transactions thereof. In such a case, if the defendant pleads, that he is not a partner, the plea must be accompanied with an answer and a discovery, as to all the circumstances, specially charged as evidence of the partnership.¹

¹ Hare on Discov. 34, 35; *Drew v. Drew*, 2 Ves. & Beam. 159; *Sanders v. King*, 6 Madd. 61; S. C. cited 2 Sim. & Stu. 274. Mr. Hare has fully explained these two classes of cases; and I gladly refer the reader to his able exposition of them. Hare on Discov. p. 30 to 36. I have contented myself with the short illustrations in the text. In *Sanders v. King*, 6 Madd. 61; S. C. cited 2 Sim. & Stu. 274, Sir John Leach (V. C.) with reference to a plea of partnership, after the observations quoted in Ante § 673, said:—"This practice seems to afford a very strong analogy for the present purpose. There the defendant affirms upon his oath, that there is no equitable matter to destroy the legal bar of the release; yet he is nevertheless bound to accompany his plea with an answer, and discovery as to every circumstance charged as evidence of that Equity. Here the defendant affirms upon his oath, that there is no partnership; and, by analogy it seems to follow, that he is nevertheless bound to accompany his plea with an answer, and a discovery as to every circumstance charged as evidence of the partnership. Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a plea, which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery, as to the subject of the suit, does not protect him from answer and discovery, as to such matters as are specially charged as evidence of the plaintiff's title. According to this rule, this plea being unaccompanied by an answer and discovery, as to the circumstances specially charged as evidence of the partnership, should be overruled; but, being a new case, the defendant must be at liberty to amend his plea." In all cases of this sort, it is important for the plaintiff in his Bill, if he means to rely on circumstances as evidence in support of his title, and of which he seeks a discovery, that he should specially charge such circumstances as evidence of his title, otherwise the defendant may plead a negative plea, denying the plaintiff's title, without any accompanying answer. Indeed, in such a case, the answer, if it claims a debt, will overrule the plea. Thus, where to a creditor's Bill the defendant pleaded, that the deceased was not indebted to the plaintiff at her death, and accompanied the plea with an answer denying the debt, and the manner in which it was contracted; it was held, that the answer overruled the plea. On that occasion, the Vice Chancellor said—"To apply these principles to the present case: If the testatrix were not at her death indebted to the plaintiff in any sum of money, then the plaintiff's title to any relief, or to any discovery upon this Bill, wholly fails; and the

§ 676. The origin of this class of pleas may be easily traced to a change in the frame and character of Bills [*519] *and pleadings, from those, which existed under the old practice of the Court. The Bills were formerly of a very simple character, not taking any notice of the real or supposed defence, which would be set up by the defendant. The defence came out on a plea; and the replication stated the matter in avoidance of the plea; and then the rejoinder denied the matters in the replication; and the parties were then at issue. When, for example, according to the old practice, a plaintiff by his Bill stated a case for relief, if there had been a former decree on the merits, which he sought to set aside, on

plea of no debt is a full bar to the whole suit; unless the plaintiff has sought from the defendant a discovery of any circumstances, by which the existence of the alleged debt is to be established; and then the defendant, although by his plea he may deny the debt, must still answer as to the particular discovery, which is thus sought from him. But, in order that a defendant may in such a case know, what is the particular discovery, which the plaintiff requires from him, it is incumbent upon the plaintiff distinctly to state it in the Bill; and the common form of doing this is, by the plaintiff's charging, as evidence of his title, the particular matters, as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff, what are the particular matters affecting his title, as to which he seeks such discovery, the defendant, not knowing, what he is expected to answer, is not to answer at all. The plaintiff in the present Bill gives no distinct information to the defendant, that he seeks any discovery from him, for the purpose of establishing the existence of the debt. The defendant's plea, therefore, of no debt, was a full bar to the whole discovery, as well as to the relief. And the defendant as much overruled his plea by answering to the debt, as he would have overruled it by answering to any other part of the Bill. If, upon the filing of this plea, the plaintiff had desired a particular discovery from the defendant, as to any circumstances, by which the debt was to be established, he would have amended his Bill, and would have charged, as evidence of his title, the special matters, which he required to be answered." *Thring v. Edgar*, 2 Sim. & Stu. 274, 280, 281. But see *Jones v. Davis*, 16 Ves. 265; *Arnold v. Heaford*, 1 McClell. & Younge, 330; *Hare on Discov.* 35, 36.

account of fraud in obtaining the decree, the Bill did not, in any manner whatsoever, allude to the decree. It was left to the defendant to plead the decree, as a defence, barring the plaintiff's right. And the plaintiff then, by his replication, would reply, that the decree had been obtained by fraud; by which the plaintiff would admit, that the decree was a *bar, if not [*520] capable of impeachment on the ground of fraud. The defendant would, by his rejoinder, avoid, or deny the charge of fraud, and sustain the decree; and then the issue would be simply on the fact of fraud.¹ In such a case, it is manifest, that no answer, on the part of the defendant, to the charges of fraud would be proper; for, as no such charges were in the Bill, no discovery would be sought, or would be proper. In truth, if there were any answer in such a case, it would overrule the plea.²

¹ Mitf. Eq. Pl. by Jeremy, 243, note (e); Beames Pl. in Eq. 2 to 6.

² See Gilb. For. Rom. 58, 59; Mitf. Eq. Pl. by Jeremy, 299; Beames Pl. in Eq. 37, 38. In Mitf. Eq. Pl. by Jeremy, 299, it is said:—"A defendant may also support his plea by an answer touching any thing not charged by the Bill, as notice of a title, or fraud; for by such an answer nothing is put in issue, covered by the plea from being put in issue, and the answer can only be used to support or disprove the plea. But if a plea is coupled with an answer to any part of the Bill, covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be overruled." For the former portion, he cited Gilb. For. Roman. 58, where it is said:—"But you may answer any thing, which is not charged in the Bill, in *subsidiu* of your plea; as you may deny notice in your answer, which you deny also in your plea; because that is not putting any thing in issue, which you would cover by your plea from being put in issue; but it is adding by way of answer that, which will support your plea, and not an answer to a charge in the Bill, which by your plea, you would decline." But quere, if this doctrine be maintainable? Must not an answer be to matters charged in the Bill? If the answer is as to other matters, is it not irrelevant? Can the defendant make his answer evidence in support of his plea, when not responsive to the Bill? See Beames Pl. in Eq. 36, 37, 38; Arnold's case, Gilb. For. Roman. 59. See *Thring v. Edgar*, 2 Sim. & Stu. 274.

§ 677. This mode of pleading continued for a great length of time ; and was originally derived from the civil law. For by that law, after the libel, the defendant put in his exception (*exceptio*) ; then the plaintiff put in his replication (*replicatio*) ; and then came the rejoinder and [*521] subsequent pleadings, until the parties had arrived at a definite issue. Thus, we find in the Digest, that in the first place came the definition of the *exceptio*, which has been already cited ;¹ then the definition of a replication ; *Replicatio est contraria exceptio, quasi exceptionis exceptio* ; or more fully, *Replicationes nihil aliud sunt, quam exceptiones, et à parte actoris veniunt.*² And then there is added ; *Sed et contra replicationem solet dari triplicatio ; et contra triplicationem rursus : et deinceps multiplicantur nomina, dum aut Reus aut Actor objecit.*³

§ 678. But, when a change of the frame of pleadings took place, and special replications, rejoinders, and sur-rejoinders, fell into disuse ; and the Bill, instead of relying solely on the matter, constituting the plaintiff's original case, proceeded to anticipate the defence ; and charged facts to avoid that defence, (thus performing the double functions of a Bill, and of a replication under the old practice) ; and required a discovery as to the matters charged ; a change in the mode of making his defence became indispensable for the protection of the defendant ; and he was compelled to put in a plea, which was in part both a plea and a rejoinder. That is, he was obliged to plead the bar, and to negative the charges and circumstances, which sought to avoid it.

¹ Ante § 650 ; Dig. Lib. 44, tit. 1, l. 2.

² Dig. Lib. 44, tit. 1, l. 2, § 1.

³ Dig. Lib. 44, tit. 1, l. 2, § 3.

And as a discovery was sought, in relation to these very matters charged in avoidance, he was also compelled to accompany his plea with an answer, fully discovering, and responding to these matters. Under such circumstances, the objection, *Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio*, did not apply. For the [*522] material issue between the parties was not the bar set up in defence; but it was the facts and charges set up in the Bill to avoid it.¹ Nor was the plea, under such circumstances, liable to the imputation of duplicity; for it contained in the whole, but one single defence. And the answer was necessary in support of the plea; because the plaintiff was entitled to the discovery of the facts and charges, stated in his Bill, in avoidance of the bar, and which might be indispensable to prove his case at the hearing.²

§ 679. Having thus explained the origin, if not having thus vinticated the importance and justice, of what, with no very great propriety, is called a plea not pure, or an anomalous plea, let us now proceed first, to the consideration of the allegations, which such a plea ought to contain, or to omit; and next, to the consideration of what the accompanying answer should also contain, or should omit; both of which are of great practical importance.

§ 680. First, as to the plea. It has been a matter of much juridical discussion and controversy, whether, in the case of a plea to a Bill, which Bill admits a good bar or defence to exist to the suit, and then states facts and circumstances in avoidance of such bar or defence, the plea

¹ Gilb. For. Rom. 55, 56; Bayley v. Adams, 6 Ves. 595, 596; Cooper Eq. Pl. 227, 228.

² See Beames Pl. in Eq. 2 to 6; Bayley v. Adams, 5 Ves. 597, 598; Ante § 671, note (2); Evans v. Harris, 2 Ves. & Beam. 364.

should negative those facts and circumstances, or should simply plead the bar or defence without more, and rely on the accompanying answer alone to negative and disprove them. It is now firmly established, that the plea itself, as well as the answer, must contain averments, negating the facts and circumstances, so set up in the [*523] *Bill in avoidance of the bar or defence. For, otherwise, the plea will not amount to a complete defence to the Bill; since the denial of those facts and circumstances, is in truth the only point in controversy.¹

¹ Mitf. Eq. Pl. by Jeremy, 239 to 244; Id. 298, 299; *Heath v. Corning*, 3 Paige R. 566. It may be thought, that Lord Cottenham's remarks in *Foley v. Hill*, 3 Mylne & Craig, 475, 480, 481, somewhat state this doctrine. But it is not so. There the plaintiff, by the statute of limitations, expressly negated any promise within six years; and the very question was, whether, there should not be an answer in support of the plea, averring the special circumstances set up in the Bill to establish a promise and to avoid the bar. It was decided upon the clearest principles of equity, that there should be such an answer. Lord Cottenham on that occasion said; "The Bill in this case is founded upon the principle of anticipating a legal bar in the shape of a plea of the statute of limitations; and, with that view, it introduces, in the usual way, a charge, which, if true, would remove the bar, by preventing the operation of the statute. That is the neat statement of the point, and it certainly raises a question applicable, not only to the statute of limitations, but to every case where a charge is to be found in a Bill, which, if true, would remove an expected legal bar. The defendants plead the legal bar. No objection is taken to the averments of the plea; but the objection is, that the allegation, which, if true, meets the bar, and is very properly excluded from the plea, is not answered. The answer does not, in terms, negative that allegation; and the argument is, that, under these circumstances, the Court must adjudicate upon the plea, and, that the question, whether that allegation be or be not true, although a material part of the case in order to try the truth of the plea, is not a material circumstance upon the argument of the plea; in other words, that the Court would be bound to allow the plea, though there was no statement in the answer to destroy the effect of the allegation in the Bill, introduced for the purpose of meeting and displacing the anticipated bar. Now, independently of authority, and having been occasionally engaged in cases of this sort for upwards of thirty years, I have always considered it to be one of the best established principles of pleading, that this could not be done. I have always understood that where a

If those facts and circumstances do not exist, the bar or defence is admitted by the plaintiff to be perfect. If

Bill contained an allegation, which would meet the legal bar, the defendant could not plead the legal bar without negating that allegation. That applies to all cases of this kind—to pleas of the statute of limitations, pleas of fraud, and so forth. Lord Redesdale lays down the rule very clearly. Lord Eldon not only lays it down, but rests his decision upon it in *Bayley v. Adams* (6 Ves. 586); for the result of that case was, as appears from the marginal note and his Lordship's judgment, that the charges in the Bill were not sufficiently answered, and the question was, whether, under those circumstances, the plea was, or was not to be allowed. It was argued, that, if the charge, introduced for the purpose of meeting the plea, has not been sufficiently answered, the proper course is to take exceptions to the answer. That, however, is not so. The plaintiff cannot except to the answer, until after the argument on the validity of the plea; for, by excepting to the answer, he would admit the validity of the plea. (Red. Pl. 317, 4th ed.) The reason of the rule is not very material; for we find it not only laid down by Lord Redesdale and Lord Eldon, but received as the universal rule in practice. The whole machinery of pleading in Equity is somewhat cumbrous, and not quite well reduced to principle. At the same time we must recollect, that the plaintiff, by the mode of pleading he has adopted, furnishes himself with a special replication in the Bill, if he anticipates the defence by introducing a charge which would meet it. If the defendant had pleaded the statute, the plaintiff, according to the old practice, would reply the matter here stated by way of charge. That would be a special replication, a course, which is not now permitted; but the plaintiff does that, which is equivalent to it, by framing his Bill in the manner he has adopted here. Now the defendant cannot plead to the whole of such a Bill as that; for the legal bar is not the only question to be tried. There are two questions; first, whether the legal bar would apply; and secondly, if it would, whether it is not defeated by the circumstances charged in the Bill for the purpose of meeting it. Then the defendant puts in the plea, pleading his legal bar; and takes issue on that matter, which is to deprive the legal bar of its effect. The Court requires, that he should meet that allegation in the Bill, which, if true, would shew, that the bar ought not to prevail; otherwise the Court would be deciding upon the legal bar without the advantage of the plaintiff's oath as to whether there was not something in the case, which would make that legal bar inoperative. The Court, therefore, requires, that the defendant should, at least to the extent of his oath, pledge himself to the denial of that, which, if true, would defeat the legal bar. These defendants have pleaded the legal bar; but they have left quite untouched the charges introduced for

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they do exist, the defendant must equally admit, that the bar or defence is fatally defective.¹ Some illustrations of this doctrine will occur in the subsequent pages.¹

the purpose of obviating that bar. It is a question, which all authorities and the universal practice of the profession have determined; and I have no doubt, without hearing the counsel for the plaintiff, that the Vice Chancellor's decision was right." See 2 Daniell's Ch. Pr. 112 to 128.

¹ Mitf. Eq. Pl. by Jeremy, 240 to 244; Beames Pl. in Eq. 27 to 32; Cooper Eq. Pl. 227, 228; Rayley v. Adams, 6 Ves. 586, 594 to 599; Cork v. Wilcock, 5 Madd. R. 328, 330; Hart v. Corning, 3 Paige R. 566. This question is most elaborately reasoned out by Lord Redesdale, in considering the question, where a decree is sought to be avoided for fraud. But his reasoning is equally applicable to all other cases; and therefore it is here cited at large. "If," (says he), "a Bill is brought to impeach a decree on the ground of fraud used in obtaining it, which, as has been observed, may be done without the previous leave of the Court, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud, supported by an answer fully denying them. Whether averments negating the charges of fraud are necessary to a plea of this description, appears to have been a question much agitated in recent cases; upon which it may be observed, that without such averments, if the decree were admitted by the Bill, nothing would be put in issue by the plea. The question in the cause must be, not whether such a decree had been made; but whether such a decree having been made, it ought to operate to bar the plaintiff's demand. To avoid its operation, the Bill must allege the fraud in obtaining it; and to sustain it as a bar, the fact of fraud must be denied and put in issue by the plea. For upon the question, whether the decree ought to operate as a bar, the fact of fraud is the only point, upon which issue can be joined between the parties; and unless the plea covers the fact of fraud, it does not meet the case made by the Bill; and on argument of the plea, the charge of fraud, not being denied by the plea, must be taken to be true. If the Bill states the decree only as a pretence of the defendant, which it avoids by stating, that, if any such decree had been made, it had been obtained by fraud, the decree must be pleaded; because the fact of the decree is not admitted by the Bill; and the charge of fraud must also be denied by the plea for the reasons before stated. If the Bill states the decree absolutely, but charges fraud to impeach it; yet the decree must be pleaded; because the decree, if not avoidable, is alone the bar to the suit; and the fraud, by which the bar is sought to be avoided, must be met by negative averments in the plea; because without such averments, the plea would ad-

§ 681. Secondly ; As to the answer in support of the plea. In order to require, or even to justify, such an

mit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined upon such a plea, if the decree is admitted by the Bill, the only subject, upon which evidence can be given, is the fact of fraud. If that should be proved, it would open the plea on the hearing of the cause ; and the defendant would then be put to answer generally, and to make defence to the Bill, as if no such decree had been made. The object of the plea is to prevent the necessity of entering into that defence by trying first the validity of the decree. If the evidence of fraud should fail, the decree, operating as a bar, would determine the suit, as far as the operation of the decree would extend. It has also been objected, that a plea of the decree is a plea of the matter impeached by the Bill. But the frame of a Bill in Equity necessarily produces, in various instances, this mode of pleading. If the Bill stated the title, under which the plaintiff claimed, without stating the decree, by which it had been affected, the defendant might have pleaded the decree alone in bar. If the Bill stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it ; and yet sought relief founded on the title concluded by it, the defendant might demur ; because upon the face of the Bill the title of the plaintiff would appear to be so concluded. But, as in the form of pleading in Equity, the Bill may state the title of the plaintiff, and at the same time state the decree, by which, if not impeached, that title would be concluded, and then avoid the operation of the decree, by alleging, that it had been obtained by fraud ; if the defendant could not take the judgment of the Court upon the conclusiveness of the decree by plea, upon which the matter, by which that decree was impeached, would alone be an issue, he must enter into the same defence (by evidence, as well as by answer), as if no decree had been made ; and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is therefore permitted to him to avoid entering into the general question of the plaintiff's title, as not affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defence, namely, the fact of fraud in obtaining the decree. This has been permitted to be done in the only way, in which it can be done, by pleading the decree with averments, denying the fraud alleged ; and those averments being the only matter in issue, they are necessarily of the very substance of the plea. The decree, if obtained by fraud, would be no bar ; and nothing can be in issue on a plea, but that, which is contained in the plea ; and every charge in the Bill, not negatived by the plea, is taken to be true on argument of the plea. If, therefore, the decree merely were pleaded on argument of the plea, the charge

answer, there must be some specific facts charged in the Bill, to which such an answer is a proper response. A Bill may be specific in two respects. It may allege a particular fact, and charge, that the evidence thereof is in the possession of the defendant; or it may be specific in charging a general fact, such as the fact, upon which the title of the plaintiff is founded, and charge particular circumstances to prove that general fact, and require discovery thereof from the defendant. It is necessary, in order to the allowance of an answer in support of a plea, that the Bill should contain some charge of one kind, or of the other.¹ Therefore, where the Bill does not charge any specific fact, inconsistent with the plea, negating, and avoiding, as it were, that plea by anticipation, but only alleges, generally, that the defendant holds papers and writings, by which the truth of the several matters charged in the Bill, or some of them, would appear (which matters, if true, would not affect the validity of the plea, but would leave it with its full force), it is not necessary to put in an answer in support of the plea; for nothing is charged, which is specific in any point of view, to defeat the plea, and an accompanying answer is unnecessary; and indeed is improper, since it would overrule the plea.²

of fraud must be taken to be true, and the plea ought therefore to be overruled. But if on argument the plea were allowed; or if the plaintiff, without arguing, replied to the plea, no evidence could be given on the charges of fraud to avoid the plea; and the defendant proving his plea, that is, proving the decree and nothing more, would be entitled to have the Bill dismissed at the hearing." *Mitf. Eq. Pl. by Jeremy*, 239 to 243, and note (g). See also 2 *Ves. & Beam.* 364; 6 *Madd. R.* 64; 2 *Sim. & Stu.* 279; *Ante* § 671, note (2).

¹ *Hare on Discov.* 36, 37; *Macgregor v. East India Company*, 2 *Sim. R.* 455; *James v. Sadgrove*, 1 *Sim. & Stu. R.* 4; *Hindman v. Taylor*, 2 *Bro. Ch. R.* 7; *Post* § 754.

² *Hare on Discov.* 37; *Macgregor v. East India Company*, 2 *Sim.* 452;

§ 681. *a.* But if the Bill should contain allegations, which, if true, would defeat the bar set up by the plea, in such a case the plea cannot be pleaded to the discovery prayed by the Bill, although the Bill merely charges in general terms, that the defendant has in his custody or power divers books, papers and writings, by which, if produced, the truth of the several matters aforesaid, or some of them, would appear. For in such a case there might be an answer, negating the existence of such books, papers and writings; or there might be a discovery, which, when made, might completely prove a case, which would displace the bar.¹

§ 682. So, unless it appears from the frame of the

Hardman v. Ellames, 2 Mylne & Keen, 743, 744; *Cooper Eq. Pl.* 228, 229; *Mitf. Eq. Pl. by Jeremy*, 269 to 272; *Forbes v. Skelton*, 8 Sim. R. 335.

¹ *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. R. 683; *Lord Portarlington v. Soulby*, 6 Sim. R. 356; *James v. Sadgrove*, 1 Sim. & Stu. 4; *Macgregor v. East India Company*, 2 Sim. 455. This last case may be thought to involve some qualification or contradiction of the doctrine. But perhaps, correctly considered, it is reconcileable with it; for the Court seemed to think, that the Bill contained no allegation, that there had been any promise within six years to pay the debt, and therefore a pure plea of the statute of limitations was proper; and that the general language of the Bill, that the defendant had books, papers, &c., in his custody, which would prove the allegations in the Bill, or some of them, did not call for any discovery, which would avoid the bar. Lord Abinger in *Clayton v. Earl of Winchelsea* (3 Younge & Coll. 683, 689) thought the case of *Macgregor v. East India Company* incorrectly decided; and that a plea of the Statute of Limitations was not maintainable to a Bill of Discovery. But this must be understood in a qualified sense; for if none of the facts sought to be discovered would avoid the bar, then it would seem, that the plea was good. But his Lordship's opinion, that the general allegations in the Bill, as to papers and documents, &c., are sufficient to require a discovery by answer, seems well founded. On this occasion his Lordship said; "It appears to me, that the question in this case rests on a simple point. In determining these cases, one would be desirous, if possible, to shew, that the pleadings both at law and in equity were reconcileable with common sense; and I think, that, upon a careful examination of the principles, on

Bill, that some discovery is sought from the defendant, by which the existence of the title of the plaintiff is to be established, no answer is necessary or proper; for, in order that a defendant may, in such a case, know, what is the particular discovery, which the plaintiff requires of him, it is incumbent upon the plaintiff distinctly to state it in his Bill. And the common form of doing this is, by the plaintiff's charging, as evidence of his

which they rest, they will, generally speaking, be found to be so. Now, I think, that the distinction, which may serve to reconcile many of the cases on this subject, is that, which exists between a negative and affirmative plea. If you charge matters in the Bill, and demand discovery as to those matters, and the defendant pleads affirmative matter, the issue of which lies upon him to prove, and he then goes on to answer any matter charged in the bill, the answer overrules the plea; because it is wholly immaterial to the plea. But if he plead a negative plea; that is to say, if he traverses matters charged in the Bill, and the Bill not only alleges those matters, but also that the defendant has documents, which would prove them, the plea is not satisfactory, if he does not also deny the possession of those documents. The plaintiff has a clear right to a defence upon both points. No doubt, the defendant, by his plea, denies what the plaintiff puts in issue, and may do so conscientiously enough. But if the plaintiff calls on him to produce documents to prove the issue, it is not sufficient, if he do not make some statement, as to that, which relates to the proof of the allegation. It is said, indeed, by the learned counsel for the plaintiff, and very justly, that in this Bill there is no special charge, that the defendant has deeds, which would shew that he had taken titheable matters; but surely the general charge is sufficient to embrace that. It states, generally, that the defendant has documents in his possession, which would tend to shew the truth of the matters charged in the Bill, or some of them. Suppose he had a book, shewing the produce of corn for the last year; that would be a document. I think, that a plea, in order to be a good defence as a negative plea, ought to go on to meet that part of the Bill, which relates to the proof of the matter of the plea. An affirmative plea stands on a different ground." There does not, however, seem to be any real distinction between the case of an affirmative plea, and that of a negative plea, where the Bill contains charges anticipatory of the plea, and avoiding it, as has been remarked by the learned Reporters, (3 Younge & Coll, 689, note (a); Mitf. Eq. Pl. by Jeremy, 270, 271, 272, 273; Post § 754, § 806: 2 Daniell's Ch. Pract. 112 to 128.

title, the particular matters, as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff, what are the particular matters affecting his title, as to which he seeks such discovery, the defendant, not knowing, what he is expected to answer, is not to answer at all.¹

¹ *Thring v. Edgar*, 2 Sim. & Stu. 274; *Pennington v. Beechey*, 2 Sim. & Stu. 282; *Hare on Discov.* 38, 39; 2 *Daniell's Ch. Pract.* 112 to 128. Mr. Hare (on *Discov.* 39, 40), has remarked on the language of the Court in the case of *Thring v. Edgar*, 2 Sim. & Stu. 274, cited in the text, as follows; "The form of expression here pointed out, it would seem, must be confined to those cases, where the defendant charges a particular circumstance in support of his title. It can scarcely, in any propriety of language, apply, where the Bill, having averred the specific facts, upon which the title is founded, charges in the common form, applying to books and papers, that by them the truth of 'the several matters aforesaid, or some of them, would appear;' and merely adding to that general charge, that a certain fact in particular would thereby be proved. For example, if the Bill insisted upon a certain agreement, and, as evidence thereof, charged, that the defendant had done some act, manifesting his sense of the existence of the agreement, the words in question may be aptly used, as indicating the matter to be discovered in the event of the defendant's pleading to the general fact. But if the plaintiff states his case, as he may do, without alleging any collateral matter as evidence of it, he may still entitle himself to an answer, notwithstanding the plea, if he adds to the usual charge, that the defendant holds papers and writings, from which the truth of the several matters would appear, an allegation, that thereby in particular some circumstance, which he specifies, inconsistent with the anticipated plea, would appear. The formal words, adverted to, are then inappropriate. The object of the charge is, to compel an admission, upon which the plaintiff might require the papers to be produced. The papers may constitute evidence favorable to the plaintiff; the mere possession of them of itself proves nothing." See Ante § 681, a, and note; *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. 683, 688. Mr. Justice Washington, in *Sims v. Lyle* (4 Wash. Cir. Court Rep. 303, 304), made some remarks upon the nature and office of a plea, and when an answer should accompany the same, which deserve to be cited in this place. "A plea, being nothing more than a special answer to the Bill, setting forth and relying upon some one fact, or a number of facts, tending to one point, sufficient to bar, delay, or dismiss the suit, it would be a vice in the plea to cover any other parts of the Bill, than such as concern the particular subject of the bar; its office being to reduce the cause, or some part of it, to a single

§ 683. But if there be a special charge, that the defendant holds a particular document or paper, or is acquainted with a particular fact, by which document or paper, if produced, or by which fact, if confessed, the general title, asserted by the plaintiff, would be proved; then, and in that case, there must be an answer accompanying the plea, which shall deny the possession of the document or paper, or the existence or knowledge of the fact.¹

point, and thus to prevent the expense and trouble of an examination at large. It is true, that all facts essential to render the plea a complete defence to the Bill, so far as the plea extends, must be averred in it, or it will be no defence at all. If the plea be to the whole of the Bill, it must cover the whole; that is, it must cover the whole subject, to which the plea applies, and which it professes to cover, or it will be bad. As, if the Bill respect a house and so many acres of land; and the plea, professing to cover that charge, pleads only in bar as to the house. But if it cover the whole subject, and contains a full defence in relation to it, there is no necessity, nor would it be proper to notice other parts of the Bill, not involved in the subject, to which the plea applies. If the plea be only to a part of the Bill, the rest of the Bill ought to be answered, or else the Court would consider the parts not embraced by the plea, or answered, as true. But there is no instance, where the plea contains in itself a full defence to the Bill, that an answer is necessary, unless it is rendered so, in order to negative some equitable ground stated in the Bill for avoiding the effect of the anticipated bar; as where fraud, combination, facts intended to avoid the force of the statute of frauds, or to bring the plaintiff within some of the exceptions to the act of limitations, as the one or the other of these defences may be expected. And in those and similar cases, the defendant is bound, not only to deny those charges in his plea, but to support his plea by an answer, also denying them fully and clearly. If every plea required an answer to accompany it, there would be no use for the twentieth rule, lately established by the Supreme Court (which is conformable to the English practice), which declares, that if the plea be overruled, the defendant shall proceed to answer the Bill; since the argument supposes, that the Bill has already been answered. In this case, the plea professes to go to the whole Bill, and does in fact cover the whole subject, to which the plea applies. And if the matter of it be a full defence to the suit, it is unnecessary to answer other parts of the Bill, not involved in the subject, which forms the ground of the defence."

¹ Hare on Discov. 37; Deane v. Attorney General, 1 Younge & Coll. 197; Foley v. Hill, 3 Mylne & Craig R. 475, 480, 481.

So, if the Bill alleges, that the defendant has in his possession, deeds and papers, which would prove, not merely the general title, which the Bill sets out; but which would prove particular facts, which contribute to establish that title, there must be an answer accompanying the plea.¹ So, if the Bill, after stating a general fact, should formally allege, as evidence of that fact, that certain circumstances had occurred, of which he seeks a discovery, to establish that general fact, there must be an answer, not only negating the general fact, but also all the circumstances, which the Bill so alleges as evidence thereof.²

§ 684. Indeed, the doctrine may be stated in a more general form. If there is any charge in the Bill, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded; such as fraud, or notice of title; that charge must be denied by way of answer, as well as by averment in the plea. In this case, the answer must be full and clear, or it will not be effectual to support the plea; for the Court will intend the matters so charged against the pleader, unless they are fully and *clearly denied. But if they are in substance [*529] fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the Bill may not be precisely answered. Though the Court, upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intentions against the pleader; yet if the plaintiff thinks

¹ Hare on Discov. 37; *Hardman v. Ellames*, 5 Sim. R. 647, 650; S. C. 2 Mylne & Keen, 742; *Harland v. Emerson*, 8 Bligh R. (N. S.) 86.

² Hare on Discov. 38, 39; *Evans v. Harris*, 2 Ves. & Beam. R. 364; *Bogardus v. Trinity Church*, 4 Paige R. 178; *Plummer v. May*, 1 Ves. 426.

the answer to any of them is evasive, he may except to the sufficiency of the answer in those points.¹

§ 685. Thus, for example, a plea of a release cannot properly extend to the discovery of the consideration of the release, if the consideration is impeached by the Bill ; but the plea must be assisted by averments, covering the grounds, on which the consideration is so impeached ; and it must be accompanied by an answer, stating the facts as to the consideration, in support of the plea.² Therefore, where a Bill stated various transactions between the defendant and the testator of the plaintiff, and imputed to those transactions fraud and unfair dealing on the part of the defendant ; and impeached accounts of the transactions delivered by the defendant to the testator on the ground of errors, omissions, unfair and false charges ; and also impeached a purchase of an estate, conveyed by the testator to the defendant, in consideration of part of the defendant's alleged demands ; and prayed a general account, and that the purchase of the estate might be set aside as fraudulently obtained, and that the conveyance might stand as security only for what was justly due from the testator's [*530] estate to the *defendant ; a plea of a deed of mutual release, which was put in to so much of the Bill as sought a discovery, and prayed an account of dealings and transactions prior to and upon the day of the date of the deed of release, and to all relief and discovery grounded thereupon ; and which stated the deed to have been founded on a general settlement of accounts on that day, and to have excepted securities then given to the

¹ Mitf. Eq. Pl. by Jeremy, 298, 299 ; Cooper Eq. Pl. 228, 229 ; *Drew v. Drew*, 2 Ves. & Beam. 159 ; *Chamberlain v. Agar*, 2 Ves. & Beam. 259 ; *Beames Pl. in Eq.* 27, 28 ; *Id.* 35, 36 ; *Bogardus v. Trinity Church*, 4 Paige R. 178.

² Mitf. Eq. Pl. by Jeremy, 261, 262.

defendant for the balance of those accounts, which was in his favor, and averred only, that the deed had been prepared and executed, without any fraud or undue practice on the part of the defendant, was overruled.¹ The consideration for the instrument was the general settlement of accounts; and if those accounts were liable to the imputations cast upon them by the Bill, the release was not a fair transaction, and ought not to preclude the Court from decreeing a new account. The plea, therefore, could not be allowed to cover a discovery tending to impeach those accounts; and the fairness of the settled accounts was not put in issue by the plea, or supported by an answer, denying the imputations charged in the Bill.²

§ 686. Hence, also, it is, that in every case, where an answer is required to accompany a plea, the plea should not cover the whole Bill. But it should cover so much of the Bill only, as does not relate to the discovery of the particular facts, to which the plaintiff has a right to require an answer, in support of the plea. If it covers such a discovery, it will be bad; because the defendant is bound to make that discovery.³

§ 687. Upon this ground, where a Bill was brought *by an acceptor against an indorsee of a bill of [*531] exchange, to have it delivered up to be cancelled, as being a security for money lost at play to the drawer; and the Bill charged, that it was indorsed to the defendant without consideration, and after it was due; and also charged notice of the circumstances, under which it was accepted, and that the defendant had in his custody books, pa-

¹ Mitf. Eq. Pl. by Jeremy, 262, 263; *Roche v. Morgell*, 2 Sch. & Lefr. 721; *Fish v. Miller*, 5 Paige R. 26; *Bolton v. Gardner*, 3 Paige R. 273; *Parker v. Alcock*, 1 Young & Jerv. 432.

² Ibid.

³ *Portarlington v. Soulby*, 6 Sim. 356; *Davies v. Davies*, 2 Keen R. 538.

pers, &c. from which the truth of the matters contained in the Bill would appear; and the defendant put in a plea to the whole Bill, that he was a *bonâ fide* purchaser for a valuable consideration, without notice of the circumstances alleged in the Bill; and, for better supporting his plea, put in an answer, denying, that the Bill was indorsed after it was due, or that he had notice of the circumstances, under which it was alleged in the Bill to have been accepted; but it omitted to notice the allegation in the Bill, that he had books and papers, &c., from which the truth of the matters charged would appear; the plea was overruled by the Court for this defect.¹ The plea was then allowed to be amended, and the possession of books and papers, &c., denied in the amended plea. The plea, as amended, was also held bad; because it was a plea to *the whole Bill*; whereas it ought to have been a plea to all the relief, and to all the discovery sought by the Bill, except certain parts; and to those parts there ought to have been an answer in support of the plea.²

[*532] *§ 688. On the other hand, great care must be taken not to extend the answer beyond the facts and circumstances, which are necessary to be discovered in support of the plea, and are not covered by the plea;

¹ The plea was ordered to stand for an answer, with liberty to except. *Portarlington v. Soulby*, 6 Sim. 356. See Wigram on Points in Discov. 151 to 153; *Id.* 162 to 181, 1st. edit.; *Id.* p. 32 to p. 39, 2d edit. Mr. Wigram, in the work last cited, holds, that it is not necessary, in order to require an answer in support of a plea, that the facts should be charged in the Bill, *as evidence* of the plaintiff's case. But that it is sufficient, that such facts, as are charged, are of a nature, which are material to the plaintiff's case, and necessary to be replied to by an answer in support of the plea. He admits, that *Sanders v. King*, 2 Sim. & Stu. 277; *S. C.* 6 Madd. R. 61; *Thring v. Edgar*, 2 Sim. & Stu. 274; and *Pennington v. Beachy*, 2 Sim. & Stu. 282, are the other way; but he controverts their authority. Wigram on Points of Discovery, 168 to 181, 1st edit.; *Id.* p. 32 to 79, 2d edit.

² *Ibid.*

for, if a plea is coupled with an answer to any part of the Bill, covered by the plea, and which, by the plea, the defendant consequently declines to answer, the plea will, upon argument, be overruled.¹ The same principle will apply, where there is a plea, and no answer whatsoever is required in support of the plea from any charges in the Bill, requiring a discovery; for, in such a case, any answer is impertinent, and overrules the plea.² The reason of this doctrine is, that pleas are to be put in *ante litem contestatam*; because they are pleas only, why the defendant should not answer; and, therefore, if he does answer to any thing, to which he may plead, he overrules his plea; for the plea is only, why he should not answer; and if he answers he waives the objection, and of course his plea.³

¹ Mitf. Eq. Pl. by Jeremy, 299; *Cottington v. Fletcher*, 2 Atk. 155; *Gilb. Forum Roman.* 58; *Beames Pl. in Eq.* 36, 37, 38; *Portarlington v. Soulby*, 6 Sim. R. 356; S. C. 7 Sim. R. 28; *Hook v. Dorman*, 1 Sim. & Stu. 227; *Bolton v. Gardner*, 3 Paige R. 273; *Ferguson v. O'Hara*, 1 Peters Cir. R. 493; *Souzer v. DeMeyer*, 2 Paige R. 574; *Foley v. Hill*, 3 Mylne & Craig R. 475, 480, 481; and the remarks of Lord Cottenham in *Denys v. Locock*, 3 Mylne & Craig, 235 to 237.

² *Thring v. Edgar*, 2 Sim. & Stu. 274; *Beames Pl. in Eq.* 37. But see *Wigram on Points of Discov.* 174 to 178, 1st edit.; *Id.* p. 138 to p. 154, 2d edit. See Lord Cottenham's remarks in *Denys v. Locock*, 3 Mylne & Craig, 235, 237, on *Thring v. Edgar*.

³ *Gilb. For. Roman.* 58; *Arnold's case*, *Gilb. For. Rom.* 59; *Cottington v. Fletcher*, 2 Atk. 155, 156; *Beames Pl. in Eq.* 37, 38, 39; *Mitf. Eq. Pl. by Jeremy*, 240, note (b); *Souzer v. DeMeyer*, 2 Paige, 574. Mr. Wigram has some very important observations on this topic, which, though long, are proper to be quoted, (*Wigram on Points of Discov.* p. 172 to p. 181, 1st edit.) "Mr. Beames, in his valuable book upon Pleas in Equity, refers to numerous cases, affirming the proposition, in support of which he cites them, that, 'if an answer extend to any part of the Bill covered by the plea, it will be fatal to the plea on argument.' The rule, then, in its strictest sense, cannot be carried beyond this; that a defendant must not answer that, which his plea covers; for that, by the rules of pleading, he is understood to decline answering. The rule of pleading, thus defined, raises a distinct question of law;

§ 689. Care should also be taken by the plaintiff not to except to the answer in support of a plea, if there is any

namely, What is meant by the expression, 'discovery covered by a plea.' The meaning of this, in one sense, must have reference to a case, in which the defendant, having insisted, that he was not bound to give specified discovery, has *de facto* given the very discovery, which he had in terms insisted he was not bound to give; as, where a defendant, having pleaded to all the discovery sought by the Bill, has answered part of it. This, however, was not the sense, in which the Vice Chancellor understood the rule in *Thring v. Edgar*; for in that case, the answer, by which the plea was held to be vitiated, applied to matter expressly excepted out of the operation of the plea; and, therefore, not, at all events, *de facto*, or in terms, covered by it. The sense, in which the Vice Chancellor must have used the expression, and which the passage cited from the *Forum Romanum* may possibly be supposed to point at, may thus be stated. General rules of law, unconnected with rules of pleading, determine, what discovery a plaintiff is entitled to. If a plaintiff seeks to obtain discovery, to which, by those general rules, he is not entitled, the defendant may submit to the Court the reasons, upon which he founds his right to be protected against the discovery sought. A plea is one of the appointed modes of making this submission; and the question of substance, which every plea to discovery raises, is, whether the matter of the plea is or is not a reason in law, why the plaintiff should not have that discovery, which he seeks. Whatever discovery the plea would, on the part of the defendant, be a reason in law for not giving, that discovery the plea is said to cover. Confining the observations, which follow, to those parts of the Bill, which the plea thus covers, the strictest interpretation of which the rule in question is susceptible is this; that, whatever the defendant (who pleads) may,—he *must*,—abstain from answering, or waive the benefit of his plea to discovery altogether. Further than this, the rule of pleading referred to cannot possibly go. There is no authority, so far as the author has been able to discover, for holding, that a plea is vitiated by an answer merely, irrespective of the matter, to which such answer may apply. The rule is, not, that any answer overrules a plea; but that an answer to that, which the plea covers, overrules it. The admissibility of an answer in *subsidiu*m of a plea, excludes the argument, which would carry the rule beyond this. It must, therefore, in a given case, be determined, what the plea covers, before the effect of the answer upon it can be tried. If the Bill contains allegations, which, if uncontroverted, would invalidate the plea, these (as already shewn) the defendant must answer. And, in the absence of authority to the contrary, it seems irresistibly to follow, that a plea can never be hurt by a discovery, which relates exclusively to the matter of the plea itself. *That* discovery, the plea

doubt as to the sufficiency of the plea ; for the taking of exceptions to the answer will, under such circum-

can never cover ; unless, indeed, the plea in fact purports to cover it ; which, however, is not the case here supposed." Again he says ; " How then, it may be asked, is a plea to be framed in a case, in which the plea does not exclude all right to discovery ? A full answer to this question would involve the investigation, which the writer has already declined. The following suggestions are all, that he ventures now to offer upon the subject. The defendant must, of course, begin by integrating (as into a separate Bill) those parts of the Bill, the answer to which are material to the trial of the plea ; for these must not, at all events, be covered by the plea. If a given charge in the Bill, being relevant and material to the trial of the plea, be also relevant and material to those parts of the Bill, which the plea should cover, such charge must, for the purposes of the plea, be itself divided ; viz. so far as it relates to the matter of the plea, &c. ; and to that extent the charge must not be covered by the plea. If a given charge, relating exclusively to the matter of the plea be not material for the purpose of the trial of the plea, the defendant may (it is conceived) safely exercise an option about answering it or not. By answering it, he will not (it is conceived) overrule his plea (provided it be properly excepted out of the operation of the plea, so that the plea and answer may not in fact apply to the same thing) ; because he will not thereby give any discovery of matter, which by his plea, he declines to answer. And, by refusing to answer such a charge, he will not (it is conceived) affect the validity of his plea, because, by the supposition, the discovery is not material. This last suggestion is consistent with the principles before contended for (in my first proposition), and appears to be sanctioned by the opinion of Sir Thomas Plumer, in *Drew v. Drew*. In that case, the plaintiff alleged, that John Drew, her son (then deceased), had been her husband's apprentice, and afterwards her partner, in the business of a lighterman and coal merchant ; and that, upon his death, the defendant (one of his children) had become his administrator, and had taken possession of the plaintiff's effects. The Bill prayed an account of the partnership dealings, and a sale of the effects. The defendant put in a negative plea, denying the partnership ; and one of the objections taken to the plea was, that the defendant ought to have answered the charge, that his father was the apprentice, as that fact might afford some evidence from the probability, that he would be taken into partnership. The Vice Chancellor (Sir Thomas Plumer) allowed the plea. 'It is not necessary (his Honor said) to answer every circumstance, tending to the point, upon which the defendant relies, and tenders an issue by his plea.' If it be doubtful, whether a given charge must be answered, or may be covered by the plea, and the answer to such charge be one, which the defendant do not object to give, the safer course is to leave it both unanswered and uncovered until the argument of the plea. The Court can, without difficulty, allow a defendant to amend his plea ; but there is great

stances, have the effect of allowing the plea, in the same manner as a replication to the plea would do.¹ The true course, in such a case, is first to set down the plea for argument; and if it should be held good, the answer may then be excepted to for insufficiency.²

difficulty in allowing him to withdraw an answer. This, indeed, was done by Lord Lyndhurst, C. B., in the late case of *Tarlton v. Hornby*, in the Exchequer (1 Y. & Coll. 172), upon the (supposed) authority of the case of *Stone v. Yea*. But the authority of this latter case for that purpose, was denied by the Lords Commissioners in the late case of *Angell v. Westcombe*. If the question be one, which it is an object with the defendant not to answer, he must, of course, at all hazards, cover it by his plea. Having thus determined, what the plea shall leave uncovered, and (as a consequence of this) what it shall purport to cover, the defendant must actually accompany the plea with an answer as to all those uncovered parts of the Bill, the answers to which are material to the argument of the plea. Whether he need further, before the argument, answer charges in the Bill, which affect only the truth of the plea (such parts being uncovered by the plea) is considered hereafter." Mr. Wigram in his second edition, has added to the foregoing remarks; but they do not essentially change the structure of the argument. I have not, therefore, thought it necessary to vary the original question. See Wigram on Points of Discovery, § 219, p. 146 to § 224, p. 157, 2d edit. See also the cases cited, of *Drew v. Drew*, 2 Ves. & Beam. 159; *Stone v. Yea*, Jacobs R. 426; and Lord Cottenham's remarks on *Thring v. Edgar*, 2 Sim. & Stu. R. 274, in the case of *Denys v. Locock*, 3 Mylne & Craig R. 235 to 237.

¹ Cooper Eq. Pl. 233; Mitf. Eq. Pl. by Jeremy, 317; Gilb. For. Rom. 95; Beames Pl. in Eq. 37, and note (4); Wigram on Points of Discovery, 172, 173, 177, 178, 1st edit.; Id. p. 146 to p. 157, 2d edit.; Foley v. Hill, 3 Mylne & Craig, 475, 481, 482.

² Lord Redesdale, on this subject, has remarked; "Where a defendant pleads or demurs to any part of the discovery sought by a Bill, and answers likewise; if the plaintiff takes exceptions to the answer, before the plea or demurrer has been argued, he admits the plea or demurrer to be good; for, unless he admits it to be good, it is impossible to determine, whether the answer is sufficient or not. But, if the plea or demurrer is only to the relief prayed by the Bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued. If a plea or demurrer is accompanied by an answer to any part of the Bill, even a denial of combination merely, and the plea or demurrer is overruled, the plaintiff must except to the answer as insufficient. But if a plea or demurrer is filed without any answer, and is overruled, the plaintiff need not take exceptions, and the defendant must

§ 690. Where facts appear upon an answer to an original Bill, which will operate to avoid the defence made by plea to an amended Bill, the answer to the original Bill may be read on the argument of the plea, to counterplead the plea.¹ So that it should seem, that, if the answer to an original Bill will disprove an averment to a plea to an amended Bill, the Court may permit it to be read for that purpose.²

§ 691. In regard to the form and frame of a plea and an answer in support of it, it may, in conclusion, be stated, (although the preceding observations have, in a great measure, already anticipated the appropriate suggestions,) that, as the averments, negating the charges of fraud, are used merely to put the fact of fraud, as alleged by the Bill, in issue in the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud, contained in the Bill, fully in issue.³ And, as the plaintiff is entitled to have the answer of the defendant upon oath to any matter in dispute between them, in aid of proof of the case made by the Bill, the defendant must answer to the facts of fraud, alleged in the Bill, so fully, as to leave no doubt in the mind of the Court, that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established.⁴ If the answer should not be full in all material points, the Court may presume, that the fact of fraud may be capable of proof in the point not fully answered; and may therefore not deem the answer sufficient to support the plea as conclusive;

answer the whole Bill, as if no defence had been made to it." *Mitf. Eq. Pl. by Jeremy*, 317. See *Kuypers v. Dutch Reformed Church*, 6 *Paige*, 570.

¹ *Mitf. Eq. Pl. by Jeremy*, 299, 300; *Bogardus v. Trinity Church*, 4 *Paige R.* 178.

² *Ibid.*

³ *Mitf. Eq. Pl. by Jeremy*, 244.

⁴ *Ibid.*

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and, therefore, may overrule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause.¹ But though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer, if he conceives it not to be so full to all the charges, as to be free from exception; or, by amending his Bill, he may require an answer to any matter, which may not have been so extensively stated, or interrogated to, as the case would warrant; or to which he may apprehend, that the answer, though full in terms, may have been in effect evasive.²

§ 692. It has been already stated, in considering the nature of demurrers, that a demurrer cannot be good in part, and bad in part; though one cause of demurrer assigned may be good, and the others not.³ But the same principle does not, as has been elsewhere suggested, apply to a plea; for a plea may be bad in part, and not in the whole.⁴ Thus, for example, if a plea covers too much, the Court will allow it to stand for the part, which it properly covers.⁵

§ 693. But a plea, like a demurrer, may be either to the whole Bill, or to a part only of the Bill. If it does not go to the whole Bill, it should (as we have already seen) definitely and exactly express, to what parts it does extend.⁶ And if one defence is made by the

¹ Mitf. Eq. Pl. by Jeremy, 244, 245.

² Ibid.

³ Ante § 443; Cooper Eq. Pl. 113, 115, 231; *Huggins v. York Buildings Company*, 2 Atk. 44; *Dormer v. Fortescue*, 2 Atk. 284; Mitf. Eq. Pl. by Jeremy, 214, and notes; Beames Pl. in Eq. 49.

⁴ Cooper Eq. Pl. 231; *Duncalf v. Blake*, 1 Atk. 53; *Huggins v. York Buildings Company*, 2 Atk. 44; Ante § 443.

⁵ *Dormer v. Fortescue*, 2 Atk. 284; Beames Pl. in Eq. 44, 45; *French v. Shotwell*, 20 John. R. 668; S. C. 5 John. Ch. R. 555; *Kirkpatrick v. White*, 4 Wash. Cir. R. 595.

⁶ Ante § 695.

answer, and another defence by the plea, the plea will be ordered to stand for an answer. And, indeed, whenever a plea is to the whole of the Bill, if it is a bar at all, an answer to any part of the Bill overrules the plea. If a plea is to the whole of the Bill; but does not extend to, or cover the whole, the plea is bad.¹ As, where a Bill of foreclosure was filed of a messuage and forty acres of land; and the defendant pleaded an absolute title in himself, and averred, that the premises consisted of a messuage and tenement; and that they were the same, which were meant by the Bill; the Court overruled the plea, because it could not be considered as relating to the forty acres; though it was insisted, that the word "tenement" might relate to any land, and that the averment of identity was a fact traversable, which the defendant was bound to prove.²

§ 694. As to the form of a plea, it is, like a demurrer, always prefaced by a protestation against any confession or admission of the facts stated in the Bill. But the only use of this seems to be to prevent any conclusion in another suit; because, for the purpose of deciding the validity of the plea, the Bill, so far as it is not contradicted by the plea, is admitted to be true.³ After the protestation, the defendant always states in the plea the extent to which it goes; as whether it is to the whole Bill, or to part only of the Bill; and in that latter case, to what part it is intended to apply.⁴ In the next place

¹ Mitf. Eq. Pl. by Jeremy, 294, 295. The validity of a plea must be tried with reference to the charges in the Bill, and not by the interrogatory part. *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. 683; *Id.* 426; Ante § 28, § 36; *Milligan v. Milledge*, 3 Cranch R. 280.

² *Cooper Eq. Pl.* 229, 230; *Wedlake v. Hutton*, 3 Anst. 636; *Beames Pl. in Eq.* 41, 42, 43; *Anon.* 3 Atk. 70; *Brown v. Horsley*, *Salkeld v. Science*, 2 Ves. 107; *Hare v. Duppa*, 1 Ves. & Beam. 511.

³ *Beames Pleas in Eq.* 46, 47.

⁴ *Ibid.*

follows the substance of the plea, or matter relied upon; as an objection to the jurisdiction of the Court; to the person of the plaintiff, or of the defendant; or in bar of the [*539] *suit; together with such averments, as are requisite and necessary to support it. The conclusion of the plea is a repetition, that the matters so offered are relied upon, as an objection to the jurisdiction, or to the person of the plaintiff or of the defendant, or in bar of the suit; praying the judgment of the Court, whether the defendant ought to be compelled to make any further or other answer to the Bill, or to the part of it, to which the plea is offered.¹

¹ Beames Pl. in Eq. 46, 47. Mr. Beames, in speaking upon the subject of the formal conclusion of pleas, says; "It may not, perhaps, be useless to observe, that, at law, pleas to the jurisdiction generally conclude by praying judgment, whether the Court will take further cognizance of the matter, whilst pleas to the person conclude, either by praying judgment, if the plaintiff ought to be answered his Bill, and that it may be quashed, or by praying judgment of the Bill, writ, or count (as the case may be), and that the same may be quashed. And special pleas in bar conclude by praying judgment, if the plaintiff ought to have, or maintain his action. I have endeavored, by consulting many of the old books of practice, to ascertain, whether any considerable uniformity or precision prevailed in the conclusion of pleas in Equity. Some of the old forms of pleas to the jurisdiction conclude, by praying the judgment of the Court, whether it would hold plea upon, and enforce the defendant to answer the Bill for the cause aforesaid, wherein the defendant submits to the order of the Court; whilst other precedents, with less precision, demand judgment of the Court, whether the defendant shall be compelled to make any farther answer. The form of pleas in Equity to the person are tolerably uniform in concluding, by praying judgment of the Court, whether the defendant shall be compelled to make any farther answer, during the existence of the disability pleaded. The precedents of pleas in Equity in bar generally conclude, with pleading the matter set up in bar of the discovery and relief, or the discovery, &c., as the case may be, and usually demand the judgment of the Court, whether the defendant shall be compelled to make any farther answer to the complainant's Bill, praying to be dismissed with costs: a prayer, that is sometimes added, and sometimes omitted. But pleas in bar, according to the old books, do not always state, that the matter is pleaded '*in bar*.' If, indeed, there be any point of form,

§ 695. When an answer accompanies a plea, in order to support it, it is prefaced with an averment, that the

in which pleas of all descriptions may be said, with respect to their conclusion, and that, with very few exceptions, to concur, it will be found to be in demanding the judgment of the Court, whether the defendant shall make any farther or other answer,—a part of the plea peculiarly applicable to its nature as a defence in a Court of Equity, where it professedly brings forward, as we have already had occasion to remark, a substantive ground, why the defendant should not answer. There are, I apprehend, but few cases in the books relative to the conclusion of pleas in Equity. In *Randolph v. Randolph*, an early case, Mr. Baron Parker considered a plea defective, because the defendant ‘did not aver it in the conclusion,’ a form, that some of the old pleas observe, but others disregard. In *Alison v. Sharpley*, a defendant pleaded an administration granted of the goods within the province of York, the intestate having died possessed of personal estate in the province of Canterbury, as well as in that of York; and the plea ‘concluded generally,’ demanding, ‘whether the defendant ought to make answer to any matter contained in the Bill in any other manner.’ The Court considered the plea to be good, as far as it applied to the personal estate in the province of York, ‘and they were clearly of opinion, that the conclusion extended to make it a plea to the whole Bill, though the matter of the plea was special, and, therefore, that, as to what was not contained in the plea, the defendant ought to answer, and so it was awarded.’ Neither of these cases can be considered as decisive of the question raised in *Merrewether v. Mellish*. In that case, the Court says, ‘the question is reduced to the point of form, as to the conclusion of the plea, whether it is sufficient to say, the defendant ought not to be called upon for a farther answer, or whether, as at law, the plea ought to state, that additional parties are necessary, naming them.’ I should apprehend, that these are two perfectly distinct questions, and that a plea may be right in respect to one, and bad as to the other. The plea at law, in the body of it, states the parties by name, who have been omitted; and the case in *Moseley*, though not a decision, goes some way towards showing, that the plea in Equity should state the parties omitted, if not by name, as in *Fawkes v. Pratt*, at least generally. If that statement be necessary, it forms part of the body of the plea, which, if the objection raised in *Merrewether v. Mellish*, as to the conclusion, can be substantiated, may still be defective in the conclusion. How far that objection is sound, the reader must decide, as it merely remains to add, that the Court, after blending the two questions, held the plea in that case informal, but gave leave to amend it.” Beames Pl. in Eq. 48 to 51; *Merrewether v. Mellish*, 13 Ves. 435. The following form is given in Vanheythuysen’s Equity Draftsman, pp. 444, 445, as the form of a pure negative plea. “This defendant, by protestation to all the discovery and relief sought and

defendant does not thereby waive his plea, but wholly relies thereon.¹ So, where the plea is not to the whole of the Bill, but only to part, the answer is commenced with the same protestation against a waiver of the plea, and with a declaration, that it is intended to be only in answer to the rest of the Bill, not covered by the plea.²

§ 696. A plea is filed, like a demurrer, in the proper office ; and pleas in bar of matters *in pais* must be upon oath of the defendant. But pleas to the jurisdiction of the Court, or to the disability of the person of the plaintiff, or pleas in bar of any matter of record, or of matters recorded, or as of record, in the Court itself, or in any other court, need not be upon oath.³

§ 697. If the plaintiff conceives a plea to be defective in point of form, or of substance, he may take the judgment of the Court upon its sufficiency. And, if the defendant is anxious to have the point determined, he may also take the same proceeding.⁴ Upon argument of a plea, it may either be allowed simply ; or the benefit of

prayed by the complainant's said Bill, &c., he, this defendant, doth plead, and for plea he saith, that he, this defendant, is not executor or administrator in the Bill mentioned, or the legal representative of the said B., which said representative or representatives ought to be made party or parties to the complainant's said Bill, as this defendant is advised. All which matters and things this defendant avers to be true, and pleads the same to the said Bill, and humbly demands the judgment of this honorable Court ; and humbly prays to be dismissed, with his reasonable costs," &c.

¹ Cooper Eq. Pl. 231 ; Mitford Eq. Pl. by Jeremy, 300, 301. The formal beginning of an answer accompanying a plea, is as follows : " And this defendant, not waiving his said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the residue of the complainant's Bill not herein before pleaded unto, or so much thereof as he, this defendant, is advised is in any case material or necessary for him to make answer to, he answereth, and saith, that," &c. &c. " And he denies all combination," &c. &c. &c. Vanheythuyssen Eq. Draftsman, 440, 442.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 301 ; Cooper Eq. Pl. 231, 232.

⁴ Ibid.

it may be saved to the hearing ; or it may be ordered to stand for an answer.¹ In the first case, the plea is determined to be a full bar to so much of the Bill, as it *covers, if the matter pleaded, with the averments [*542] necessary to support it, are true.² If, therefore, a plea is allowed upon argument ; or if the plaintiff without argument thinks it, though good in form and substance, not true in point of fact ; he may take issue upon it, and proceed to disprove the facts, upon which it is endeavored to be supported. For, if the plea is, upon argument, held to be good ; or the plaintiff admits it to be so by replying to it ; the truth of the plea is the only subject of question remaining, so far as the plea extends ; and nothing but the matters contained in the plea, as to so much of the Bill, as the plea covers, is in issue between the parties.³ If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests. If he fails in this proof, so that, at the hearing of the cause the plea is held to be no bar, and the plea extends to the discovery sought by the Bill, the plaintiff is not to lose the benefit of that discovery ; but the Court will order the defendant to be examined on interrogatories, to supply the defect. But, if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred ; even though the plea is not good, either in point of form or of substance.⁴ Therefore, where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the plaintiff replied ; it was determined, that the plea, though irregular, had been admitted by the replication to be good ; and that

¹ Mitf. Eq. Pl. by Jeremy, 301, 302.

² Ibid.

³ Ibid. *Hughes v. Blake*, 6 Wheat. R. 453. *The State of Rhode Island v. The State of Massachusetts*, 14 Peters R. 210, 257.

⁴ Mitf. Eq. Pl. by Jeremy, 302 ; *Hughes v. Blake*, 6 Wheat. 453.

the fact of notice not being in issue, the defendant, proving, what he had pleaded, was entitled to have the Bill dismissed.¹

[*543] *§ 698. If, upon argument, the benefit of a plea is saved to the hearing, it is considered, that so far as appears to the Court, it may be a defence; but that there may be matter disclosed in evidence, which would avoid it, supposing the matter pleaded to be strictly true; and the Court, therefore, will not preclude the question.²

§ 699. When a plea is ordered to stand for an answer, it is merely determined, that, it contains matter, which may be a defence, or part of a defence; but that it is not a full defence; or that it has been informally offered by way of plea; or that it has not been properly supported by an answer, so that the truth of it is doubtful.³ For, if a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea;⁴ and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an

¹ Mitf. Eq. Pl. by Jeremy, 301 to 303; Cooper Eq. Pl. 232, 233; *Harris v. Ingledew*, 3 P. Will. 94, 95; *Bogardus v. Trinity Church*, 4 Paige R. 178.

² Mitf. Eq. Pl. by Jeremy, 303; Cooper Eq. Pl. 233. Mr. Cooper has stated the proposition in the text somewhat more at large. "When," (says he) "the benefit of the plea is saved to the hearing, the decision of the cause does not rest upon the truth of the matter of the plea; but the plaintiff may avoid it by other matter, which he is at liberty to adduce. But if a plea is ordered to stand for an answer, it is then considered merely as matter, which may constitute a defence in whole or in part, but that it is not a full defence, even though the plaintiff should not produce new matter to obviate it. At least, the discussion of the question of the efficacy is not precluded by such an order, but only the mode of defence has been determined to be informal and improper." *Gilb. For. Rom.* 64.

³ Mitf. Eq. Pl. by Jeremy, 303; *Orcutt v. Orms*, 3 Paige R. 459.

⁴ Ante § 690.

answer only.¹ A plea is usually ordered to stand for an answer, where it states matter, which may be a defence to the Bill, though perhaps not proper for a plea, or informally pleaded. But if a plea states nothing, which can be a defence, it is merely overruled.² If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the Bill, as it covers, unless, by the order, liberty *is given to except.³ [*544] But that liberty may be qualified, so as to protect the defendant from any particular discovery, which he ought not to be compelled to make. And, if a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the Bill, not covered by the plea.⁴ If a plea, accompanied by an answer, is allowed, the answer may be read at the hearing of the cause to counterprove the plea.⁵

§ 700. There are some pleas, which are pleaded with such circumstances, that their truth cannot be disputed; and others, being pleas of matter of fact, the truth of which may be immediately ascertained by mere inquiry, it is usually referred to one of the Masters of the Court to make the inquiry. These pleas, therefore, are not usually argued. Thus, pleas of outlawry, or of excommunication, being always pleaded *sub sigillo*, the truth of the fact pleaded is ascertained by the form of pleading; and the suit is consequently delayed, until the disability

¹ Mitf. Eq. Pl. by Jeremy, 303; *Hildyard v. Cressy*, 3 Atk. 304.

² Mitf. Eq. Pl. by Jeremy, 303.

³ Mitf. Eq. Pl. by Jeremy, 304; *Sellon v. Leawn*, 3 P. Will. 239; *Maitland v. Wilson*, 3 Atk. 814; *Orcutt v. Orms*, 3 Paige R. 459; *Leacroft v. Dempsey*, 4 Paige R. 124.

⁴ Mitf. Eq. Pl. by Jeremy, 304.

⁵ Mitf. Eq. Pl. by Jeremy, 303, 304; *Cooper Eq. Pl.* 233; *Souzer v. De Meyer*, 2 Paige R. 574. Ante § 690.

shall be removed ; unless the plaintiff can show, that the plea is defective in form ; or that it does not apply to the particular case ; and for these purposes he may have the plea argued.¹ Pleas of a former decree, or of another suit depending, are generally referred to a Master to inquire into the fact ; and if the Master reports the fact true, the Bill stands instantly dismissed, unless the Court otherwise orders. But the plaintiff may except to the Master's report, and bring on the matter to be argued before the Court. And if he conceives the plea to be defective, in point of form, or otherwise, independent of [*545] *the mere truth of the fact pleaded, he may set down the plea to be argued, as in the case of pleas in general.²

§ 701. Pleas also may in some cases be amended ; as where there has been an evident slip or mistake, and the material ground of defence seems to the Court to be good. Yet the Court always expects to be told precisely, what the amendment is to be, and how the slip happened, before it will allow the amendment to take place. The defendant will also be tied down to a short time, in which to amend. And in a case, in which a plea seemed incapable of amendment, the defendant had leave to withdraw his plea, and to plead *de novo* in a fortnight. Where a plea is clearly good in substance, but is objectionable in point of form, as not concluding either in bar, or otherwise, leave will sometimes be given to amend the plea.³

¹ Mitf. Eq. Pl. by Jeremy, 304, 305.

² Ibid.

³ Cooper Eq. Pl. 234 ; Newman v. Wallis, 2 Bro. Ch. R. 143, 147 ; Merriwether v. Mellish ; 13 Ves. 435, 439. Mitf. Eq. Pl. by Jeremy, 281, note ; Id. 324, note.

CHAPTER XIV.

PLEAS TO RELIEF.

§ 702. HAVING stated these considerations applicable to pleas in general, we shall now proceed to the examination of the different sorts of defences, which either may be, or must be, insisted upon by way of plea. We have already had occasion to notice, that some matters of defence can only be taken by demurrer; some only by plea; others again only by answer; and others again may be taken in either mode, where they go to the very substance of the Bill, and the Equity asserted in it.¹

§ 703. In our subsequent inquiries respecting the different kinds of defences, which may be taken by plea, the same method will be observed, as has been already pursued in regard to demurrers.² In the first place, then, we shall consider the appropriate pleas, as matters of defence, to original Bills; and next, those to Bills not original.

§ 704. Original Bills, so far as the present inquiries are concerned, are either Bills praying for relief, or Bills not praying for relief. A plea may either be to the relief, or to the discovery, or to both. If the plea is good to the relief, it is (as we have already seen) held in England (perhaps it may be different in America) to be good to the discovery also sought by the Bill; in like manner.

¹ Ante § 439, § 647; Mitf. Eq. Pl. by Jeremy, 233, 234; Cooper Eq. Pl. 235; Ante § 558, note (1); Cozine v. Graham, 3 Paige R. 177.

² Ante § 440, § 466.

as a demurrer, which is good to the relief, is held to be good to the discovery.¹

§ 705. First, then, let us consider those pleas, which constitute an appropriate defence to Bills for relief. These may be divided into four kinds. (1.) Pleas to the jurisdiction; (2.) Pleas to the person; (3.) Pleas to the frame or form of the Bill; (4.) Pleas in bar to the Bill.²

§ 706. Those pleas, which are commonly termed pleas to the jurisdiction of the Court, do not dispute the rights of the plaintiff in the subject-matters of the suit, or that they are fit objects of the cognizance of a Court of Equity;

¹ Ante § 312, and note (5), § 545, § 516; Cooper Eq. Pl. 117, 236.

² Mr. Beames (Pl. in Eq. 53) has proposed a similar classification. "We should observe," says he, "that pleas in Equity have generally been classed under three heads; 1st, to the jurisdiction; 2dly, to the person of the plaintiff or defendant; and, 3dly, in bar: whilst pleas at law have been usually arranged under five heads; 1st, to the jurisdiction; 2dly, to the person of the plaintiff or defendant; 3dly, to the count; 4thly, to the writ; and, 5thly, in bar, or to the action. And, as each subsequent plea at law abandons the preceding plea, if the order of pleading be inverted, the defendant loses the advantage of the plea, which he had an anterior right to; for *ordine placitandi servato, servatur et jus*. It is not, perhaps, absolutely necessary to consider, whether there are any pleas in Equity, which correspond in strictness with pleas to the count, or pleas to the writ, or whether there are not some demurrers in Equity, which are analogous in principle to such pleas at law. But, the distribution of all pleas in Equity thus alluded to, is certainly not correct; and the consequence of that distribution has been, that some pleas in Equity, which unquestionably could not, with propriety, be described as falling under either of these three heads, have been thrust into one or other of them. In the present work, therefore, although the three heads, under which pleas have been generally arranged, will be adopted as classes of distribution; another, or fourth class, will be added to them, namely, of pleas not properly falling under any of those three heads, and which, for the sake of distinction, may be termed pleas to the Bill. And, as such pleas to the Bill are both analogous and equivalent to pleas in abatement at law, they will be discussed after pleas to the person, and previously to pleas in bar to the relief." Lord Redesdale has included the two last classes under the head of pleas in bar. (Mitf. Eq. Pl. by Jeremy, 219, 220). But Mr. Beames's division is manifestly more correct.

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is into three kinds; (1.) declinatory, corresponding to our pleas to the jurisdiction; (2.) dilatory, corresponding to our pleas to the person; and (3.) peremptory, corresponding to our pleas in bar; *Quæ perimunt jus actoris*.¹ The two former were always put in before the suit was put in contestation, *ante litem contestatam*; for they were before the prætor, as reasons, why he should not proceed in the cause to assign judges for its decision.²

§ 708. All declinatory and dilatory pleas in Equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement; and, therefore, in general, the objections, founded thereon, must be taken *ante litem contestatam* by plea, and are not available by way of answer, or at the hearing.³ And it has been said, that pleas of

Appellantur autem exceptiones aliæ perpetuæ et peremptoriæ; aliæ temporales et dilatoriæ. Perpetuæ et peremptoriæ, quæ semper agentibus obstant, et semper, de quâ agitur, perimunt. Temporales, atque dilatoriæ sunt, quæ ad tempus nocent, et temporis dilationem tribuunt. Just. Inst. Lib. 4, tit. 13, § 8, § 9, § 10.

¹ Gilb. For. Roman. 50, 53; Voet ad Pand. Lib. 44, tit. 1, § 4; Beames Pl. in Eq. 56, 57.

² Gilb. For. Roman. 50, 53; Pothier Pandect. Lib. 44, tit. 1, note (10), and the passages there cited.

³ See Gilb. For. Rom. 50, 51, 53, 54; Beam. Pl. in Eq. 55, 56, 57. Mr. Beames (Pl. in Eq. 57 to 60), speaking of pleas in Equity of a declinatory and dilatory nature, says:—"In the Practical Register, a plea to the person is called a plea in abatement in Equity; on which it has been remarked, that the propriety of this has been much doubted, referring to the passage in Mr. Vesey's Reports. It is there stated, 'that the distinction between pleas in abatement, and pleas in bar, was very little known; and that Lord Thurlow had said, he did not know, what a plea in abatement in Equity was.' The Practical Register certainly uses the term plea in abatement, as a term well known in Equity; and it occurs in a number of other books, some of which are of considerable reputation. Lord Hardwicke, in the passages we have just quoted, uses it as familiar to his hearers. The Attorney General, in the anonymous case in Mosely, employs it in a similar manner. And, what is more remarkable, Lord Thurlow himself repeatedly uses the term 'plea in abatement,' in contradistinction to a plea in bar, in the cases of *Newman v. Wallis*, and *Gun v. Prior*, and acknowledges, as strongly as language can acknowledge, the

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pleas in bar.¹ For, it has been said, that though no man shall be permitted to plead two dilatories at several times, nor several bars ; because he may plead them all at once ; yet, after a plea to the jurisdiction, he may be admitted to plead in bar ; because it is consistent with those pleas to plead in bar at the same time.²

§ 709. In the consideration of demurrers to Bills of relief, we have had occasion to treat of most of the objections, which may be taken as a defence by way of plea, whether they are declinatory, or dilatory, or peremptory. It has been remarked, that the objections to the relief sought by an original Bill, which can be taken advantage of by way of plea, are nearly the same as those, which may be the object of demurrer. But they are rather more numerous ; because a demurrer can extend to such only as appear on the face of the Bill itself ; whereas a plea generally proceeds on other matter.³ Our observations, therefore, upon the various kinds of pleas will generally be brief, dwelling only upon those, which are either peculiar to this mode of defence, or which require more full explanations, than have been already given.⁴

§ 710. First ; as to pleas to the jurisdiction. These

¹ Pothier (*ubi supra*) says ; *Dilatoriæ (Exceptiones) usque ad litem contestationem duntaxet possunt opponi.*

² Cooper Eq. Pl. 226, 227 ; Id. 237 ; Ante § 647. See *Saltus v. Tobias*, 7 John. Ch. R. 214, 215. Mr. Beames doubts the propriety of the doctrine in this passage, and thinks its true meaning indistinct. Beames Pl. in Eq. 14, 15. It is certain, that, without the leave of the Court, double pleas in bar are never allowed ; though the practice of allowing them by the Court in special cases, seems now established. *Kay v. Marshall*, 1 Keen R. 190, 197 ; Ante § 657, p. 502, note (1) ; Wyatt Pract. Reg. 325.

³ Mitf. Eq. Pl. by Jeremy, 220.

⁴ Ante § 467 to § 544.

may be arranged under four heads : (1.) That the subject-matter of the Bill is not within the cognizance of any municipal court of justice. (2.) That it is not within the jurisdiction of a Court of Equity. (3.) That some other Court of Equity is invested with the proper jurisdiction. (4.) That some other court possesses the proper jurisdiction.

§ 711. The first head does not require any illustration beyond what has been already stated under the head of demurrers upon the same ground.¹ Ordinarily, indeed, an objection of this sort must be taken by demurrer, if it is apparent upon the face of the Bill, and it cannot be taken by plea. But if the Bill should be so framed, as not to present the objection, it might doubtless then be taken by plea. But in such a case, the plea would, properly speaking, be a plea in bar, and not technically a plea to the jurisdiction ; the distinguishing feature of the latter being, that it points out some other court, which possesses jurisdiction, and does not deny jurisdiction to all municipal courts.²

¹ Ante § 468 to § 472.

² Cooper Eq. Pl. 237, 238, 239 ; Nabob of Arcot v. East India Company, 3 Bro. Ch. R. 292 ; S. C. 1 Ves. jr. 371. In this case a plea to the jurisdiction was put in, stating, that the subject-matter was not cognizable in any municipal court of justice. On that occasion, Lord Thurlow said, " In a general view of the plea, it is perfectly new. It is stated to be a plea to the jurisdiction of the Court. But it differs from a plea to the jurisdiction in all the particulars, by which those pleas have been described ; because (as it has been truly observed), it is impossible to plead to the jurisdiction of any particular court, without giving another remedy to the party in some other court. Now, this plea says, expressly, that the party has no remedy in any court of municipal jurisdiction whatever. I take it, therefore, in fact, to be a plea in bar ; as if it had been said, *Ex tali facto actio non oritur* ; as if it had been gratuitous, or honorary, or of that species of contract, upon which an action does not arise. And if it had been necessary, from the form of the Bill, to have brought into the view

§ 712. In regard to the second head, it may be stated, that the general objects of the jurisdiction of a Court of Equity have been already discussed in the former commentaries on Equity Jurisprudence ; and the manner, in which a want of jurisdiction is to be taken advantage of, when it appears on the face of the Bill, has also been fully considered in the chapter on demurrers.¹ When the want of jurisdiction does not appear on the face of the Bill, it seems to be the proper function of a plea to bring it before the Court.

§ 713. A case, which is not really such, as will give a Court of Equity jurisdiction, cannot easily be so disguised in a Bill as to avoid a demurrer. But there may be instances to the contrary ; and in such cases it should seem, that a plea of the matter necessary to show, that the Court has not jurisdiction of the subject, though perhaps, unavoidably, in some degree a negative plea, would hold.² Thus, if the jurisdiction were attempted to be founded on the loss of an instrument, where, if the defect, arising from this supposed accident, had not happened, the Courts of ordinary jurisdiction could com-

of the Court, that it was a demand of that description, the plea would have been a plea in bar to the action. And here the whole argument tends to the same end ; that, considering the situation of the parties, and the contract, that has been entered into, as having relation to that situation, the contracts are not the subject of an action. The plea, therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular Court, but of all Courts. And a plea to the jurisdiction of all Courts, I take to be absurd, and repugnant in terms. Even if the Bill had stated all the case, on which the argument on the side of the defendant relies, and had brought it to be that species of treaty, which the law ought, for some reasons, to pronounce impracticable to be executed by Courts of municipal jurisdiction ; it amounts to no more than saying, that, from the matter of the action itself, *Ex tali facto, non oritur actio.*" See Beam. Pl. in Eq. 73, 74.

¹ Ante § 472 to 486. See also Beames Pl. in Eq. 63 to 87 ; Mitf. Eq. Pl. by Jeremy, 111 to 151.

² Mitf. Eq. Pl. by Jeremy, 222.

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where the defendant claims the privilege of an University, or other particular jurisdiction.¹

§ 715. Where the suit is brought in a superior Court of general Equity jurisdiction, nothing will be intended to be out of its jurisdiction, except what is shown to be. It is requisite, therefore, in a plea to the jurisdiction of the Court to allege, that the Court has not jurisdiction of the subject, and to show, by what means it is deprived of jurisdiction.² It is likewise necessary to show, what Court has jurisdiction. If the plea does not properly set forth these particulars, it is bad in point of form. In point of substance, it is necessary to entitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give a complete remedy.³ A plea, therefore, of privilege of the University of Oxford, to a Bill for a specific performance of an agreement, touching lands in Middlesex, was overruled; for the University Court could not give complete relief.⁴ And if a suit is instituted against different persons, some of whom have privilege, and some not; or if one defendant is not amenable to the particular jurisdiction; a plea will not hold.⁵ So, if there is a particular jurisdiction; and yet the parties, who are to litigate any question, are both resident within the jurisdiction of the Court of Chancery, a plea to the jurisdiction will not be sustained.⁶ Thus,

¹ Mitf. Eq. Pl. by Jeremy, 223, 224; Cooper Eq. Pl. 239, 240; Beames Pl. in Eq. 79 to 87; Ante § 486. Mr. Cooper (Eq. Pl. 240), says,—“It was formerly the rule, that a defendant could not demur, because the jurisdiction was in another Court of Equity; for a demurrer is always in bar, and goes to the merits of the case; and therefore that it was informal and improper in that respect; but that the defendant should always plead to the jurisdiction. But it has been since laid down, that if it appears on the face of the Bill, that another Court of Equity has the proper jurisdiction, the defendant may demur; though such demurrers are very rare, because the objection can hardly sufficiently appear on the Bill, and therefore must be pleaded.”

² Mitf. Eq. Pl. by Jeremy, 224, 225.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

upon a Bill concerning a mortgage of the island of Sarke, both the mortgagor and the mortgagee residing in England, the Court of Chancery will hold jurisdiction of the cause: for a Court of Equity *agit in personam*.¹ So, where the Court may not have jurisdiction to give relief, it may yet entertain a Bill for a discovery in aid of the Court, which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king in council, where the defendant cannot be compelled to answer upon oath.²

§ 716. In regard to the fourth head, it is to be observed, that Courts of Equity have no jurisdiction, where by the constitution or laws of the country the subject-matter is exclusively appropriated to some other Court of justice, or to some other special tribunal. Thus, for example, Courts of Equity have generally no jurisdiction in cases, which ordinarily belong to the jurisdiction of Courts of Common Law; or to the Ecclesiastical Courts; or to the Courts of Admiralty or Prize.³ If the objection is apparent on the Bill it may be taken by demurrer; if not apparent, it may be taken by plea.⁴

§ 717. So, Courts of Equity have no jurisdiction, where the subject-matter in dispute is chambers in an Inn of Court, the jurisdiction being in the benchers.⁵ But though the property in chambers in an Inn of Court cannot be made the subject of a suit in the Court of Chancery, or indeed in any Court; yet a plea to the jurisdiction in such case will be good; because the proper jurisdiction can be pointed out by the plea. Thus, where a Bill was filed for the specific performance

¹ Mitf. Eq. Pl. by Jeremy, 224, 225; Beames Pl. in Eq. 88, 89, 91, 92, 93, 94; Cooper Eq. Pl. 241, 242, 243; Ante § 487, 488.

² Ibid.

³ Beames Pl. in Eq. 76, 77, 78; Ante § 490, § 491, § 492.

⁴ Ante § 711.

⁵ Beames Pl. in Eq. 78.

of an agreement stated in the Bill, relative to the renewal of a grant of chambers in Gray's Inn; a plea, that Gray's Inn is a voluntary society, governed by benchers, subject to an appeal to the judges, was, upon argument, held a good plea, and allowed accordingly; though it was admitted, that there was no instance of any of the Courts exercising jurisdiction over the property or discipline of the Inns of Court.¹

§ 718. Similar to a plea to the jurisdiction is the case of a plea to an information, charging an undue election of a fellow of a college in one of the universities, "that by the statutes the visitor of the college ought to determine all controversies concerning elections of fellows, and that such controversies ought not to be determined elsewhere."² But the extent of the visitor's authority must be averred, and it must also be averred, that he is able to do complete justice. And where there is a trust created, the visitor having no power to compel performance of the trust, relief must be had in the King's Courts of general jurisdiction.³

§ 719. Upon similar grounds, if one of two plaintiffs has no interest in the subject matter of the suit, the objection may be taken by plea; and such a misjoinder will be a good defence to the whole suit.⁴

§ 720. In cases of a Bill brought in a Court of Equity of a limited jurisdiction, as to persons, or as to subject-matter, if the Bill should allege all the necessary facts to es-

¹ Cooper Eq. Pl. 238. A plea of this sort actually put in by the Benchers of Gray's Inn, and allowed by Lord Thurlow in *Cunningham v. Bragg*, 2 Bro. Ch. R. 241, will be found at large in Mr. Beames's Pl. in Eq. Appendix, p. 324 to p. 328.

² Mitf. Eq. Pl. by Jeremy 225, 226; Beames's Pl. in Eq. p. 95; Atty. Genl. v. Talbot, 1 Ves. 78; S. C. 3 Atk. 602; Cooper Eq. Pl. 240, 241.

³ Ibid.

⁴ *Makepeace v. Haythorne*, 4 Russ. R. 244.

tablish and support that jurisdiction, the defendant may also negative the existence of those facts by a plea to the jurisdiction. Courts of Equity jurisdiction of a limited nature are not infrequent in those States in America, which have not established a general jurisdiction.¹ Thus, for example, in Massachusetts, Equity jurisdiction is given to the Supreme Court of the State in cases of partnership. In case of a suit brought in that Court by one asserted partner against another, alleging the partnership, there can be no doubt, that it would be a good plea to the jurisdiction to negative the partnership. But, how far in such a case an answer in support of the plea would be necessary or proper, must depend upon the structure of the Bill, and the peculiar local jurisprudence.

§ 721. Bills in Equity in the Courts of the United States present an illustration of a somewhat different nature. By the constitution and laws of the United States, the Circuit Courts are invested with general Equity jurisdiction in cases between citizens of different States; but ordinarily they have no such jurisdiction in cases between citizens of the same State.² In cases, therefore,

¹ This is true, for example, in Massachusetts, and New Hampshire, and Maine, and Pennsylvania. Quere, whether such an exception ought not to be taken by plea; or whether it can be insisted on in a general answer; since such an answer would seem to admit the jurisdiction? Lord Hardwicke's doctrine, in *Green v. Rutherford* (1 Ves. 371), seems the other way. But that doctrine was applied, not to a superior Court, but to Courts of a private, particular, and limited, jurisdiction. Even with this restriction Mr. Beames doubts its correctness. Beames Pl. in Eq. 96, and cases there cited. The Supreme Court of the United States have made a distinction between superior Courts of limited jurisdiction and inferior Courts of limited jurisdiction; affirming the judgments of the former not to be nullities, even if jurisdiction is not apparent on their proceedings. *Kemp's Lessee v. Kennedy*, 5 Cranch, 173; *Turner's Adm'r. v. Bank of North America*, 4 Dall. R. 8.

² Ante § 492. There are some exceptions; such as cases in Equity under the patent laws, and the copyright laws, and other cases of a peculiar nature.

where Bills in Equity are brought in the Circuit Courts, founded upon the supposed different citizenship of the parties, the citizenship of each party, as plaintiff and as defendant, must be distinctly alleged in the Bill; otherwise the Bill will be dismissed for want of jurisdiction. And the exception may be taken advantage of by demurrer, or by motion.¹ But if, upon the record, there are distinct averments of the citizenship of the plaintiff, and of that of the defendant; so that upon the face of the Bill the jurisdiction attaches; the defendant, if he means to contest the alleged citizenship, must do it by a plea to the jurisdiction. For, he is not at liberty to put the citizenship in issue by a general answer; as such an answer admits the jurisdiction of the Court to inquire into the general merits of the suit, and puts them in issue.²

§ 722. Secondly; Pleas to the person. Pleas to the person do not (as has been already observed) necessarily dispute the validity of the rights, which are made the subject of the claim; but they object to the ability of the parties to sue, or to be sued.³ They are of two kinds: (1.) Pleas to the person of the plaintiff; and (2.) Pleas to the person of the defendant. In the former kind, the following pleas are usually included, viz.: (1.) of outlawry; (2.) of excommunication; (3.) of popish recusant convict; (4.) of attainder; (5.) of alienage; (6.) of infancy; (7.) of coverture; (8.) of idiocy or lu-

¹ See *Bingham v. Cabot*, 3 Dall. R. 382; *Turner's Administrator v. Emille*, 4 Dall. 7; *Turner's Administrator v. Bank of North America*, 4 Dall. 8; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Sullivan v. Fulton Steamboat Company*, 6 Wheat. R. 450; *Caprom v. Van Noorden*, 2 Cranch R. 126; *Strawbridge v. Curtis*, 3 Cranch, 267; Ante § 492.

² *Livingston v. Story*, 11 Peters R. 351, 393; *Dodge v. Perkins*, 4 Masson R. 435.

³ *Beames Pl. in Eq.* 99; Ante § 493, § 494.

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and overruled it. The reasons assigned were, that in the plea the jurisdiction ought to have been set forth, and that the judges had a right to try the cause; for, otherwise, it will not be strong enough to forfeit personal estate. And things of this kind cannot be taken to a common intent; but the plea must be judged of with the same strictness, as if it was a plea at common law.¹

§ 724. The fifth plea is alienage of the plaintiff. This, of course, is generally inapplicable, unless the suit respects lands, or the plaintiff is an alien enemy; for an alien, who is not an alien enemy, is under no disability to sue for any personal demand in a Court of Equity. There are, indeed, some circumstances, under which even an alien enemy is permitted to sue; as, where he is here under the license, protection, and safe-conduct of the Government.²

¹ Cooper Eq. Pl. 245, 246; *Burk v. Brown*, 2 Atk. 399.

² Mitf. Eq. Pl. by Jeremy, 229; Cooper Eq. Pl. 246, 247; Beames Pl. in Eq. 112 to 115; Ante § 51 to § 56; Wyatt Pr. Reg. 327. The following form of a plea of an alien enemy is given in Beames Pl. in Eq. p. 337:—
 “This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants’ Bill of complaint mentioned and contained to be true, in such sort, manner, and form, as the same are therein and thereby stated, charged, alleged, or set forth, doth plead thereunto; and for plea thereunto saith, that the said complainants are aliens, born in foreign parts, out of the allegiance of our lord the King, (that is to say), the said complainant, Charles Albrecht, in the territory of Saxony, and the said complainant, Charles Delbruck, in the territory of Westphalia; and that the said complainants, long before and at the time of exhibiting their said Bill of complaint against this defendant, were, and now are, enemies of our lord the King, voluntarily inhabiting, and dwelling, and carrying on trade with the realm and territory of France, and within the allegiance, and under the government of the persons exercising the powers of government there; and that the persons so exercising the powers of government there, then were and still are at war with, and enemies to our lord the King; and that the said complainants then were, and now are, adhering to the said enemies; and this defendant doth therefore plead the matters aforesaid to the said defendants’ Bill,

§ 725. In relation to the pleas of infancy, coverture, idiocy, and lunacy of the plaintiff, it needs only to be observed, that if a Bill is filed in the name of any person incapable alone of instituting a suit, such as is the case of an infant, a married woman, an idiot, or a lunatic (so found by inquisition, and under guardianship), the defendant may plead such disability in abatement of the suit.¹

§ 726. As to the ninth plea, that of bankruptcy and insolvency of the plaintiff, a few words may suffice. The plea is perfectly good, where the subject-matter of the suit has by the bankruptcy or insolvency of the party become vested in the assignees.² It is sometimes classed among pleas in abatement to the person.³ But, as it is in effect a plea, that the plaintiff has no title, or that the title, which he had, has been transferred to others, it seems, so far as the plaintiff is concerned, to be a plea in bar. But it is so no farther than he is con-

and the relief and discovery thereby sought; and he humbly hopes to be hence dismissed with his reasonable costs in this behalf sustained." This is the plea, which was used in *Albrecht v. Sussman*, 2 Ves. & B. 323, and was allowed by Lord Chancellor Eldon. A similar plea will be found in *Vanheyth. Eq. Drafts*. 448.

¹ *Mitf. Eq. Pl. by Jeremy*, 229, 230; *Cooper Eq. Pl.* 248; *Beames Pl. in Eq.* 115 to 118; *Wyatt Pr. Reg.* 326. See also *Wartnaby v. Wartnaby*, Jac. R. 378; Ante § 56 to § 67, § 495.

² *Mitf. Eq. Pl. by Jeremy*, 232; *Bowser v. Hughes*, 1 Anst. R. 101. See also *Tarlton v. Hornby*, 1 Y. & Coll. 172; Ante § 495, and the cases there cited; 2 *Daniell's Ch. Pr.* 101, 102.

³ *Cooper Eq. Pl.* 248. Mr. Beames says, that Lord Redesdale places this plea under the head of pleas in abatement. *Beames Pl. in Eq.* 120. I do not find this to be correct. Lord Redesdale apparently places it as a plea in bar under his fifth head; viz. that the plaintiff has no interest in the subject, or no right to institute a suit concerning it. *Mitf. Eq. Pl. by Jeremy*, 220, 221, 231, 232. Mr. Cooper arranges it under the head of pleas to the person. It seems, that a plea of bankruptcy of the plaintiff must be put in on oath. *Joseph v. Tuckey*, 2 Cox R. 44; *Mitf. Eq. Pl. by Jeremy*, 232, note (o).

cerned ; because it does not deny the right to sue, as existing in another person, nor dispute the validity of the rights, which are made the subject of the existing suit.¹ It seems, that in a plea of bankruptcy all the facts and circumstances, which are necessary to establish the sufficiency of the proceedings in bankruptcy, and to show the party to be lawfully declared a bankrupt, must be specially set forth. It is not enough in a plea of this sort, to allege, that a commission of bankruptcy was duly issued against the plaintiff, under which he was duly found and declared a bankrupt.²

§ 727. As to the tenth plea to the person of the plaintiff, viz. that the plaintiff is not the person, he pretends in his Bill to be, or that he does not sustain the character, which he assumes ; although it is a negative plea, it is good in abatement of the suit.³ Thus, where a plaintiff sued in the character of administrator, a plea, that he was not administrator, was held good.⁴ So, where a plaintiff entitled himself as administrator in the Bill, a plea that the supposed intestate was living, was held good.⁵ So, a plea to a Bill by a plaintiff, claiming as heir, that the plaintiff is not heir, has been held good.⁶ So, if a plaintiff should sue as a partner, a plea,

¹ Beames Pl. in Eq. 119, 120 ; *Tarlton v. Hornby*, 1 Y. & Coll. 172.

² *Carleton v. Leighton*, 3 Meriv. R. 657 ; Beames Pl. in Eq. 118, 119.

³ *Mist. Eq. Pl. by Jeremy*, 230 ; Beames Pl. in Eq. 120, 121, 122 ; *Cooper Eq. Pl.* 249, 250 ; Ante § 496.

⁴ *Ibid.* See *Ord v. Huddleston*, 2 Dick R. 510 ; S. P. 1 Cox R. 198.

⁵ *Ibid.* Sir Thomas Sewel in *Ord v. Huddleston*, 2 Dick R. 510, seemed to think this was a plea in bar, and not in abatement. See Beames Pl. in Eq. 122.

⁶ Beames Pl. in Eq. 123, 124 to 129. See 16 Ves. 264, 265. Ante § 668 ; *Drew v. Drew*, 2 Ves. and Beam. 159 ; *Newman v. Wallis*, 2 Bro. Ch. R. 143, and Mr. Belt's note ; *Hall v. Noyes*, 3 Bro. Ch. R. 489.

that he is not a partner would be good.¹ So, to a Bill by a plaintiff, as a creditor of an estate, a plea, that he is not a creditor, and that the deceased was not indebted to him, would be good.² So, if a person should sue as plaintiff, in the character of a widow, for dower, a plea of *ne unques accouple*, that is to say, a plea, that the plaintiff and her supposed husband were never lawfully joined in matrimony, would be a good plea.³ So, to a Bill, brought by an executor before probate of the will, a plea, that the will has not been proved, would be good.⁴ So, if a *feme covert* should sue alone in her own name, the coverture may be pleaded in abatement.⁵ So, a plea, that the plaintiff, or one of the plaintiffs, is a fictitious person, or was dead at the commencement of the suit, would be a good plea in abatement of the suit.⁶

§ 728. The principle of the plea may be properly stated in a more comprehensive form; viz. the want of interest of the plaintiff in the subject-matter. Interest in the subject-matter of the suit, or a right to the thing demanded, and a proper title to institute the suit, are essentially necessary to maintain the Bill. If the objection is apparent upon the face of the Bill, it may, and indeed it ought to be taken by way of demurrer. But a title apparently good may be stated in a Bill; and yet the plaintiff may not really have the title he states; either because he misrepresents himself, which has been considered under the last head; or because he sup-

¹ *Sanders v. King*, 6 Madd. R. 61; *Drew v. Drew*, 2 Ves. and Beam. 151.

² *Thring v. Edgar*, 2 Sim. and Stu. R. 274.

³ *Poole v. Poole*, 1 Younge R. 331.

⁴ *Simons v. Milman*, 2 Sim. R. 241.

⁵ *Wyatt Prac. Reg.* 326.

⁶ *Cooper Eq. Pl.* 249; *Beames Pl. in Eq.* 122.

presses some circumstances respecting his title, which, if disclosed, would show, either that nothing was ever vested in him, or that the title, which he had, has been transferred to another; and this defect the defendant may show by plea in bar of the suit. As, if a plaintiff claims as a purchaser of a real estate; and the defendant pleads, that he is a papist, and incapable of taking by purchase; or if a plaintiff claims property under a title, which accrued previous to a conviction of himself, or of the person, under whom he claims, of some offence, which occasioned a forfeiture; or if a plaintiff sets up a title, which accrued previous to his bankruptcy; this, or any other defective title to the matter, claimed by the Bill, if the defendant by plea shows the defect, will be a good bar to the suit.¹

§ 729. A plea of conviction of any offence, which occasions forfeiture, such as manslaughter, must (as we have seen) be pleaded with equal strictness as a plea of the same nature at common law. But, if a plea goes to show, that no title was ever vested in the plaintiff, though for that purpose it states an offence committed, a conviction of the offence is not essential to the plea; and the same strictness is not required, as in a case of forfeiture. Thus, in the Exchequer, to a Bill seeking a discovery of the owners of a ship captured and the payment of a ransom, the defendants pleaded, that the captor was a natural-born subject, and the capture an act of piracy. Though the Barons at first thought, that the plea could not be supported, unless the plaintiff had been convicted of piracy, and the record of the convic-

¹ Mitf. Eq. Pl. by Jeremy, 232, 233; Cooper Eq. Pl. 166 to 170; Beames Pl. in Eq. 120 to 129; Ante § 260, § 261, § 495, § 496, § 508, § 509, § 510.

tion had been annexed to the plea ; yet they were finally of opinion, that as the plea showed, that the capture was not legal, and that, therefore, no title had ever been vested in the plaintiff, the plea was good ; and they allowed it accordingly. Pleas of want of title generally extend to discovery as well as to relief.¹

§ 730. It cannot often be necessary to make defence on the ground of want of title by way of plea ; for if facts are not stated in the Bill, from which the Court will infer a title in the plaintiff, though the Bill does contain an assertion, that the plaintiff has a title, the defendant may demur ; the averment of title in the Bill being, not of a fact, but of the consequence of facts. Thus, where a plaintiff stated an encumbrance on a real estate, of which he was devisee, and averred, that it was the debt of the testator, and prayed, that it might be paid out of the testator's personal estate, in ease of the real estate devised ; the defendant having pleaded, that the testator had done no act, by which he made it his own debt, the plea was overruled ; because, whether it was his debt, or not, was matter of inference from the facts stated in the Bill, and therefore the proper defence was by demurrer. Accordingly, the defendant afterwards demurred, and the demurrer was allowed.²

§ 731. In treating of demurrers notice has been taken, that, though a plaintiff has an interest in the subject of a suit, and a right to institute a suit concerning it, yet he may have no right to call upon the defendant to answer his demands ; and it has been also observed, that this happens, where there is a want of privity of title be-

¹ Mitf. Eq. Pl. by Jeremy, 232, 233 ; Cooper Eq. Pl. 246 ; Beames Pl. in Eq. 110.

² Mitf. Eq. Pl. by Jeremy, 233, 234.

tween the plaintiff and defendant. It would, probably, be difficult to frame a Bill, which was really liable to objection on this head, so artfully, as to avoid a demurrer. But, if such a Bill could be framed, it should seem, that the defence might be made by plea.¹

§ 732. In the next place, as to pleas in abatement to the person of the defendant. Although persons, who are outlawed, and excommunicated, attainted, &c., cannot plead their own disabilities to a Bill brought against them; yet it will be a good plea in abatement, that the defendant is not the person he is alleged to be, or that he does not sustain the character, which he is alleged to bear in the Bill.² Thus, for example, if a defendant is sued as a *feme covert*, or as a *feme sole*, or as heir, or as executor, or administrator, or as partner; in every such case it would be a good plea, that the defendant did not bear the character, which was so alleged in the Bill.³

§ 733. It seems to have been considered, as more convenient for a defendant, under these latter circumstances, to put in an answer, alleging the mistake in the Bill, and praying the judgment of the Court, whether he should be compelled further to answer the Bill. But this, in fact, amounts to a plea, though it may not bear the title; and a plea has been considered as the proper defence.⁴

¹ Mitf. Eq. Pl. by Jeremy, 234; Ante § 513 to 518.

² Mitf. Eq. Pl. by Jeremy, 234, 235; Cooper Eq. Pl. 250; Beames Pl. in Eq. 129, 130.

³ Mitf. Eq. Pl. by Jeremy, 234, 235; Cooper Eq. Pl. 250; Beames Pl. in Eq. 129, 130; Sanders v. King, 6 Madd. 61; S. C. 2 Sim. & Stu. 279; Drew v. Drew, 2 Ves. & Beam. 159. See Griffith v. Bateman, Rep. temp. Finch, 334; Wyatt Pr. Reg. 326.

⁴ Mitf. Eq. Pl. by Jeremy, 234, 235, 309, 311, 312; Cooper Eq. Pl. 250; Wyatt Pract. Reg. 327. The following form of a plea by the defendant,

§ 734. Upon an analogous ground, if the defendant has not that interest in the subject of a suit, which can make him liable to the demands of the plaintiff, and the Bill alleging, that he has, or claims an interest, avoids a demurrer, he may plead the matter necessary to show, that he has no interest, if the case is not such, that by a general disclaimer he can satisfy the suit. Thus, where a witness to a will was made a defendant to a Bill brought by the heir at law, to discover the circumstances attending the execution; and the Bill contained a charge of pretence of interest by the defendant; though a demurrer for want of interest was overruled, because it admitted the truth of the charge to the contrary in the Bill; yet the Court declared an opinion, that a defence might have been made by plea.¹

that he is not executor, is in Van Heythuysen's Equity Draftsman, p. 444. "This defendant, by protestation to all the discovery and relief sought and prayed by the complainant's said Bill, and he, this defendant, doth plead, and for plea he saith, that he, this defendant, is not executor or administrator in the Bill mentioned, or the legal representative of the said B., which said representative or representatives ought to be made party or parties to the complainant's said Bill, as this defendant is advised. All which matters and things this defendant avers to be true, and pleads the same to the said Bill, and humbly demands the judgment of this honorable Court, and humbly prays to be dismissed, with his reasonable costs."

¹ Mitf. Eq. Pl. by Jeremy, 235; Cooper Eq. Pl. 250; Ante § 262, § 519, § 520; Beames Pl. in Eq. 131, 132. The decision in *Plummer v. May*, 1 Ves. 426, seems perfectly correct, because of the charge in the Bill, that the defendant pretended to some right or interest under the will; which the demurrer admitted. If no such pretence had been alleged, then a demurrer would have been good. But a plea, in this case, denying the interest, supported by an answer, denying the claim of any interest, would have been good. Ibid. Mr. Cooper has said; "But it has since been determined, that a demurrer to such a Bill will be also good; and it is settled, that a defendant of this sort may make his defence either by plea or demurrer." Cooper Eq. Pl. 251. But this is not quite an accurate statement. It is true only, where there are no facts stated in the Bill, which require an answer; and it is apparent on the face of the Bill, that the defendant is a mere witness, without any claim of interest. In such

§ 735. Thirdly; Pleas to the Bill, or frame of the Bill. Such pleas differ from pleas to the jurisdiction, as they do not dispute the original power of the Court to take cognizance of the particular matter, but, tacitly, in some instances, admit it. And they differ from pleas to the person, by admitting the plaintiff's ability to sue, and the defendant's liability to be sued, though they object to the suit as framed, or contend, that it is unnecessary. They likewise differ from pleas in bar; because they do not deny the validity of the right, which is made the subject of the suit; though they contend, that the right ought not to be canvassed on the existing record. They seem, indeed, to bear a considerable resemblance to those pleas at law, which are in abatement to the action of the writ, of which the following are stated as instances; that there is another action pending for the same cause; that the action itself is prematurely brought; and that the action is misconceived.¹ These pleas have been arranged under the following heads: (1.) Plea of another suit depending in a Court of Equity for the same matter; (2.) Plea of want of proper parties; (3.) Plea of multiplicity of suits; (4.) Plea of multifariousness, or joining, and confounding, distinct matters in one suit.²

a case, if the defendant does not plead, or demur, but answers, it seems, that he must answer fully. See *Cookson v. Ellison*, 2 Bro. Ch. R. 252; and Mr. Belt's note; *Fenton v. Hughes*, 7 Ves. 287, 289, 290; *Beames Pl. in Eq.* 131, note (4). In relation to the plea of want of interest in the defendant, it is put by Mr. Beames and Mr. Cooper as a plea in abatement. But it seems also to partake of the character of a plea in bar, and is arranged by Lord Redesdale as a plea in bar. *Mitf. Eq. Pl. by Jeremy*, 220, 221, 231, 232.

¹ *Beames Pl. in Eq.* 133.

² *Beames Pl. in Eq.* 134 to 158. Lord Redesdale treats the two first of these pleas under the head of pleas in bar. *Mitf. Eq. Pl. by Jeremy*,

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place, the plea should aver, and so the fact should be, that the second suit is for the same subject-matter as the first. And, therefore, a plea, which did not expressly aver this, though it stated matter tending to show it, was considered as bad in point of form, and overruled upon argument.¹ In the next place, it should state not only, that the same issue is joined in the former suit, as in the suit now before the Court, and that the subject-matter is the same, but also, that the proceedings in the former suit were taken for the same purpose.² In the next place, the plea should aver, that there have been proceedings in the suit ; such as an appearance, or process requiring an appearance at least.³ This is analogous to the rule in the civil law, as to what shall constitute the pendency of a suit. *Coepta autem est,*

¹ *Devie v. Lord Brownlow*, 2 Dick. R. 611 ; *Mitf. Eq. Pl. by Jeremy*, 246 ; *Beames Pl. in Eq.* 136.

² *Behrens v. Sieveking*, 2 Mylne & Craig, 602. Lord Cottenham, in giving judgment in this case, said ; "That in order to support the plea, it was necessary to shew, that the proceedings, in which the plaintiffs were alleged to have failed, were taken for the same purpose as the present suit ; for, the issue might have been the same, while the object was different ; and the circumstance, that the matter had been tried, as a matter of evidence, could not be conclusive. The defendant had to shew, that the subject-matter was the same ; that the right came in question before a court of competent jurisdiction ; and that the result was conclusive, so as to bind the judgment of every other court. His Lordship added, that it was in the plea alone, that any statement of the Bill of proof or of the proceedings taken upon it was to be found ; but that the plea left the Court in ignorance upon the question, whether the proceedings, which it alleged to have taken place in the Lord Mayor's Court, were conclusive, even in that court. His Lordship thought, that the plaintiff could not have taken issue upon the plea, and that no question was stated in the plea upon which his Lordship could ask for the opinion of the Recorder."

³ *Mitf. Eq. Pl. by Jeremy*, 246, 247 ; *Beames Pl. in Eq.* 137 ; *Cooper Eq. Pl.* 272 ; *Moor v. Welsh Copper Company*, 1 Eq. Abridg. 39, pl. 14 ; *Anon.* 1 Vern. 318.

*atque ita pendere lis alibi censetur, non modo, si litis contestatio jam facta sit, sed et si sola citatio, seu in jus vocatio, utpote quæ preventionem inducit.*¹ On this ground, where a Bill was brought against the defendants, who were partners in trade, for several shares in their stock; and the plaintiff in such suit afterwards sold one sixth part of what he was entitled to, to another person, who now brought his Bill for such sixth part; the defendants pleaded the former Bill, and that such first suit was still depending. But, because the plea did not aver, that the defendants had appeared to the former suit, or put in their answer, or that they were so much as served with process to appear, the plea was disallowed.² In the next place, the plea should regularly aver, that the *former suit is [*572] still depending; for this seems an essential ingredient to the validity of the plea.³

§ 738. It is not necessary to the sufficiency of the plea, that the former suit should be precisely between the same parties, as the latter. For, if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original Bill, touching the part so purchased by him, a plea of the former suit

¹ Beames Pl. in Eq. 137, 138; Voet. ad Pandect. lib. 44, tit. 1, § 3.

² *Moor v. Welsh Copper Company*, 1 Eq. Abridg. 39, pl. 14; Cooper Eq. Pl. 272.

³ Mitf. Eq. Pl. by Jeremy, 247; Cooper Eq. Pl. 272; Beames Pl. in Eq. 138, 139. Lord Redesdale says, that it has been held, that a positive averment, that the former suit is depending, is not necessary; Mitf. Eq. Pl. by Jeremy, 247; and he cites *Urlin v. Hudson*, 1 Vern. R. 333, which certainly seems to support his statement; though the averment there was, "which suit is still depending, for aught he (the defendant) knows to the contrary." However, it seems very doubtful, if this case is sound law. Mr. Beames and Mr. Cooper both appear to doubt it. Beames Pl. in Eq. 138, 139; Cooper Eq. Pl. 272.

depending, touching the whole property, will hold.¹ So, where one part owner of a ship filed a Bill against the ship's husband for an account ; and afterwards the same part owner and the rest of the owners filed a Bill for the same purpose ; the pendency of the first suit was held a good plea to the last ; for, though the first Bill was insufficient for want of parties, yet by the second Bill the defendant was doubly vexed for the same cause.² The course, which the Court has taken, where the second Bill has appeared to embrace the whole subject in dispute, more completely than the first, has been, to dismiss the first Bill with costs, and to direct the defendant in the second cause, to answer, upon being paid the costs of a plea allowed ; which puts the case on the second Bill in the same situation, as it would have been in, if the first Bill had been dismissed before filing the second.³

[*573] *§ 739. There are some cases, however, to which the pendency of the plea of a former suit will not properly apply, even where it may be for the same subject-matter. Thus, where the effect of the second suit cannot be had in the former, this plea will not hold ; nor where the second Bill, brought by a different person, although for the same matter, as far as concerns the foundation of the demand, is for a different Equity ; nor where, though the second suit is brought by the same person for the same purpose, it is brought in a different right.⁴ Thus, where the executor of an administrator, conceiving himself to be the personal representative of the intestate, brought a Bill, and afterwards procured administration *de bonis non*, and filed another Bill ; a

¹ Mitf. Eq. Pl. by Jeremy, 248 ; Cooper Eq. Pl. 273 ; Beames Pl. in Eq. 139, 140. ² Ibid. ³ Ibid.

⁴ Beames Pl. in Eq. 140, 141.

plea of the pendency of the former Bill was overruled.¹ Lord Redesdale thought the reason of this determination to have been, that the first Bill being wholly irregular, the plaintiff could have no benefit from it; and it might have been dismissed upon demurrer.² But Lord Hardwicke gave a different reason for his determination, expressly founding it upon this position, that where the same person sues in different rights, it is the same as if there were different persons.³

§ 740. Where a decree is made upon a Bill brought by a creditor on behalf of himself and of all other creditors of the same person, and another creditor comes in before the Master to take the benefit of the decree, and proves his debt, and then files a Bill on behalf of himself *and the other creditors, the defendants may [*574] plead the pendency of the former suit; for a man, coming under a decree, is *quasi* a party. The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the Court for liberty to conduct the cause.⁴

§ 741. Whether a plea of the pendency of another suit in Equity for the same matter in a foreign tribunal would be a good plea, has been a matter of some discussion in some of the Courts. Upon principle there would not seem to be any real difficulty in holding, that it is not a good plea. It is certain, that the pendency of another suit for the same matter in a foreign tribunal,

¹ Mitf. Eq. Pl. by Jeremy, 248, 249.

² Ibid.

³ Beames Pl. in Eq. 140, 141, and cases there cited; *Huggins v. York Buildings Company*, 2 Atk. 44; S. C. 2 Eq. Abridg. 3, pl. 14; *Neve v. Weston*, 3 Atk. 557; *Law v. Rigby*, 4 Bro. Ch. R. 60; *Gage v. Lord Stafford*, 1 Ves. 544; S. C. Ambler, 103; Mitf. Eq. Pl. by Jeremy, 248, 249; Cooper Eq. Pl. 274.

⁴ Mitf. Eq. Pl. by Jeremy, 249; *Neve v. Weston*, 3 Atk. 557; *Houl-ditch v. Donnegall*, 1 Sim. & Stu. 361; Cooper Eq. Pl. 274; Beames Pl. in Eq. 139, 140.

would not be held a good plea to a suit in a Court of Law ; and there seems to be the same reason for overruling it in Equity.¹

§ 742. Hitherto we have been speaking of a plea of another suit depending in a Court of Equity. And the question, which next presents itself, is, whether the pendency of an action in a Court of Law for the same subject-matter is a good objection to be urged in a plea of this sort in a Court of Equity.² It is the established rule, that such a plea is bad and unavailable in Equity. The reason usually given for this diversity is, that the plaintiff has a right to the oath of the defendant in Equity, to exonerate him of the *onus probandi* at law.³ [*575] *Perhaps a more general ground may be found in the fact, that it can scarcely ever occur, that the remedial justice, and the grounds of relief are precisely the same in each Court ; for if the remedy be complete at law, that is an objection to the jurisdiction of a Court of Equity. It would be absurd to allow a suit, depending at law, to be a bar in a suit in Equity, when the merits of the case could not be tried in the suit at law. The defendant is not, however, without a remedy for the double vexation ; for a Court of Equity will, upon the coming in of the defendant's answer, put the plaintiff to his election, whether he will proceed in the suit at law, or in

¹ *Foster v. Pascall*, 3 Atk. 589, 590 ; *Mitf. Eq. Pl. by Jeremy*, 247, note (t) ; *Dillon v. Alvares*, 4 Ves. 357. See *Cooper Eq. Pl.* 275 ; *Beames Pl. in Eq.* 141, 142 ; *Houlditch v. Donnegall*, 1 Sim. & Stu. 479.

² *Beames Pl. in Eq.* 146 to 148 ; *Cooper Eq. Pl.* 276.

³ *Gilb. For. Rom.* 55 ; *Beames Pl. in Eq.* 146 to 148. Yet a plea of this sort is never required to be put in upon oath, because it is examinable by a Master, as a matter of record. *Mitf. Eq. Pl. by Jeremy*, 247 ; *Urlin v. Hudson*, 1 Vern. 332 ; *Beames Pl. in Eq.* 146 ; *Cooper Eq. Pl.* 275.

Equity ; and if he elects the latter, then an injunction will issue to any further proceedings at law ; if the former, then the Bill will be dismissed.¹ But if the plaintiff should fail in his suit at law, this dismissal of his Bill will not be a bar to his bringing a second Bill.²

→ § 743. As the plea of another suit, depending in Equity, is clearly a good plea, if true, the usual course of the Court is not to have the plea set down and argued ; but to refer it to one of the Masters to look into the two suits, and to report, whether, or not, they are both for the same matter. If the Master reports, that both suits are for the same matter, the plea is allowed ; but if he reports otherwise, the plea is then *ipso facto* overruled.³ According to the general orders of the Court, the reference to the Master is to be procured by the plaintiff, and a report thereupon within one month after the *filing of such plea, otherwise the Bill [*576] to stand dismissed of course with the ordinary costs.⁴ If the plaintiff, therefore, set down the plea to be argued, he admits the truth of the plea, and it must be allowed, unless defective in form.⁵

§ 744. If we pause upon this proposition, there certainly appears something rather anomalous in the proceeding relative to this plea, as its effect seems to be, to preclude the plaintiff from having both an examination as to the truth of the plea, and a decision as to the form of the plea, as he is generally entitled to. If he examine into the truth of the plea by the reference to the Master, he waives, it is apprehended, taking the opinion of the Court on the form of the plea. And if he set down the

¹ Gilb. For. Rom. 55 ; Beames Ord. in Ch. 11, 12 ; Beames Pl. in Eq. 146, 147, 148 ; Mitf. Eq. Pl. by Jeremy, 249, 250 ; Cooper Eq. Pl. 276.

² Mitf. Eq. Pl. by Jeremy, 250.

³ Cooper Eq. Pl. 275.

⁴ Ibid.

⁵ Ibid.

plea for the purpose of having a decision on its form, he thereby admits the truth of the plea, and foregoes an inquiry before the Master; and the plea must be allowed, unless it should be defective in form.¹ But, it is conceived, he may adopt the latter course, notwithstanding the terms of the general order would seem to preclude him from taking, in any event, the opinion of the Court on the form of the plea.²

§ 745. Secondly; a plea for the want of proper parties. Little remains to be said upon this subject beyond what has been already suggested in our prior inquiries.³ Though a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the Court, which ought to prevent its interference, yet the defendant may object to the Bill, if it is deficient to answer the purposes of complete justice. [*577] *This is usually for want of proper parties; and, if the defect is not apparent on the face of the Bill, the defendant may plead the matter necessary to show it. A plea of the want of parties goes both to discovery and relief, where relief is prayed; though the want of parties is no objection to a Bill for a discovery merely.⁴ Where a sufficient reason to excuse the defect is suggested by the Bill; as where a personal representative is a necessary party, and the Bill states, that the representation is in contest in the Ecclesiastical Court; or where the party is resident out of the jurisdiction of the Court, and the Bill charges that fact; or where a Bill seeks a discovery of the necessary parties; an objection for want of parties will not be allowed; unless, per-

¹ Beames Pl. in Eq. 144 to 146; Beames Ordin. in Ch. 176, 177; Mitf. Eq. Pl. by Jeremy, 247; Cooper Eq. Pl. 274, 276; Murray v. Shadwell, 17 Ves. 352.

² Ibid.

³ Ante § 236, § 238, § 541.

⁴ Ante § 610.

haps, the defendant should controvert the excuse made by the Bill, by pleading matter to show it false.¹ Thus, in the first instance, if before the filing of the Bill the contest in the Ecclesiastical Court was determined, and administration granted, and the defendant showed this by plea, perhaps the objection for want of parties would be, in strictness, good.² Upon arguing a plea of this kind, the Court, instead of allowing it, has given the plaintiff leave to amend the Bill upon payment of costs; a liberty, which he may also obtain after the allowance of a plea, according to the common course of the Court; for the suit is not determined by the allowance of a plea, as it is by the allowance of a demurrer to the whole of a Bill.³

¹ Mitf. Eq. Pl. by Jeremy, 280, 281; Cooper Eq. Pl. 185, 186, 187, 289, 290; Beames Pl. in Eq. 148; Robinson v. Smith, 3 Paige R. 222; Mitchell v. Lenox, 2 Paige R. 280; Milligan v. Milledge, 3 Cranch, 220; Lord Redesdale has classed this plea among pleas in bar. Mitf. Eq. Pl. by Jeremy, 220, 280. On this, Mr. Beames (Pl. in Eq. 149, 150), has remarked:—"This plea is generally classed as a plea in bar; but with what propriety, (admitting, as it tacitly does, that the plaintiff is entitled to some relief, and not disputing the validity of the rights, made the subject of the suit,) cannot, I apprehend, be easily stated, especially as it is borrowed from the analogous plea at law to actions arising, *ex contractu*, which has been considered a plea in abatement. Thus, in the instance of a *quare impedit*, 'the incumbent may plead in abatement, that such an one is not named a defendant, when he ought to be.' It appears from Mr. Raithby's note of the case of Hamm v. Stephens, that the plea was considered, and is entered in the Register's book, as a 'plea in abatement for want of parties.' Lord Redesdale, although he has treated the plea now under discussion as a plea in bar, seems rather to question the propriety of so classing it, by observing, that it is, 'perhaps, a temporary bar only,' an observation, that is equally applicable, for instance, to a plea of outlawry, which has never, it is apprehended, been classed as a plea in bar in Equity. In addition to which, Lord Hardwicke himself says, that 'an exception for want of parties is in the same nature with a plea in abatement at law.' Whether, however, it be properly classed as a plea in bar, or as a plea to the Bill, it is unquestionable, that a plea for want of parties

² Ibid.

³ Ibid.

§ 745. *a.* In respect to the want of proper parties, also, although it may be generally pleaded to the Bill, that there is such a defect; yet the structure of the Bill, even when it seeks relief, as well as discovery, may sometimes prevent the objection from being taken by way of plea. Thus, for example, if a Bill be brought for payment of an annuity charged on real estate, and the Bill charges, that the defendant ought to discover, whether there are any incumbrancers prior to the plaintiff's; and if there are, to set forth their names, and the nature of their claims and priorities, it would not be a good plea, that there are prior incumbrancers, who ought to be made a party to the Bill; for the defendant is bound to make the discovery as asked in the Bill; and if there are more than one, he ought to discover all the incumbrancers.¹ And if a plea, that there is one incum-

is a good plea in Equity, as it is at law." See also *Anon. Mosel. R. 207*. It has already been stated (§ 238), that, where there is a defect of parties, the plea should show, who the proper parties are, by name, if practicable; if not so, by a description, which will point out to the plaintiff the proper parties, and will enable him to amend his Bill accordingly. See *Mitf. Eq. Pl. by Jeremy*, 180, 181; *Attorney General v. Jackson*, 11 Ves. 367, 369, 370; *Attorney General v. Wyburgh*, 1 P. Will. 599; *Attorney General v. Shelly*, 1 Salk. 163; *Beames Pl. in Eq.* 154, 155; *Fawkes v. Pratt*, 1 P. Will. 593; *Merrewether v. Mellish*, 13 Ves. 435, 438; *Anon. Mosel. R. 207*; *Cockburn v. Thompson*, 16 Ves. 325 to 329. See also *Cook v. Mancius*, 3 John. Ch. R. 427.

¹ *Rawlins v. Dalton*, 3 Younge & Coll. 447, 452, 453. Lord Abinger on this occasion said; "I am clearly of opinion, that the plea must be overruled, on three distinct grounds. The first is, that the matter discovered in the plea is part of the discovery sought by the Bill, and I never can suppose, that Courts of Equity, which are generally governed by the rules of common sense, can allow what ought to have been the subject of an answer, and which the plaintiff seeks to have discovered by his Bill, set up by way of plea in order to defeat the Bill. There is a class of cases, where the relief and discovery sought by the Bill are so blended, that you cannot separate them, and if you plead to the relief, you must answer as to the discovery. Here the party seeks to recover a certain annuity charged on lands; but upon this Bill his title to receive payment of the

brancer who is not a party, is allowed, and the Bill amended accordingly, and the defendant then pleads to the amended Bill, that there are other incumbrancers, who are not made parties, the latter plea will be disallowed; for the defendant ought to have inserted all the incumbrancers in the original plea.¹

* §746. Thirdly; the plea of multiplicity of [*578] suits. This objection may be taken by way of plea; for it is against the whole policy of Courts of Equity to encourage multiplicity of suits.² Indeed, this constitutes one main ground of the objection of want of sufficient parties; since its tendency is to multiply litigation.³

annuity may depend on the existence of prior incumbrancers. One object of the Bill is to obtain a discovery of the other incumbrancers, in order to make them parties to the suit. Ought, then, the omission to make the incumbrancers parties to be pleaded to such a Bill? But at all events, can it be endured, that a defendant should plead the want of one incumbrancer, thereby getting the plaintiff's Bill dismissed, and his own costs of the dismissal, and then be allowed to plead the same plea again as to another incumbrancer? By the same rule he might go on and plead fifty successive pleas of the same sort. It appears to me, however, that the very nature of the Bill, which seeks to know, who are the incumbrancers upon the estate, precludes a plea for want of parties in a case like this, and that the defendant should include in his answer to the Bill the names of all, whom he alleges ought to be, but whom the plaintiff has omitted to make, parties to the Bill."

¹ Rawlins v. Dalton, 3 Younge & Coll. 447, 452, 453.

² Beames Pl. in Eq. 155, 156, 158; Mitf. Eq. Pl. by Jeremy, 221; Id. 148; Ante § 287; Cooper Eq. Pl. 184, 185.

³ Stafford v. City of London, 1 P. Will. 428; Ante § 72, § 73, § 75, § 76. This plea is also classed by Lord Redesdale as a plea in bar. Mitf. Eq. Pl. by Jeremy, 220, 221. Upon this, Mr. Beames (Pl. in Eq. 156), has remarked—"Lord Redesdale terms it a plea in bar, which, with great deference to his Lordship, it cannot be, as it does not deny the existence of the right, made the subject of suit, but tacitly admits that right. Nor can it be denominated a plea either to the jurisdiction, or to the person. It is a plea in abatement of the Bill, as framed, neither denying the jurisdiction of the Court, nor the ability of the plaintiff to sue, nor contending, that the right made the subject of the suit has no existence; but simply asserting, that the plaintiff ought not to split his demands, but should bring the whole at once before the Court."

→ § 747. Fourthly. The plea of multifariousness, or of joining and confounding distinct matters in one Bill. Generally this objection is apparent on the face of the Bill; and then it should be taken by way of demurrer.¹ But in case the Bill is artfully framed, so that from that, or from some other cause, the objection does not appear on the face of the Bill, the defendant may take advantage thereof, by setting forth the special matter by a plea.² Such a plea properly considered, would be neither to the jurisdiction, nor to the person, nor in bar; but it would be strictly a plea to the Bill, or to the frame thereof.³ This subject has been already treated at large under the head of demurrer; and therefore it is unnecessary to add more in this place.⁴

§ 748. Having disposed of these preliminary pleas, declinatory, or dilatory, we come in the next place to the consideration of pleas in bar, belonging to the class of peremptory exceptions of the civil law. Though the subject of a suit may be within the jurisdiction of a Court of Equity, and the Court, in which it is brought, may have the proper jurisdiction; though the plaintiff may be under no personal disability, and may be the person he pretends to be, and may have a claim of interest in the subject, and a right to call on the defendant [*580] *concerning it; and though the defendant may be the person he is stated to be, and may claim an interest in the subject, which may make him liable to the plaintiff's demands, (with respect to which circumstances pleas have been already considered⁵); still the

¹ Mitf. Eq. Pl. by Jeremy, 221; Ante § 271 to § 287.

² Beames Pl. in Eq. 157, 158; Mitf. Eq. Pl. by Jeremy, 221.

³ Beames Pl. in Eq. 157, 158.

⁴ Ante § 271, § 284, § 530 to § 541.

⁵ Ante § 734.

plaintiff, by reason of some additional circumstance, may not be entitled in the whole or in part to the relief or assistance, which he prays by his Bill. The objections, which may be made to the whole or to any part of a suit, and which have not been already considered, are principally the subject of those kinds of pleas, which are commonly termed pleas in bar.¹ Let us proceed to examine these different kinds of pleas in the order, in which they have been usually arranged.

§ 749. Pleas in bar may be ranked under three heads. (1.) Pleas, founded on some bar created by statute; (2.) Pleas, founded on matter of record, or, as of record, in some Court; (3.) Pleas of matter purely *in pais*, as it is termed; that is, upon matter of fact, not of record.²

§ 750. First; Pleas in bar, founded on matter, which is made a bar by statute. Pleas of this sort are, (1.) The Statute of Limitations; (2.) The statute for the prevention of frauds and perjuries; (3.) Any other statute, public or private, which has created a bar; (4.) The plea of a statute fine and nonclaim.

*§ 751. The Statute of Limitations. This is [*581] a good bar to a suit in Equity, as it is at law; and it will ordinarily bar both the claim of the debt, and the discovery, when the debt became due.³ Indeed, when

¹ Mitf. Eq. Pl. by Jeremy, 236.

² This is the distribution of Mr. Cooper (Eq. Pl. 251), and of Mr. Beames (Pl. in Eq. 159, 160); and I have followed it, as preferable to that of Lord Redesdale, who has divided them into, (1.) Pleas of matters recorded, or as of record in the Court itself, or of some other Court of Equity; (2.) Pleas of matters of record, or matters in the nature of matters of record of some other court, not a Court of Equity; and, (3.) Pleas of matters *in pais*. Mitf. Eq. Pl. by Jeremy, 236.

³ Mitf. Eq. Pl. by Jeremy, 269; Cooper Eq. Pl. 251; *James v. Sadgrove*, 1 Sim. & Stu. 4; *Macgregor v. East India Company*, 2 Sim. R. 455; Ante § 681, a. and note.

the objection appears on the face of the Bill, it may, as we have already seen, be taken by way of demurrer.¹ Thus, for example, if, upon the face of a Bill to recover a debt, it appears, that the debt accrued due more than six years before the commencement of the suit, a demurrer will lie.² If it does not so appear, then a plea is proper. It was formerly thought, that though the plea might be a good bar to the relief sought by such a Bill; yet it was not a good bar to the discovery sought, when the debt became due; for if that had been set forth, it would appear to the Court, whether the time limited by the statute of limitations was elapsed or not.³ But the doctrine is now well established, that the bar equally applies to each, to the discovery, as well as to the relief.³

¹ Ante § 484, § 503, note (4); *Foster v. Hodgson*, 19 Ves. 179; *Hoven-den v. Annesley*, 2 Sch. & Lefr. 637; *Hoare v. Peck*, 6 Sim. 51; *Mitf. Eq. Pl. by Jeremy*, 212, note (c); *Stackhouse v. Barnston*, 10 Ves. 466, 469, 470.

² *Mitf. Eq. Pl. by Jeremy*, 269; *Mackworth v. Clifton*, 2 Atk. 51; Ante § 681, a. and note.

³ *Sutton v. Scarborough*, 9 Ves. 71; *Cork v. Wilcock*, 5 Madd. R. 328. Lord Redesdale (*Mitf. Eq. Pl. by Jeremy*, 269, 270), has made the following remarks on the decisions, which establish the present doctrine. "These decisions are stated to have been founded on a rule, adopted of late years, that where a demurrer to relief would be good, the same ground of demurrer would extend to the discovery, on which the relief prayed was founded; and applying this rule, originally confined to demurrers, to pleas also. It may be doubted, whether, in this extension of the rule to pleas, the difference between a plea and demurrer has been sufficiently considered. A demurrer founds itself on the Bill, and asserts no matter of fact, the truth of which can be disputed. A plea, on the contrary, asserts a fact, the truth of which is put in issue by the plea. When, therefore, the statute of limitations is pleaded to a demand, and the question to be tried on the issue, joined upon the plea, is, whether the debt became due within six years before the filing of the Bill, it is denying the plaintiff the benefit of that discovery in aid of proof, which is allowed in all other cases, to hold, that a plea of the Statute of Limitation, with an averment, that the cause of action, if any, accrued six years before the filing of the Bill, will be a bar to the discovery of the truth of

The objection may also be taken by way of answer, and relied on as a defence.¹

*§ 752. Where the demand is of any thing [*582] executory, as a note for the payment of an annuity, or of money at a distant period, or by instalments, the defendant must, by his plea, aver, that the cause of action hath not accrued (not, that he did not promise) within six years; because the statute bars only what was actually due six years before the suit was brought.² This is in accordance with the rule of pleading adopted at law.³

that averment. In the case of money received by the defendant for the use of the plaintiff, and where the sums received, as well as the times when they were respectively received, may rest in the knowledge of the defendant only, it may amount to a complete denial of justice to hold, that a plea of the statute of limitations, with such an averment, is a bar to any discovery as to the sums received, and when received, and of whom, and as to entries in books, and other papers, which discovery might enable the plaintiff to prove the falsehood of the plea by witnesses and production of papers, as well as by the defendant's answer." These remarks seem properly addressed to a case, where the Bill states, that the debt has accrued within the period of the statute of limitations; and then they would seem to be conclusive in favor of requiring the discovery to be made. But, suppose the Bill should state the debt to be due ten years ago, and then should require a discovery, whether it did not; would the same reasoning be applicable? See Ante § 681, § 681, a, § 683; Post § 806.

¹ Van Hook v. Whitlock, 7 Paige R. 373; 1 Story on Equity Jurisp. § 55, a, p. 73; Id. § 529; 2 Story on Eq. Jurisp. § 1520, § 1521, and cases cited in the notes; Post § 847.

² Mif. Eq. Pl. by Jeremy, 271; Beames Pl. in Eq. 165, 169, 170; Cooper Eq. Pl. 252, 253. See McGregor v. East India Co. 2 Sim. 452.

³ Beames Pl. in Eq. 165, 166. As to the mode of averment, which will satisfy the rules of pleading, it has been decided, that the want of an averment, in a plea of the statute of limitations, that the money was not received within six years, may be supplied by an averment, that the cause of action, if any, arose above six years before the filing of the Bill; as, where the Bill was for an account of all sums received in respect of prizes, insurance, &c., and the defendants pleaded the statute of limitations, and the plea averred, that "there had been no promise or agreement

§ 753. There are exceptions allowed in Courts of Equity, in analogy to those at law, to the strict application of the statute of limitations. It cannot be pleaded, where the case falls directly within the exceptions of the statute itself, such as infancy, coverture, insanity, being imprisoned, or beyond seas. Neither can it be pleaded in a case, where an executor of the debtor has not taken out administration; because no laches can be attributed to a plaintiff for not suing, while there was no executor against whom he could bring his action. But where the allegation of the Bill, upon a fair construction, was, that the defendant had possessed the personal estate, and therefore might have been sued, as executor *de son tort*, a plea of the statute of limitations by an executor, who had not taken out probate till some years after the testator's death, was allowed.¹

§ 754. In the cases above stated, the Bill is supposed not to state, that the debt accrued more than six years before the suit brought; and not to state any circumstances, which would take the case out of the statute;² such as a fraud, or a mistake; or a new promise within six years; or any exception of disability within the

within six years before the defendants were served with process, to come to any account for, or make satisfaction, or to pay any sum of money to the plaintiff;" although it was objected, that there was no averment in this plea, that the money was not received within the last six years; yet the Court decided, that it was supplied in substance by the averment, that no cause of action had accrued, within the last six years; and allowed the plea. *Sutton v. Scarborough*, 9 Ves. 71; *Cooper Eq. Pl.* 252.

¹ *Cooper Eq. Pl.* 253, 274; *Beames Pl. in Eq.* 167, 168; *Burditt v. Grew*, 8 Pick. R. 108.

² See *Thring v. Edgar*, 2 Sim. & Stu. 274; *McGregor v. East India Company*, 2 Sim. R. 402.

statute;¹ of which it seeks a discovery. In such a case, the plea of the statute of limitations would be a pure plea. But, if the Bill should charge a fraud, and that *the fraud was not discovered until within [*584] six years, a pure plea would not be appropriate. But it must be the plea not pure, or the anomalous plea, already mentioned. That is to say, the plea should not only plead the statute of limitations; but it should contain averments, denying the fraud; or stating that the fraud, if any, was discovered within six years.² And it should also be accompanied by an answer in support of the plea, answering and denying the circumstances of fraud, and the other circumstances, which go to avoid the bar.³ So, upon a similar ground, where a particular special promise within six years is charged in the Bill, to avoid the statute of limitations; or where any other matter whatsoever is charged by the Bill, to avoid the statute of limitations, the plaintiff must specially deny the promise, or other matter so charged, by averment in the plea; and must also accompany it with an answer in support of the plea, containing a like denial of the promise, or other matter charged, and all the circumstances thereof.⁴

¹ Ante § 681, a. and note; *Forbes v. Skelton*, 8 Sim. R. 335; *Brooksbank v. Smith*, 2 Younge & Coll. 58, 60.

² *S. P. Brooksbank v. Smith*, 2 Y. & Coll. 58; *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. 683, 688; Ante § 681, a. and note; Post § 815, a.

³ Mitf. Eq. Pl. by Jeremy, 271; *South Sea Company v. Wymondsell* 3 P. Will. 193; *Beames Pl. in Eq.* 163, 164, 167; *Cooper Eq. Pl.* 252, 253; *Hovenden v. Annesley*, 2 Sch. & Lefr. 635, 636, 637; *Goodrich v. Pendleton*, 3 John. Ch. R. 384. *Kane v. Bloodgood*, 7 John. Ch. R. 134; *S. C.* 2 Cowen R. 360; *Clayton v. Earl of Winchelsea*, 3 Younge & Coll. R. 683, 688; *Hindman v. Taylor*, 2 Bro. Ch. R. 7; Ante § 684.

⁴ Mitf. Eq. Pl. by Jeremy, 271; *Cooper Eq. Pl.* 232; *Beames Pl. in Eq.* 164, 165; *Bayley v. Adams*, 6 Ves. 586; *Cork v. Wilcock*, 5 Madd. R. 328, 330; *James v. Sadgrove*, 1 Sim. & Stu. 4; *Chapin v. Colman*, 11

In such a case, care must be taken not to cover such a discovery by pleading the plea to the whole Bill, or to any part thereof, which will cover such a discovery; for [*585] if the *plea does cover it, it will, as has been already stated, be overruled.¹

§ 755. The statute of limitations may also be set up in bar to a Bill to prevent the defendant from setting an outstanding term, in order to defeat the plaintiff in an action of ejectment; for in such a case, if more than twenty years have elapsed, since his title accrued, and he has been out of possession, it is plain, that when he has obtained the equitable relief, which he seeks, he will nevertheless be unable to proceed at law; and, therefore, the only ground for equitable relief fails.²

§ 756. In some of the foregoing cases, Courts of Equity seem to act upon the positive injunctions of the statute of limitations; for, in a case of concurrent jurisdiction (as in cases of account or other debts), the statute would seem to apply equally to courts of law and of Equity.³ But in a great variety of other cases, Courts of Equity may correctly be said to act, not so

Pick. R. 331. A plea of the statute of limitations need not deny the usual allegations, "that the defendant has books, &c. in his custody, by which, if produced, the several matters aforesaid, or some of them, did or would appear," unless it is also charged that, if produced, they would show a promise within six years; because, otherwise, the possession of these documents is quite immaterial. *McGregor v. East India Company*, 2 Sim. R. 452.

¹ Ante § 686; *Portarlington v. Soulby*, 6 Sim. 356; *Bolton v. Gardner*, 3 Paige, 273. When, and under whatever circumstances, the plea will be good in bar of an account, see *Cooper Eq. Pl.* 253; *Beames Pl. in Eq.* 167; *Spring v. Gray*, 2 Mason R. 522 to 533.

² *Jermey v. Best*, 1 Sim. R. 373.

³ 2 Story on Equity Jurisp. § 1520, and note (2); *Hovenden v. Annesley*, 2 Sch. & Lefr. 607, 629, 630.

much in obedience to the law, as in analogy to the law.¹ For, although, in such cases, suits in Equity are not within the words of the statute; yet Courts of Equity generally adopt it as a positive rule, and apply it by parity of reasoning to cases not within it.²

*§ 757. Thus, for example, if an equitable title [*586] is not sued upon until after the time, within which a legal title of the same nature ought to be sued upon, to prevent a bar by the statute of limitations, Courts of Equity, acting by analogy to the statute, will not entertain it. For, in Courts of Equity, lapse of time is emphatically an ingredient in regard to entertaining suits for relief. If the party be guilty of such laches in prosecuting his equitable title, as would bar him, if his title were solely at law, he will be held barred in Equity.³ Hence, it is a general rule in Equity, in regard to all trusts and equitable estates in land, that every new right of action in Equity, that accrues to a party, whatever it may be, must be acted upon and prosecuted within twenty years; and that an adverse possession for twenty years (subject to the ordinary exceptions at law) is a good bar to such an equitable right or title.⁴ Therefore, the Statute of Limitations may be pleaded to a Bill to redeem a mortgage, if the mortgagee has been in possession twenty

¹ 1 Story on Eq. Jurisp. § 55, § 529; 2 Story on Eq. Jurisp. § 1520 to § 1522; *Hovenden v. Annesley*, 2 Sch. & Lefr. 607, 629, 630; *Burditt v. Grew*, 8 Pick. 108; *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 429; *Stackhouse v. Barnston*, 10 Ves. 466.

² Mitf. Eq. Pl, by Jeremy, 273, and cases cited note (x) and note (z).

³ *Bond v. Hopkins*, 1 Sch. & Lefr. 429; *Hovenden v. Annesley*, 2 Sch. & Lefr. 628, 629, 630 to 636; 1 Story on Eq. Jurisp. § 55, § 529; 2 Story on Eq. Jurisp. § 1520 to § 1522; *Stackhouse v. Barnston*, 10 Ves. 466.

⁴ *Hovenden v. Annesley*, 2 Sch. and Lefr. 636; *Cholmondeley v. Clinton*, 2 Jac. & Walker, 1, 137, 141 to 189; *Miller v. McIntire*, 6 Peters R. 61.

years, unless within that period he has treated it as a mortgage.¹ So, a Bill to foreclose a mortgage, will not lie after twenty years possession by the mortgagor, without acknowledging the mortgage; and a plea, setting up the bar, will be good.² But redemptions have been opened after twenty years, where the mortgagee [*587] has *treated it as redeemable during that time; as, if he has kept accounts upon it.³

§ 758. If there is a mortgage of a manor, with an advowson appendant, and the church becomes void, the mortgagee, though in possession, is not allowed to present to the church till the mortgage is foreclosed.⁴ But if the mortgagee of an advowson presents to it, a Bill by the mortgagor, seeking to compel a resignation, must be brought within six months after a *quare impedit*.⁵ And if it is not, plenarty for six months before the Bill filed may be pleaded in bar; for the statute of Westminster the second is considered, for this purpose, as a statute of limitations, in bar of an equitable, as well as of a legal right.⁶ But if a *quare impedit* is brought before the six months are expired, though the Bill is filed after, it may be in some cases a ground for the Court to interfere; and, consequently, plenarty would not in such cases be pleadable in bar.⁷

§ 759. A further illustration of the doctrine of Courts of Equity on this subject may be found in the case of a rent-charge, either legal or equitable, which is not within the purview of the statute of limitations, and is

¹ Mitf. Eq. Pl. by Jeremy, 273; *Hovenden v. Annesley*, 2 Sch. & Lefr. 636, 637; *Cooper Eq. Pl.* 255; *Chomondeley v. Clinton*, 2 Jac. & Walk. 1, 137 to 189; *Stackhouse v. Barnston*, 10 Ves. 466; *Corbet v. Barker*, 3 Anst. 755; *Raveld v. Russell*, 1 Younge R. 9.

² Ibid.

³ Ibid.

⁴ *Cooper Eq. Pl.* 255; *Mitf. Eq. Pl. by Jeremy*, 272.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

not of course barred, either at law, or in Equity, by the mere lapse of time.¹ But, nevertheless, in a case of this sort, Courts of Equity will, after a great lapse of time, unexplained by circumstances, entitling the party to relief, refuse its aid, as it may well be presumed, that the rent-charge has been in some way extinguished. And Courts *of Equity fully recognise the max- [*588] im, *Vigilantibus, non dormientibus jura subveniunt*.²

§ 759. *a.* So, if a judgment has been obtained against a debtor, and no efforts are made by the creditor to enforce it for twenty years, the lapse of time will be a good bar to the judgment, and may be so pleaded, notwithstanding it may be shown, that during the greater part of the time, the debtor has been insolvent; for a Court of Equity will never be active in relieving persons, who have for a long time slumbered upon their rights; and especially when they might have had relief in Equity, and enforced their rights there, if they had applied within a reasonable period.³

§ 760. It may be added, in concluding this subject, that, in general, Courts of Equity hold, that, unless the defendant claims the benefit of the statute by plea, or by answer, he cannot insist upon it in bar of the plaintiff's demand. However, the Courts will in cases, which will allow of the exercise of discretion, use the statute as a rule to guide that discretion; and will also

¹ *Collins v. Goodall*, 1 Vern. 235; *Cooper Eq. Pl.* 254; *Wynn v. Williams*, 5 Ves. 130; *Stackhouse v. Barnston*, 10 Ves. 466 to 470; *Eldridge v. Kutt*, Cowper R. 214; *Beames Pl. in Eq.* 168.

² 1 Story on Eq. Jurisp. § 55, a. § 529; 2 Story on Eq. Jurisp. § 1520 to 1522, and notes; 1 Fonbl. Eq. B. 1, ch. 4, § 27 and note (q); *Cooper Eq. Pl.* 259; *Aston v. Aston*, 1 Ves. 264; *Stackhouse v. Barnston*, 10 Ves. 466 to 469; *Beames Pl. in Eq.* 168, 169, 170; *Baldwin v. Peach*, 1 Younge and Coll. 453.

³ *Grenfell v. Girdlestone*, 2 Younge & Coll. 662, 679, 681, 682.

sometimes resort to the policy of the ancient law, which in many cases limited the demand of accruing profits to the commencement of the suit.¹

§ 761. (2.) The statute for prevention of frauds and perjuries may also be pleaded in bar of a suit, to which the provisions of the statute apply.² Thus, for example, to a Bill for the specific performance of a contract or agreement respecting lands, the defendant may plead the statute, and by negative averments insist, that there has been no contract or agreement in writing signed by the parties.³ Therefore, where a Bill stated a parol agreement for the sale of lands, and that five guineas were paid in part of the purchase money, and the [*589] defendant *pleaded the statute of frauds in bar, the plea was allowed;⁴ for a part payment of the purchase money is not such a part performance of the contract or agreement, as takes the case out of the statute.⁵ So, to a parol variation of such a contract, the statute may be pleaded, if the variation is essential.⁶

§ 762. There is a distinction suggested on this sub-

¹ Mitf. Eq. Pl. by Jeremy, 273, 274, and the cases cited in note (z) and note (a).

² Mitf. Eq. Pl. by Jeremy, 265; Cooper Eq. Pl. 255; Beames Pl. in Eq. 171; Cottington v. Fletcher, 2 Atk. 156. See this case commented on in Moore v. Edwards, 4 Ves. R. 24; S. C. 6 Ves. 68; Beames Pl. in Eq. 180; Gilb. For. Roman. 61. This statute passed 29 Car. 2, ch. 3, and has been very generally adopted and reenacted in America. 2 Story on Eq. Jurisp. § 752.

³ Cooper Eq. Pl. 255; Mitf. Eq. Pl. by Jeremy, 266; Beames Pl. in Eq. 171, 172; Stevens v. Cooper, 1 John. Ch. R. 425.

⁴ Main v. Matthews, 4 Ves. 720; Cooper Eq. Pl. 235, 236; Beames Pl. in Eq. 471, 472.

⁵ 2 Story on Eq. Jurisp. § 760, and cases there cited.

⁶ Cooper Eq. Pl. 256; Brodie v. St. Paul, 1 Ves. jr. 326; Jordan v. Sawkins, 1 Ves. jr. 402; S. C. 3 Bro. Ch. R. 388; Parkhurst v. Van Cortlandt, 2 John. Ch. R. 275.

ject, important in point of practice. If a bill for the specific performance of a contract respecting the sale of land, states the agreement generally, with no representation, fixing it as in writing, or not, as that general averment may be understood of an agreement in writing, or not, though the plea of the statute has rather the appearance of an answer; yet it has always been admitted in that form. But if the Bill states an agreement in writing, and seeks nothing but an execution of that agreement, a plea, that there is no agreement in writing, has been thought not to be proper; as it is no more than so much of an answer.¹

§ 763. It seems now understood, that this plea extends to the discovery of the parol agreement, as well as to the performance of it; although it has been said, that the defendant is compellable by answer, or by plea, to admit, or to deny the parol agreement, stated in the Bill.² *But this seems utterly nugatory; for it is now [*590] well settled, that if the defendant should by his answer admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission.³ But if he admits the

¹ *Morrison v. Turnour*, 18 Ves. 182. See *Whitchurch v. Bevis*, 2 Bro. Ch. R. 566, 567, and Mr. Belt's note (19); S. C. 2 Dick. 666. But quere, whether this distinction is well founded. Why is not such a negative plea good, if no circumstances are charged in the Bill requiring a discovery? See *Rowe v. Teed*, 15 Ves. 378; *Thring v. Edgar*, 2 Sim. & Stu. 274.

² This subject is thought by Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 266, 267, 268) to be still involved by the authorities in some difficulty. "It has been understood," (says he) "that this plea extended to the discovery of a parol agreement, as well as to the performance of it, except where the agreement had been so far performed, that it might be deemed a fraud on the party seeking the benefit of it, unless it was completely carried into execution; and cases have been determined accordingly.

³ *Ibid.*

parol agreement, without insisting on the statute, the Court will decree a specific performance, upon the ground, that the defendant has thereby renounced the benefit of the statute.¹

This has of late been the subject of much discussion, and some contrariety of decision. In one case the Court appeared to have conceived, that the Courts of Equity, in determining cases arising upon this statute, had laid down two propositions, founded on rules of Equity, and had given a construction to the act accordingly, which amounted to this, that the act was to be construed, as if there had been an express exception to the extent of those rules in favor of Courts of Equity; and that no action was to be sustained, except upon an agreement in writing, signed according to the requisition of the statute; and except upon Bills in Equity, where the party to be charged confessed the agreement by answer; or there was a part performance of the agreement. It was therefore determined, that to the fact of the agreement the defendant must answer. But the Court, afterwards, upon a rehearing, allowed the plea. In subsequent cases this subject was much discussed; and the question was particularly considered, whether, if the defendant admitted by answer the fact of a parol agreement, but insisted on the protection of the statute, a decree could be pronounced for performance of the agreement without any other ground, than the fact of the parol agreement thus confessed. At length it seems to have been decided, that though a parol agreement be confessed by the defendant's answer; yet, if he insists on the protection of the statute, no decree can be made merely on the ground of that confession." He immediately adds, in the succeeding sentence, a suggestion, that there must always be a discovery of the parol agreement by answer; which, however, is contrary to the text, which follows the doctrine of Mr. Cooper, Eq. Pl. 256, and that ultimately held in *Whitchurch v. Bevis*, 2 Bro. Ch. R. 559.

¹ Cooper Eq. Pl. 256, 257; Mitf. Eq. Pl. by Jeremy, 266, 267, 268; Beames Pl. in Eq. 172 to 176; 2 Story on Eq. Jurisp. § 758, and note (1); 1 Fonbl. Eq. B. 1, ch. 3, § 8, and note (d); *Cozine v. Graham*, 2 Paige R. 177; *Ontario Bank v. Root*, 3 Paige R. 478; *Rowe v. Teed*, 15 Ves. 375; *Morrison v. Turnour*, 18 Ves. 182, 183; *Cooth v. Jackson*, 6 Ves. 37, 38; *Bragden v. Bradbear*, 12 Ves. 471. In the case of the *Ontario Bank v. Root*, 3 Paige, 478, it was decided, that where the Bill sets up an agreement, which would be invalid by the statute of frauds, unless it was in writing, and the defendant by his answer denies the agreement, he need not insist upon the statute as a bar; but the plaintiff at the hearing must establish the agreement by written evidence. *S. P. Cozine v. Graham*, 3 Paige R. 177, 181.

§ 764. But if in cases of this sort any matter is charged in the Bill, which may avoid the bar, created by the statute, such as acts of part performance, or fraud, then the plea ceases to be a pure plea; and that matter must be denied by way of averment in the plea, and must also be denied particularly and precisely by way of answer in support of the plea.¹

§ 765. The statute of frauds and perjuries may be pleaded to a Bill for the discovery and execution of a trust, with an averment, that there was no declaration of the trust in writing.² But, here, as in the former case, circumstances of fraud may be alleged in the Bill, which, if true, would avoid the bar.³ If there be any such allegation of fraud, the plea ceases to be a pure plea; and the allegation must be met by an averment in the plea, denying the fraud; and there must also be an answer in support of the plea, responsive to, and denying all the circumstances of fraud so charged.⁴

*§ 766. Whether, in the case of a parol trust [*592] charged by a Bill, the defendant may confess the trust by his answer, and insist upon the statute of frauds as a bar, as he may to a Bill brought for a specific performance of a parol contract respecting lands, is an important question, which has been much discussed, and upon which (it has been said), it may be very difficult to

¹ Cooper Eq. Pl. 256; Mitf. Eq. Pl. by Jeremy, 266, 267; Beames Pl. in Eq. 176 to 182; ² Story on Eq. Jurisp. § 759 to § 767; *Whitchurch v. Bevis*, 2 Bro. Ch. R. 559, and Mr. Belt's note; *Morrison v. Turnour*, 18 Ves. 181, 182.

² Cooper Eq. Pl. 256, 257; Mitf. Eq. Pl. by Jeremy, 265; *Cottington v. Fletcher*, 2 Atk. 156.

³ *Ibid.*

⁴ Mitf. Eq. Pl. by Jeremy, 268; Cooper Eq. Pl. 257, 258; Beames Pl. in Eq. 178, 179, 180.

make a satisfactory distinction.¹ In each case, the confession by answer of the trust, or of the agreement, is susceptible of being considered as a declaration of trust in writing, or as an admission of an agreement in writing, signed by the party. If, notwithstanding the admission in the one case, the bar may be insisted on; it is not easy to say, why the same rule ought not to be applied in the other.² Indeed, it has been doubted, whether the defendant, upon a Bill charging a parol trust, is not always bound to answer, as to the existence of the parol trust; and whether a plea of the statute would be good to such a discovery.³

¹ Mitf. Eq. Pl. by Jeremy, 267, 268.

² Mitf. Eq. Pl. by Jeremy, 267, 268; *Muckleston v. Brown*, 6 Ves. 52, 67, 68, 69.

³ See *Addlington v. Cann*, 3 Atk. 141, 143, 144; S. C. cited *Parker's Rep.* 159, 160; S. C. cited and commented, on *Muckleston v. Brown*, 6 Ves. 67, 68. See *Whitchurch v. Bevis*, 2 Bro. Ch. R. 559; Mitf. Eq. Pl. by Jeremy, 267, 268. Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 267), has used the following language:—"And it may now, apparently, be concluded, that a plea of the statute, cannot, in any case, be a bar to a discovery of the fact of an agreement; and that, as the benefit of the statute may be had, if insisted on, by answer, there can be no use in pleading it in bar of relief. Whether the same rule would be applied to a confession of a trust by an answer, which may be considered as a declaration of the trust in writing, signed by the party, as indeed the confession of a parol agreement by answer might also be deemed, seems to be an important question, not agitated in the cases decided with respect to other agreements, and upon which it may be very difficult to make a satisfactory distinction. In the cases, in which it was formerly considered, that a plea of this statute was the proper defence, it was conceived, that any matter charged by the Bill, which might avoid the bar created by the statute, must be denied generally, by way of averment in the plea, and particularly and precisely by way of answer to support the plea. But according to one case, if any such matter were charged in the Bill, it became impossible to plead the statute in bar; the Court having determined, that denial of the matter so charged made the plea double, and therefore informal. And it may now be doubtful, whether a plea of the statute ought in any case, (except perhaps, in the case of a trust), to extend to any dis-

§ 767. But, whatever may be the doubts, in some cases of trust, it seems clear, that where the Bill sets

covery sought by the Bill; and indeed, whether it ought not to be deemed a needless and vexatious proceeding, if confined to relief." From this passage, it seems to be Lord Redesdale's opinion, (1.) That to a Bill for a specific performance of a parol contract, the defendant must by answer discover, whether there was a parol contract or not; and that his plea of the statute must not cover such a discovery. But this is contrary to the text, Ante § 763, and note (1), and seems inconsistent with the ultimate decision, in *Whitchurch v. Bevis*, (2 Bro. Ch. R. 559); and with the generally received doctrine in England, that a plea in bar, good to the relief, is a good bar to the discovery. Mr. Cooper, too, holds the contrary doctrine. (Cooper Eq. Pl. 256). (2.) Lord Redesdale seems to hold it doubtful, whether a plea of the statute ought in any case (except perhaps in the case of a trust), to extend to the discovery sought by the Bill; or indeed, whether any such plea is good at all. In a preceding page (p. 265), he admits the validity of a plea of the statute to the discovery and execution of a trust; and it is very difficult to perceive any distinction between such a case, and the case of a Bill for the specific performance of an agreement. In the latter case, a plea of the statute has often been recognised as good: as indeed his Lordship admits. (p. 266, and cases cited, note (k), and note (m)). See also *Mussell v. Cooke*, Prec. Ch. 533; *Whitchurch v. Bevis*, 2 Bro. Ch. R. 559; *Hollis v. Whiting*, 1 Vern. 151. That the bar of the statute may be relied on in an answer, by no means establishes, that it may not also be relied on in a plea; and an answer in support of a plea is not necessary, unless some facts are stated in the Bill, as to the trust or agreement, which call upon the defendant for a discovery. If the Bill charges a written agreement, and seeks a discovery thereof, there, the plea may require an answer in support of the plea, denying, that there is any written agreement. Perhaps Lord Eldon's doctrine, in *Morrison v. Turnour* (18 Ves. 182), cited Ante § 763, may be explained upon this ground. Mr. Belt, in his note (19) to *Whitchurch v. Bevis* (2 Bro. Ch. R. 567), seems to have thought, that a plea of the statute to a parol agreement, charged in a Bill, would be good without answering as to the parol agreement; and that a like plea would be good, if the agreement was not stated to be by parol. The truth seems to be, that Lord Redesdale, in his whole text on this subject (p. 265 to p. 269), seems to have been embarrassed by the apparent conflict of the authorities, and to have endeavored, without success, to bring them into harmony. Since he wrote, the subject of negative pleas has been much more fully considered; and the confusion in the authorities is in a great measure dissipated. See *Armitage v. Wadsworth*, 1 Madd. R. 189, 195; *Hitchins v. Lander*, Cooper Eq. Rep. 34.

up a parol trust, the non-performance of which would be a fraud upon the plaintiff; or where the parol trust is a secret trust, alleged to be in fraud of the public policy of the country; a pure plea of the statute will not prevail; for the statute will never be allowed to cover fraud. In such cases, the plea must contain averments denying the fraud, and also be supported by an answer, discovering or denying all the circumstances relied on to establish the fraud.¹ Therefore, where an heir at law filed a Bill against a devisee, for the discovery of secret trusts for charitable uses, and stating a paper in the hand-writing of the testator, as a ground for the allegation; though the defendant pleaded the statute of frauds, yet he was compelled to answer.² And so, in another case, in which co-heirs were plaintiffs, and filed a Bill for the same purpose; and it appeared, that the testator's codicil contained expressions denoting some trusts, and there were written acknowledgments by the defendants, that they were to take upon trusts for charity, the defendants were compelled to answer.³

§ 768. Even in the case of a mere naked allegation by the heir, that the defendant takes upon a secret trust for charitable purposes against the statute of mortmain, if the defendant pleads the statute of frauds, with an [*595] averment, that he never signed any writing declaratory of a trust, it will not be sufficient; because the statute was never permitted to be a cover for a fraud upon the private rights of individuals; and though,

¹ Cooper Eq. Pl. 256, 257.

² Cooper Eq. Pl. 257; *Adlington v. Cann*, 1 Atk. 141, cited also in *Parker's Rep.* 144, and 6 Ves. 67, 9 Ves. 519; *Muckleston v. Brown*, 6 Ves. 52, 65, 68, 69; *Chamberlain v. Agar*, 2 Ves. & B. 259.

³ *Ibid.*

within the intention, it cannot be said, that a trust is created under these circumstances ; yet it is clear, that a trust would be created upon the principle, on which Courts of Equity act as to fraud.¹ Thus, in the ordinary case of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for a mother, or a wife, or other person, the Court will compel the former to discover, whether he did make such a promise.² So, if a father devises to his youngest son, who promises, that, if the estate is devised to him, he will pay a sum of money to the eldest son, the Court will compel the former to discover, whether that passed in parol ; and if he acknowledges it, even praying the benefit of the statute, he will be decreed to stand, as a trustee of the estate, for the amount of the sums of money charged upon it.³

§ 769. (3.) The plea of some other public or private statute. In the same manner any other statute, which creates a good bar to the demand of the plaintiff, asserted in his Bill, may be pleaded with the averments necessary to bring the case of the defendant within the statute, and to avoid any Equity, which may be set up against the bar created by the statute.⁴ In the latter case, there must also be an answer, discovering and denying the matters of Equity, so set up to avoid a bar.⁵

*Among these statutable bars may be enumerated the statute respecting the buying of pretended titles ;

¹ Cooper Eq. Pl. 257, 258 ; Strickland v. Aldridge, 9 Ves. 516, 519 ; Chamberlain v. Agar, 2 Ves. & B. 259, 262.

² Ibid.

³ Ibid.

⁴ Cooper Eq. Pl. 258 ; Mitf. Eq. Pl. by Jeremy, 274 ; 1 Story on Eq. Jurisp. § 99, § 256 ; 2 Story on Eq. Jurisp. § 768.

⁵ Beam. Pl. Eq. 182, 183.

the statute of maintenance ; the statute of usury ; and, in England, the ship registry acts.¹

§ 770. A private or particular statute may also be pleaded in the same manner. Thus, to a Bill impeaching a sale of lands in the fens by the conservators under the statutes for draining the fens, the defendant pleaded the statutes, and that the sale was made according to, and by virtue of those statutes ; and the plea was allowed.²

§ 771. (4.) A plea is sometimes both a statute and a record ; as, for instance, a fine with proclamations in England, according to the statute of 4 Henry VII., ch. 24, and a five years' nonclaim.³ This bar is not, or at least has not been, usually applied in America. But still it may be proper to state a few matters in regard to the nature and operation of the plea, as it serves to illustrate some other points of general jurisprudence, and of pleading.

§ 772. A plea of a fine and nonclaim, is properly a legal bar ; but it is equally good in Equity, provided it is pleaded with proper averments.⁴ Where a defective title, merely legal, is purchased by a party, although the defect is apparent upon the face of his deeds, yet the fine may be set up by him, as a bar in Equity ; and he [*597] *will not be affected by notice of such defect, so as to make him a trustee for the person, who had the

¹ Beames Pl. in Eq. 182 ; Hitchins v. Lander, Cooper Eq. R. 34 ; Wall v. Stubbs, 2 Ves. & Beam. 359. In Hitchins v. Lander, Cooper Eq. Rep. 35, the form of a plea of buying a pretended title contrary to statute of 32 Henry VIII., ch. 9, § 2, is given at large ; which was allowed by Lord Eldon. S. P. Beames Pl. in Eq. Appendix 333 to 337.

² Beames Pl. in Eq. 183 ; Cooper Eq. Pl. 259, 260 ; Mitf. Eq. Pl. by Jeremy, 274 ; Brown v. Hammond, 2 Ch. Cas. 249.

³ Cooper Eq. Pl. 260 ; Mitf. Eq. Pl. by Jeremy, 250, 251, 252 ; Gilb. For. Rom. 61 ; Galt v. Osbaldiston, 1 Russ. R. 158 ; S. C. 5 Madd. R. 428. See Leigh v. Leigh, 1 Sim. R. 349, 371, 372, 373 ; Story v. Ld. Windsor, 2 Atk. 630, 631.

⁴ Ibid.

right ; for a defect upon the face of title deeds is often the occasion of a fine being levied ; and if a person has lost his right by a legal bar, he can have no remedy in Equity, whatever may be the circumstances.¹

§ 773. In regard to equitable titles also a fine and nonclaim will in many cases be a good bar, as it is in regard to legal titles. And it may be generally stated, that, wherever a person comes in by a title, in opposition to the title of a trust estate, or comes in under the title to the trust estate for a valuable consideration, without fraud, or notice of fraud, or of the trust, a fine and nonclaim may be set up as a bar to the claim of a trust.² For many purposes, indeed, a fine, though under the statute, is treated only as a species of conveyance.³

§ 774. On the other hand, there are cases, in which Courts of Equity will control the effects of a fine and nonclaim. Some of these cases are founded upon an analogy to the law ; and others again are founded upon their own peculiar jurisprudence. In the first place, there are cases, where a fine will not avail either at law or in Equity. (1.) As where the person, setting up the fine, has been guilty of covin or fraud, he will be treated as a trustee for the person equitably entitled. (2.) A mortgagor cannot bar a mortgagee by a fine and nonclaim. (3.) A fine by a lessee, or tenant at will, will not bar his lessor's right ; or a rent issuing out of the land. *(4.) A fine will not bar, or extinguish a [*598] simply collateral or naked power.⁴

¹ Mitf. Eq. Pl. by Jeremy, 261 ; Cooper Eq. Pl. 260 ; Beames Pl. in Eq. 183, 184, 185, 186.

² Mitf. Eq. Pl. by Jeremy, 252, 253 ; Beames Pl. in Eq. 191 ; Cooper Eq. Pl. 263.

³ 2 Black. Comm. 348, 349.

⁴ Beames Pl. in Eq. 186, 187, 188 ; Cooper Eq. Pl. 260, 261, 262 ; Mitf. Eq. Pl. by Jeremy, 250 to 252.

§ 775. In the next place, there are cases, in which a fine and nonclaim do not constitute a bar in Courts of Equity upon their own peculiar principles. (1.) Thus, although, where the Equity charges the land only, a fine is a good bar; yet, if it charges the person only, in respect of the land, it is then no bar; as in case of a purchaser from a trustee, knowing the trust.¹ (2.) Where the person, claiming the benefit of the fine, derives title under a trustee, but really has not the character of a purchaser for a valuable consideration, the fine is no bar; for, in such a case, he is also treated as a mere trustee.² (3.) If a person, who claims under a conveyance obtained by fraud, levies a fine, that is no bar to the owner; for he is a mere trustee of the latter in consequence of the fraud.³ (4.) If a person, coming in under a fraudulent conveyance, sells to another by a fine, with notice of the fraud, or without consideration, the fine is no bar.⁴ (5.) If the Equity or trust is created by the fine, the fine will be no bar; because it is not an opposite title.⁵ (6.) Where there is a suppression of the title-deeds by a tenant for life in possession of them, or by a trustee, a fine will be no bar to a Bill against him by [*599] the rightful owner.⁶ (7.) A fine by a person in possession, the legal estate being in a trustee, will

¹ Beames Pl. in Eq. 189; Cooper Eq. Pl. 261; Mitf. Eq. Pl. by Jeremy, 251; Salisbury v. Baggot, 1 Ch. Cas. 278.

² Beames Pl. in Eq. 189; Gilb. For. Roman. 62; Cooper Eq. Pl. 261; Mitf. Eq. Pl. by Jeremy, 251.

³ Beames Pl. in Eq. 190; Gilb. For. Rom. 62.

⁴ Beames Pl. in Eq. 190, 191; Gilb. For. Rom. 62; Kennedy v. Daly, 1 Sch. & Lefr. 380, 381.

⁵ Beames Pl. in Eq. 191; Gilb. For. Rom. 63.

⁶ Beames Pl. in Eq. 192; Bowles v. Stewart, 1 Sch. & Lefr. 225.

not bar an equitable charge under the deed of trust.¹ (8.) The pendency of a suit in Equity will sometimes, in a Court of Equity, prevent the running of a fine and nonclaim, where the matter is of an equitable nature.²

§ 776. In the next place, Courts of Equity will, in some cases, limit the operation of a fine, and allow it as a bar to a certain extent only. (1.) Where it appears to have been the intention of a husband and wife, in levying a fine, not to bar her jointure, a Court of Equity will not allow it to operate as such a bar.³ (2.) Where a fine is levied pursuant to a decree, for a particular purpose, it will not be permitted to operate farther than the decree directs.⁴ (3.) If a fine be levied of lands, comprised in marriage articles, to different uses from those intended by the articles, a reconveyance will be compelled, according to the uses intended by the articles.⁵

§ 777. In a plea in Equity of a fine and nonclaim, or of any other strictly legal bar, the same strictness is required as at law. In the case, therefore, of the plea of a fine, a direct positive averment of seisin is necessary. And, therefore, if the allegation of seisin is only argumentative ; as if it be, that the party being, or pretending *to be seised, or being in possession and [*600] receipt of the rents, and being thereby seised, conveyed the plea, will be overruled ; it being necessary to aver

¹ Beames Pl. in Eq. 192 ; Pomfret v. Winsor, 2 Ves. 472 ; S. C. cited 10 Ves. 469.

² Beames Pl. in Eq. 192, 193, 194 ; Cooper Eq. Pl. 263 ; Mitf. Eq. Pl. by Jeremy, 252.

³ Beames Pl. in Eq. 193 ; Cooper Eq. Pl. 260.

⁴ Beames Pl. in Eq. 193 ; Goodrich v. Brown, 2 Freem. 180 ; S. C. 1 Ch. Cas. 49 ; Cooper Eq. Pl. 262.

⁵ Beames Pl. in Eq. 193 ; Trevor v. Trevor, 1 P. Will. 622 ; Cooper Eq. Pl. 263.

an actual seisin. It is not, indeed, requisite to aver a seisin in fee; an averment, that the party was seised, *ut de libero tenemento*, and being so seized a fine was levied, will be sufficient.¹ A plea of a fine of lands in the county of Derby and elsewhere, with an averment, that it was of all the lands mentioned in the Bill, has been held sufficient, though without an averment, that the party had no lands but in Derbyshire.² And though advowsons were mentioned in the same plea, and it was objected, that a seisin by presentation not being alleged, the fine could not operate as a bar; yet the Court held a general averment of seisin to be sufficient, and that they would not intend, that there were advowsons merely because they were mentioned in the fine.³ A plea of a conveyance, fine, and nonclaim, is not multifarious; but is a good plea, the whole being a plea of one title only.⁴

§ 778. Secondly; Pleas of matter of record, or as of record, in some court. At the common law, courts are divided into Courts of record, and Courts not of record. The distinction is, for the most part, purely technical. The Superior Courts of common law are deemed Courts of record. The Court of Chancery in its Equity jurisdiction, the Court of Admiralty, and the Ecclesiastical Courts, are deemed Courts not of record.⁵

¹ Cooper Eq. Pl. 263, 264; Mitf. Eq. Pl. by Jeremy, 253; Beames Pl. in Eq. 185, 186.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Bacon Abridg. title Courts, D. 2 in margin. Every Court, having a power to fine and imprison, is deemed a Court of record at the Common Law. Bacon Abridg. title Courts, D. 2; 3 Black. Com. 24. Mr. Justice Blackstone (ibid.) has given other distinctions, and has stated, that all Courts of record are the King's courts; and that a court not of record is the court of a private man, whom the law will not entrust with any discretionary power over the fortune or liberty of his fellow subjects. This distinction is wholly inapplicable to the Court of Chancery, and to the Court of Admiralty, and generally to the Ecclesiastical Courts. They are

The proceedings of the former Courts are treated as matters of record; those of the latter Courts are treated, not strictly as matters of record, but as matters as of record; that is, they are deemed to be of the same validity, as if they were records.

§ 779. Let us then, in the first place, consider pleas of matters of record, technically so called. (1.) A common recovery. A defendant in Equity may plead a common recovery, duly suffered, with a deed to lead the uses, in bar to a Bill, asserting a claim under an entail, if the estate, limited to the plaintiff, or under which he claims, is thereby destroyed.¹ This doctrine is not confined to a legal entail, but will equally apply to an equitable entail.² Therefore, a common recovery suffered by a *cestui que trust* in tail, who is in possession under the trustee, will be sufficient to bar all remainders and reversions depending on such estate tail, although there be no legal tenant to the precipe, but only an equitable tenant to the precipe.³ In such a case, however, the trust estate must be conveyed to a third person, who thus becomes an equitable tenant in tail to the precipe, against whom the suit must be brought in the same manner, as in recoveries of legal estates.⁴ But recoveries of this kind operate *only on the trust estate, [*602] whereof they are suffered, and the equitable remainders or reversions expectant thereon; and they do not affect

all Courts of the King; yet they are not Courts of record. In America, Courts of Equity are generally, perhaps not universally, deemed as much Courts of record, as Courts of common law. The Courts of the United States are all Courts of record.

¹ Beames Pl. in Eq. 195; Cooper Eq. Pl. 264; Mitf. Eq. Pl. by Jeremy, 253; Attorney General v. Sutton, 1 P. Will. 754.

² Ibid.

³ Ibid.

⁴ Cooper Eq. Pl. 264, 265; Beames Pl. in Eq. 195, 196; Goodrich v. Brown, 1 Ch. Cas. 49; S. C. 2 Freem. 180; North v. Way, 1 Vern. R. 13, and Mr Raithby's note (1), p. 14.

any legal estate. So that the legal estate cannot be barred by an equitable recovery.¹

§ 780. (2.) The plea of a judgment at law in a Court of record. If the judgment of a court of ordinary jurisdiction has finally decided the rights of the parties, that judgment may in general be pleaded in bar of a Bill in Equity. Thus, where a Bill was brought by a person, claiming to be son and heir of Jocelin, Earl of Leicester, and alleged, that the earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee, and that the plaintiff had brought a writ of right to recover the lands; but that the defendant had possession of the title-deeds, and intended to set up the legal estate, which was vested in the trustee; and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee; the defendant pleaded, as to the discovery of the deeds and relief, a judgment in her favor in a writ of right; and averred, that the title in the trustee, which the Bill sought to have removed, had not been given in evidence; and the plea was allowed.²

¹ Cooper Eq. Pl. 265; Phillips v. Brydges, 3 Vea. 120, 125, 126. This plea is founded upon the analogy of the law; and would, therefore, probably be governed by the rules, applied to the same plea in a Court of law, some of which are stated in Beames Pl. in Eq. 196, 197.

² Mitf. Eq. Pl. by Jeremy, 253, 254; Cooper Eq. Pl. 266; Beames Pl. in Eq. 197, 198. Lord Redesdale had added the following comments on this case. "In this case the Bill was brought before the trial in the writ of right, and the plaintiff had proceeded to trial, without the discovery and relief, sought by his Bill, for the purposes of the trial. The plea was subsequent to the judgment. It may be doubted, therefore, whether the averment, that the title in the trustee had not been given in evidence on the trial of the writ of right, was necessary; as the judgment was a bar, as a release subsequent to the filing of the Bill would have been. And if the plaintiff could have avoided the effect of the judgment, because the title

§ 780. *a.* So, where a verdict and judgment were obtained in the Lord Mayor's Court in London in a foreign attachment, by the defendant against the plaintiff in the Bill, on the same subject-matter, on which the Bill sought relief, a plea, stating the fact, was held good, as the Lord Mayor's Court was a court of competent jurisdiction to decide the matters in dispute between the parties; and if the matters so in dispute were not finally decided by the judgment, they were there in the proper course for a final decision.¹ But, then, to support such a plea, it must be averred in the plea, that the same issue was joined as in the former suit as in the Bill, that the subject-matter of the suit was the same, and that the proceedings in the Lord Mayor's Court were for the same object and purpose.²

*§ 781. The plea will be equally good, not only [*603] to a Bill founded upon the same original cause of action; but also to a Bill to set aside a verdict and judgment, as obtained against conscience, unless it contains some allegations of fact, impeaching the verdict and judgment, which would avoid it, and require an answer.³

in the trustee had been given in evidence, it should seem, that that fact, together with the fact of the judgment, ought to have been brought before the Court by another Bill, in the nature of a Bill for a new trial, either as a supplemental Bill, or as an original Bill, the former Bill being dismissed." Mitf. Eq. Pl. by Jeremy, 254, 255.

¹ Behrens v. Pauli, 1 Keen R. 456.

² Behrens v. Sieveking, 2 Mylne & Craig R. 602.

³ Mitf. Eq. Pl. by Jeremy, 255; Cooper Eq. Pl. 266, 267; Beames Pl. in Eq. 198, 199; Williams v. Lee, 3 Atk. 223; Mitchell v. Harris, 2 Ves. jr. 135. The plea in Williams v. Lee (3 Atk. 223) is given at large in the appendix to Mr. Beames Pl. in Eq. 337 to 339. As it is rare, it is here inserted. "The plea of Richard Lee, and Mary his wife, to part, and their answer to the residue of the Bill of complaint of Henry Williams, complainant: These defendants, by protestation, not confessing or acknowledging all or any the matters and things in the complainant's said Bill of complaint to be true, in manner and form as the same are

Indeed, without such allegations, the objection would seem more proper to be taken by demurrer than by plea.¹

§ 782. And it is not sufficient to show, that injustice

therein set forth and alleged, as to so much of the said Bill, as seeks to controvert the value of the several goods and things in the Bill mentioned to be bequeathed to the said defendant, Mary Lee, by Urania Goodwin, deceased, in the Bill named, in respect of which this defendant, Richard Lee, hath recovered a verdict against the said complainant, and which seeks to controvert the right and title of these defendants, or either of them, to the same goods; and also as to so much of the said Bill, as seeks to impeach the said verdict, which this defendant, Richard Lee, hath obtained against the complainant, in respect of the same goods and effects, these defendants plead in bar; and for plea say, that before the intermarriage of these defendants, this defendant, Mary Lee (then Mary Polden, spinster), was possessed of, and legally and well entitled to, the said several goods and effects, by virtue of the last will and testament of the said Urania Goodwin; and that the complainant afterwards got the same into his custody and power. And these defendants, having afterwards intermarried, and the said complainant refusing to redeliver the said goods and effects to this defendant, Richard Lee, upon a demand by him made thereof, he, this defendant in Trinity vacation last, brought his action at law against the said complainant, in order to obtain satisfaction for the same goods and effects; and in Michaelmas term last declared against the said complainant in an action of trover and conversion of the same goods and effects, and laid his damages therein at three hundred pounds; to which declaration the said complainant pleaded not guilty. And this defendant having replied to, and taken issue upon the said plea, the said issue came on to be tried at the sittings after last Michaelmas term, at Westminster Hall, for the county of Middlesex, before the Right Honorable Sir William Lee, Knight, Lord Chief Justice of the same Court, when and where, upon a full defence made by counsel on behalf of the now complainant, and after evidence given, as well on the behalf of the now defendant, Richard Lee, as of the said complainant, the jury impanelled and sworn to try the said issue, brought in a verdict in favor of this defendant, Richard Lee, for £200 damages, besides costs of suit; which said verdict is still in full force, and has not been impeached or set aside by the said Court, where the said action was tried; nor hath the said complainant (to the knowledge or belief of these defendants) so much as complained to the said Court of the said verdict, or attempted to obtain a

¹ Mitf. Eq. Pl. by Jeremy, 255.

has been done ; but it must be shown, that it has been done under circumstances, which authorize the Court to interfere ; because, if a matter has been already investigated in a court of justice of competent jurisdiction, according to the common and ordinary rules of investigation, a Court of Equity cannot, and ought not to take upon itself to enter anew into the merits of the case.¹ It is bound to presume, that all things have been rightfully done ; and, *Expedit reipublicæ, ut sit finis litium*.

§ 783. In the next place, as to pleas of matter as of record. (1.) The sentence or judgment of a foreign court (which is deemed to be a court not of record,) upon the same matter put in controversy by the Bill, may be pleaded in bar. And it will be a good bar, if the Court, pronouncing the sentence or judgment, had

new trial in the said action, by reason that the said jury had found excessive damages, or the said verdict was given against evidence, or to the dissatisfaction of the judge, before whom the said action was tried. And this defendant, Richard Lee, avers, that the aforesaid demands of this defendant, which are controverted by the said complainant's now Bill of complaint, and the demands of this defendant, which were so as aforesaid ascertained and established by the said verdict, are the same, and not otherwise, or different. All which matters and things these defendants are ready to verify, maintain, and prove, as this honorable Court shall direct, and do plead the same in bar of so much and such parts of the said Bill, as are herein before mentioned to be pleaded unto ; and humbly pray the judgment of this honorable Court thereupon, and whether they are liable, or shall be compelled to make any farther or other answer to so much of the said Bill, as they have herein before pleaded unto. And these defendants insisting upon their said plea, and in nowise waiving or departing from the same, or the benefit thereof, but saving to themselves the benefit of the said plea ; and also saving and reserving to themselves all and all manner of advantage and benefit of exception to the many insufficiencies, errors, and imperfections of the complainant's said Bill of complaint, for answer thereunto, or to so much thereof as they are advised concerns them to make answer unto, they, these defendants, answer and say," &c.

¹ Beames Pl. in Eq. 199, 204 ; Bateman v. Willoe, 1 Sch. & Lefr. 204. Ante § 780 a. and cases there cited.

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jurisdiction, with the like exception of such circumstances, as would invalidate a domestic judgment.¹

§ 784. The general rule being stated, we are next to consider some of the exceptions to it. If there is any charge of fraud, or if other circumstances are shown by the Bill, as a ground for relief, the sentence or judgment cannot be pleaded, by a pure plea, in bar of the Bill. But the plea must, besides setting up the sentence or judgment, proceed by suitable averments to deny the fraud, or other circumstances, upon which the sentence or judgment is sought to be impeached; and thus put them in issue by the plea. And it must also be supported by a full answer to the special charges in the Bill.²

[*606] *§ 785. Upon this ground, a case was determined upon a Bill brought by the insurers of part of the property taken on board certain Spanish ships at Omoa. The Bill charged, that the navy, on whose behalf, as captors, the defendants had insured, were not the real captors, or not the only captors; that the Spanish ships struck to the land forces; and, that although the Court of Admiralty had condemned the ships taken as prizes to the navy, yet that condemnation had been obtained in consequence of the king's procurator-general having withdrawn a claim, made on behalf of the crown, at the instance of the land forces, and of an agreement between the sea and land forces to make a division of the treasure; and that the sentence was, therefore, as against

¹ Mitf. Eq. Pl. by Jeremy, 255, 256; Cooper Eq. Pl. 266, 267; Beames Pl. in Eq. 200, 201; Story on Conflict of Laws, § 584 to § 618; Bowles v. Orr, 1 Younge & Coll. 464.

² Mitf. Eq. Pl. by Jeremy, 256; Cooper Eq. Pl. 267; Beames Pl. in Eq. 203, 204; Bowles v. Orr, 1 Younge & Coll. 464.

the plaintiffs, the insurers, not conclusive. The defendants pleaded the sentence of the Admiralty, both to discovery of the facts stated in the Bill, and to the relief prayed. The plea was, in many respects, informal. But the Court was of opinion, that the sentence, thus impeached, could not be pleaded in bar to the discovery sought by the Bill; and that, as a bar to relief, it ought to have been supported by averments, negating the grounds, on which it was impeached by the Bill.¹

§ 786. Where a Court not only possesses jurisdiction over a particular cause, but that jurisdiction is of a peculiar and exclusive nature, its sentence or decree, *ex directo*, in a matter properly cognizable there, is conclusive, whenever the same matter shall come in question collaterally in any other Court, whether it be a Court of Law, or a Court of Equity.² On this ground, the probate *of a will in the proper Probate or Ecclesiastical [607*] Court, (such Court being invested with a competent and exclusive jurisdiction of the subject), will be a good bar, and may be so pleaded, to a Bill of persons, claiming as next of kin to a deceased person, who is alleged in the Bill to have died intestate; for the probate of the will is in the nature of a sentence, and is conclusive as to the title of the executor.³

§ 787. Upon a similar ground, a foreign probate of the will of a testator, who was domiciled, and died in the country, where the will was admitted to probate, and where his personal estate was situate, will be equally

¹ Mitf. Eq. Pl. by Jeremy, 256; Cooper Eq. Pl. 267; Beames Pl. in Eq. 203, 204.

² Beames Pl. in Eq. 201; Griffith v. Hamilton, 12 Ves. 307; Meadows v. Duchess of Kingston, Ambler R. 756.

³ Mitf. Eq. Pl. by Jeremy, 257; Beames Pl. in Eq. 201, 202; Cooper Eq. Pl. 268.

conclusive in favor of the title of the executor, in a Bill brought by an administrator of the deceased, appointed in the country, where the suit is brought.¹ But such foreign probate will not be conclusive, where there are personal assets in the country, where the Bill is brought; for in such a case, the will must also be proved there, in order to reach those assets.²

§ 788. Even if fraud in obtaining a will of personal estate be charged in a Bill, that will not be a sufficient ground to impeach the probate, or the validity of it in a Court of Equity.³ For, if the fraud be in the probate of the will in the Ecclesiastical Court, or other proper Court of Probate, that Court alone is competent to take [*608] cognizance of it, and to recall the probate.⁴ If the fraud be in obtaining a will of land, that fraud is properly cognizable in a Court of Common Law.⁵

§ 789. But if the fraud practised has not gone to the whole will, but only to some particular clause; or if it has been a fraud practised to obtain the consent of the next of kin to the probate, the Courts of Equity will lay hold of these circumstances to declare the executor to be a trustee for the next of kin.⁶ Where there are no such circumstances, the probate of the will is a clear bar to a demand of personal estate.⁷ The same princi-

¹ *Jauncey v. Sealey*, 1 Vern. 397; Beames Pl. in Eq. 202; Mitf. Eq. Pl. by Jeremy, 258; Cooper Eq. Pl. 268.

² Cooper Eq. Pl. 268; *Tourton v. Flower*, 3 P. Will. 369, 370; 11 Vin. Abridg. 58, 59; Beames Pl. in Eq. 202.

³ Mitf. Eq. Pl. by Jeremy, 257; Cooper Eq. Pl. 268; Beames Pl. in Eq. 202.

⁴ Cooper Eq. Pl. 268; Mitf. Eq. Pl. by Jeremy, 257; Beames Pl. in Eq. 202; 1 Story on Eq. Jurisp. § 184, § 440.

⁵ Cooper Eq. Pl. 268, 269; 1 Story on Eq. Jurisp. § 184, § 440.

⁶ Mitf. Eq. Pl. by Jeremy, 257, 258; Cooper Eq. Pl. 268; Beames Pl. in Eq. 202, 203. See *Barnsley v. Powell*, 1 Ves. 284.

⁷ *Ibid.*

ple will apply to cases of fraud committed in relation to real estate, where the fraud does not vitiate the will generally ; but only affects a particular clause, or a particular party.¹

§ 790. (2.) In the next place, as to a decree in a Court of Equity. A decree of a Court of Equity is, for most purposes, if not for all, of as high a dignity and character, as a judgment in a Court of Law. It may be a decree in the same Court, or in another Court of Equity.² In order to entitle a decree to be pleaded to a new Bill for the same matter, it must be a decree signed and enrolled, for the same subject-matter, and substantially between the same parties.³ Unless the decree is signed

¹ 1 Story on Eq. Jurisp. § 439, 440.

² Beames Pl. in Eq. 205. See Mr. Cox's note to the case of *Robinson v. Tonge*, 3 P. Will. 401, note (F.); *Morrice v. Bank of England*, Cas. Temp. Talbot, 217; S. C. 4 Bro. Parl. Cases, 287; Mitf. Eq. Pl. by Jeremy, 237 to 239; Id. 245.

³ Mitf. Eq. Pl. by Jeremy, 237; *Rutland v. Brett*, Rep. Temp. Finch, 124; *Mallock v. Galton*, 1 Dick. R. 65; Beames Pl. in Eq. 205, 206; Cooper Eq. Pl. 269; Gilb. For. Roman. 55; *Neafie v. Neafie*, 7 John. Ch. R. 1; *Reeve v. Dalby*, 2 Sim. & Stu. 464; *Pickford v. Hunter*, 5 Sim. R. 122; *Hayward v. Constable*, 2 Younge & Coll. 43. This plea bears a close analogy to the plea of *exceptio rei judicatæ* in the Civil Law; and it will be at once perceived, that the rule of both laws on this subject, are substantially the same, being founded in the same principles of general justice. The following citation from Mr. Beames's Pleas in Equity, p. 207, will present the analogy in clear terms. "We have already observed, that the *exceptio rei judicatæ* was a good plea in bar. But the effect is thus expressly qualified by the Digest: *Res inter alios judicata aliis non obest, &c.; cum res inter alios judicata nullum aliis prejudicium faciant*. Voet collects the effect of many passages, scattered in different parts of the *Corpus juris civilis*, in the following extract, speaking with express allusion to the *exceptio litis finitæ*: *Non aliter tamen huic exceptioni locus est, quam si lis terminata denuo moveatur inter easdem personas, de eadem re, et ex eadem petendi causâ: Sic ut, uno ex his tribus deficiente, cesset*. At the same time, we meet with the following passage in the Digest: *Generaliter exceptio rei judicatæ obstat, quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii*." See also Pothier Pand.

and enrolled, it cannot be pleaded in bar of another suit, though it may be insisted on, by way of answer, as a good defence.¹ This doctrine seems to be founded upon purely technical principles; and it is not very easy to say, why, on principle, a decree, which has determined the rights of the parties upon the same matter, should not be equally a bar, whether enrolled or not.² But, though a decree not enrolled, cannot be pleaded directly in bar of a new suit for want of an enrollment, it may perhaps be pleaded to show, that the new Bill is exhibited contrary to the usual course of the Court, and that it ought not, therefore, to be proceeded upon;³ for, [*610] *if the decree appeared upon the face of the Bill, the defendant might demur.⁴ As a decree, not signed and enrolled, can only be altered upon a rehearing, so a decree signed and enrolled can be altered only upon a Bill of review.⁵

§ 791. In order, however, to be a bar to the new suit, the decree must not only be substantially between the same parties, and for the same subject-matter; but it must also be in its nature final, or afterwards be made so by order of the Court; for otherwise it will not be a bar.⁶ Therefore, a decree for an account of principal

Lib. 44, tit. 1 *Exceptio rei judicatae*, where the principal texts of the Civil Law are collected.

¹ Mitf. Eq. Pl. by Jeremy, 239; Anon. 3 Atk. 809; *S. C. Kinsey v. Kinsey*, 2 Ves. 577; Cooper Eq. Pl. 269; Beames Pl. in Eq. 207, 208.

² Lord Hardwicke, in his judgment in this case, gives no reason for the decision, except that it is against the strict rule of the Court; and the defendant may stay the enrollment by a caveat for forty days, and by petition pray for a rehearing. Anon. 3 Atk. 809.

³ Mitf. Eq. Pl. by Jeremy, 239.

⁴ Ibid.

⁵ Mitf. Eq. Pl. by Jeremy, 239; *Moore v. Moore*, 1 Dick. 66; Beames Pl. in Eq. 207, note (4); Cooper Eq. Pl. 270.

⁶ Mitf. Eq. Pl. by Jeremy, 237.

and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a Bill to redeem, unless there is a final order of foreclosure.¹ Nor can a decree, which has been made upon default of the defendant in not appearing at the hearing, be pleaded without an order, making the decree absolute; the terms of such a decree always being, that it shall be binding on the defendant, unless, on being served with a writ of subpœna for the purpose, he shall show cause to the contrary.² Upon a plea of this nature so much of the former Bill and answer must be set forth, as is necessary to show, that the same point was then in issue.³

§ 792. A decree made against an infant may be pleaded in bar to a new Bill brought by him, after he comes of age; for an infant is as much bound by a decree, as a person of full age. A decree against a tenant in tail will bind the issue in tail, and even a remainder-man, *unless, perhaps, under special [*611] circumstances. And it has been repeatedly determined, that if there be a tenant for life, remainder to his first son in tail, remainder over, and he is brought before the Court, before he has issue, the contingent remainders may be barred in the suit.⁴

§ 793. A decree or order, dismissing a former Bill for the same matter, may be pleaded in bar to a new Bill, if the dismissal was upon the hearing, and was not in terms directed to be without prejudice.⁵ But an order of dismissal is a bar only, where the Court has determined, that the plaintiff had no title to the relief

¹ Mitf. Eq. Pl. by Jeremy, 237, 238, 245; Cooper Eq. Pl. 271; Beames Pl. in Eq. 208, 209, 210.

² Ibid.

³ Ibid.

⁴ Cooper Eq. Pl. 270; Beames Pl. in Eq. 209, 210; Ante § 145, § 146.

⁵ Mitf. Eq. Pl. by Jeremy, 239, 240.

sought by his Bill; and, therefore, an order, dismissing a Bill for want of prosecution, is not a bar to another Bill.¹ And a decree cannot be pleaded in bar of a new Bill, unless it is conclusive upon the rights of the plaintiffs in that Bill, or of those, under whom they claim.² Therefore, a decree against a mortgagor and an order of foreclosure enrolled, has been held not to be a bar to a Bill by intervening incumbrancers to redeem, although the mortgagee had no notice of those incumbrances.³ And the mortgagee having, in that case, been long in possession, though under the circumstances the account taken in the former cause was not deemed conclusive against the plaintiffs in the new Bill; yet the Court, on overruling the plea, and ordering the defendant to answer, limited the order, by directing, that the defendant should answer to charges of errors or omissions; and that the plaintiffs should not unravel the account at large before the hearing.⁴

[*612] *§ 794. It remains to be observed upon this subject, that, if a Bill charges fraud in obtaining a decree, and seeks to impeach it upon that ground, the plea of the decree, signed and enrolled, must contain in it averments, negating the charges of fraud, and must also be supported by a full answer, denying them.⁵ Thus, where a decree, establishing a modus, was pleaded in bar to a Bill for tithes, in which Bill the plaintiff stated, that the defendants set up the decree as a bar to his claim; and to avoid the effect of the decree, he charged, that it had been obtained by collusion, and stated facts, tending to show collusion, the Court was of

¹ Mitf. Eq. Pl. by Jeremy, 238, 239; Beames Pl. in Eq. 210, 211, 212; Cooper Eq. Pl. 270, 271; Jones v. Nixon, 1 Younge R. 359; Peering v. Dunn, 4 John. Ch. R. 140; Neafie v. Neafie, 7 John. Ch. R. 1.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Mitf. Eq. Pl. by Jeremy, 239, 240.

opinion, that the defendants, not having by averments in the plea denied the collusion, although they had done so by the answer in support of the plea, the plea was bad in form ; and it was overruled accordingly.¹

§ 795. Thirdly ; Pleas of matters purely *in pais*. Pleas of this sort go sometimes both to the discovery sought, and to the relief prayed by the Bill, or to some part of it ; sometimes only to the discovery, or a part of the discovery ; and sometimes only to the relief, or a part of the relief.² Pleas of this nature principally are, (1.) A plea of a release ; (2.) A plea of a stated account ; (3.) A plea of a settled account ; (4.) A plea of an award ; (5.) A plea of a purchase for a valuable consideration ; and, (6.) A plea of title in the defendant.³

§ 796. (1.) A plea of a release. A plea of a release may be pleaded in bar, if the plaintiff, or any person, under whom he claims, has released the subject of his *demand. And, if fraud, surprise, inadequacy of [*613] consideration, or any other objection to the release, is charged by the Bill, the plea must meet these charges by averments in the body of it ; and it must also be supported by an answer denying them.⁴ Thus, where the daughter of a freeman of London accepted a legacy of £10,000, left her by her father, who recommended it to her to release her right to her orphanage part, which she accordingly did to her brother ; and she afterwards married, and, with her husband, brought a Bill to set aside the release, charging, that the personal estate, of which the father died possessed, was much above £100,000, the daughter's share of which, by the custom, would

¹ Cooper Eq. Pl. 271, 272 ; Mitf. Eq. Pl. by Jeremy, 239, 243 ; Ante § 671, and note (2), § 676, and note (2) ; Beames Pl. in Eq. 214, 215.

² Mitf. Eq. Pl. by Jeremy, 258.

³ Ibid.

⁴ Cooper Eq. Pl. 271, 272 ; Mitf. Eq. Pl. by Jeremy, 261, 262 ; Beames Pl. in Eq. 218 to 222.

amount to upwards of £40,000; the defendant pleaded the release. But the Court held, that though there was no fraud in the case; yet that the sister should not suffer by ignorance of her rights, and of the amount of the fortune to which she was entitled; and, therefore, the Court ordered the defendant to answer as to the computation of the value of the father's personal estate at his death.¹ If a release is pleaded to a Bill for any matter, it must be under seal. But, if the Bill is for an account, and the release is not under seal, it may be pleaded as an account stated.²

§ 797. In a plea of a release, the defendant must set out the consideration, upon which the release was made. A plea of a release, therefore, cannot extend to a discovery of the consideration; and, if that is impeached by the Bill, the plea must be assisted by averments, and [*614] *also by an answer, covering the grounds, on which the consideration is so impeached.³ Thus, to a Bill, stating various transactions between the defendant and the testator of the plaintiff, and imputing to those transactions fraud and unfair dealing on the part of the defendant, and impeaching accounts of the transactions, delivered by the defendant to the testator, on the ground of errors, omissions, unfair and false charges; and also impeaching a purchase of an estate, conveyed by the testator to the defendant, in consideration of part of the defendant's alleged demands; and praying a general account; and that the purchase of the estate might be set aside

¹ Cooper Eq. Pl. 276, 277; Mitf. Eq. Pl. by Jeremy, 261, 262; Beames Pl. in Eq. 218 to 222; Pusey v. Deshouvrie, 3 P. Will. 315; Phelps v. Sproule, 1 Mylne & Keen, 231; Gilb. For. Rom. 571.

² Mitf. Eq. Pl. by Jeremy, 263; Cooper Eq. Pl. 277; Beames Pl. in Eq. 221; Phelps v. Sproule, 1 Mylne & Keen, 231.

³ Mitf. Eq. Pl. by Jeremy, 261 to 263.

as fraudulently obtained, and that the conveyance might stand as a security only for what was justly due from the testator's estate to the defendant; a plea of a deed of mutual release, extending to so much of the Bill as sought a discovery, and as prayed an account of dealings and transactions prior to and upon the day of the date of the deed of release, and to all relief and discovery grounded thereupon, and stating the deed to have been founded on a general settlement of accounts on that day, and to have excepted securities, then given to the defendant for the balance of those accounts, which was in his favor, and averring only, that the deed had been prepared and executed without any fraud or undue practice on the part of the defendant, was overruled.¹ The ground was, that the consideration for the instrument was the general settlement of accounts; and if those accounts were liable to the imputations cast upon them by the Bill, the release was not a fair transaction, and ought not to preclude the Court from decreeing a new account. The plea, therefore, could not be allowed to cover a discovery, tending to impeach those accounts; and the fairness of the settled accounts was not put in issue by the plea, or supported by an answer [*615] denying the imputations charged in the Bill.²

§ 798. (2.) A plea of a stated account. (3.) A plea of a settled account. These pleas may be conveniently considered together, as for the most part they depend upon the same considerations. A stated account pro-

¹ Mitf. Eq. Pl. by Jeremy, 261 to 263; 1 Story on Eq. Jurisp. § 523 to § 527; Capon v. Miles, 13 Price R. 667; Roche v. Norgell, 2 Sch. & Lefr. 721; Phelps v. Sproule, 1 Mylne & Keen, 231; Parker v. Alcock, 1 Younge & Jerv. 432; Fish v. Miller, 5 Paige R. 26; Allen v. Randolph, 4 John. Ch. R. 693; Bolton v. Gardner, 3 Paige R. 273; Sanders v. King, 6 Madd. R. 61; S. C. 2 Sym. & Stu. 279; Gilb. For. Rom. 57.

² Ibid.

perly exists only, where accounts have been examined, and the balance admitted as the true balance between the parties, without having been paid. When the balance thus admitted is paid, the account is deemed a settled account.¹ Each of these, and *à fortiori* a settled account may be pleaded in bar to a Bill for an account. But the defendant, who pleads a stated account, must show, that it was in writing, and the balance likewise in writing ; or, at least, it must set forth, what the balance was, and that the settlement was final. A verbal statement of account, and a receipt in full, given for the balance then agreed to be due, have been held bad as a plea in bar to a Bill for opening an account, if there have been mistakes in the transaction.²

§ 799. Even a receipt in full of all demands will be no bar to a Bill for an account, if there are suspicious circumstances appearing in the case ; as, for example, in a Bill against a steward. Such receipt will then be considered only as evidence of a particular payment, and not of a general release or discharge upon an account stated, though in other circumstances it would have that effect.³ So, a plea of the payment of a sum of money into the Ecclesiastical Court, to prevent a commission of appraisement, which sum was accepted, and a receipt given, has been disallowed as a plea in bar to the suit, as not showing, that the party had no

¹ 1 Story on Eq. Jurisp. § 523, § 526, § 527, § 528 ; *Endo v. Caleham*, 1 Younge R. 306 ; *Capon v. Miles*, 13 Price R. 767 ; *Burk v. Brown*, 2 Atk. 399 ; *Sumner v. Thorpe*, 2 Atk. 1 ; *Phelps v. Sproule*, 1 Mylne & Keen, 231 ; *Darthey v. Lee*, 2 Younge & Coll. 5 ; *Weed v. Small*, 7 Paige, 573. A stated account and a settled account may also be set up by way of defence in an answer. *Endo v. Caleham*, 1 Younge R. 306.

² Cooper Eq. Pl. 277, 278 ; Mitf. Eq. Pl. by Jeremy, 259, 260 ; Gilb. For. Rom. 56 ; *Phelps v. Sproule*, 1 Mylne & Keen, 231 ; 1 Story on Eq. Jurisp. § 523 to § 527.

³ Cooper Eq. Pl. 278.

further demand ; and the payment of the money was but an interlocutory proceeding, which can never be brought up to a judgment in a cause.¹ Much less is a *right barred by merely signing a receipt, as a [*616] witness, upon a payment by an executor to an adverse party, making the same demand.²

§ 800. Courts of Equity will not open a settled account, where it has been signed, or a security taken on the foot of it, unless for fraud, or for errors, distinctly specified in the Bill, and supported by evidence.³ The expression of "errors excepted," will not prevent its being a settled account ; nor will the allegation of general errors be enough ; for specific errors must be pointed out, or it will be final.⁴ But, where there was an admission of the allegation of general errors in a settled account between an attorney and client, it was held not binding upon the parties, although no specific errors were pointed out.⁵ It is a still stronger case for opening such an account at any time, where an attorney has used his influence over his client to get a settlement of an unfair account between them. And in such a case it is enough, if the Court see, that the account is unfair, without proof of the objection.⁶

§ 801. Where fraud has appeared in a stated account, it has been opened after a considerable lapse of time. But where specific errors are alleged, and even proved, the Court has refused, after an acquiescence of eleven years, to open an account ; but has only given the plaintiff liberty to surcharge and falsify.⁷ In the case of an agent, who was also tenant to the principal, an account was opened in respect of fraud after many years

¹ Cooper Eq. Pl. 278.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Cooper Eq. Pl. 278, 279 ; Beames Pl. in Eq. 222 to 230.

⁷ Ibid.

had elapsed; and the situation of the defendant, as agent, was held to accompany him in that of tenant, and to deprive him of the benefit of the objection (which it might be competent to another person to make) of the [*617] *neglect of the plaintiff in not bringing forward the demand at an earlier period.¹

§ 802. In the frame of a plea of a stated or settled account to a Bill, charging error or fraud, it is necessary to meet those charges by averments in the body of the plea, and also to support the plea by an answer denying them.² And, if neither error nor fraud is charged, the defendant must by the plea aver, that the stated or settled account is just and true to the best of his knowledge and belief.³ If the Bill charges, that the plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, so that, if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out.⁴ As the delivery up of vouchers is an affirmation, that the account between the parties was a stated one; if this has taken place at the time the account was stated, it seems to constitute the proper subject of an averment in a plea of this nature.⁵

§ 803. (3.) A plea of an award. An award may be pleaded to Bill to set aside the award and open the account; and it is not only good to the merits of the case, but likewise to the discovery sought by the Bill.⁶ If fraud or partiality are charged against the arbitrators, those charges must not only be denied by way of averment in the plea; but the plea must be supported by an

¹ Cooper Eq. Pl. 279; Beaumont v. Boulthée, 5 Ves. 485; Beames Pl. in Eq. 225, 226, 228.

² Cooper Eq. Pl. 279, 280; Mitf. Eq. Pl. by Jeremy, 259, 260; Beames Pl. in Eq. 222, 223, 225, 226; Phelps v. Sproule, 1 Mylne & Keen, 231; Gilb. For. Roman. 56, 57. ³ Ibid. ⁴ Ibid. ⁵ Ibid.

⁶ Mitf. Eq. Pl. by Jeremy, 260. 261; Cooper Eq. Pl. 280.

answer, showing the arbitrators to have been incorrupt and impartial.¹ And any other matter stated in the Bill, *as a ground for impeaching the award, must be [*618] denied in the same manner.²

§ 804. But a plea of an agreement or covenant to refer all matters of dispute to arbitrators, cannot be pleaded in bar of a Bill brought respecting those matters, whether the agreement or covenant be between partners or between other persons. Indeed, it seems impossible to maintain, that such a contract should be specifically performed, or should bar a suit, unless the parties had first agreed upon the previous question, what were the matters in difference, and upon the powers to be given to the arbitrators.³ Amongst the latter the same means of obtaining a discovery upon oath, and the production of books and papers, as can be given by a Court of Equity, might be essential to justice.⁴ The nomination of arbitrators also must be a subject, on which the parties must previously agree; for if either party should object to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person, so objected to, as a judge chosen by himself.⁵ It must also be determined, that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which, if any of them involved important matter of law, they might not be deemed to be.⁶

§ 805. (4.) A plea of a purchase for a valuable consideration. Supposing a plaintiff to have a full title to

¹ Mitf. Eq. Pl. by Jeremy, 260, 261; Cooper Eq. Pl. 280; Beames Pl. in Eq. 230 to 233; Dryden v. Robinson, 2 Sim. & Stu. 529; Evans v. Harris, 2 Ves. & Beam. 364. ² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 264, 265; Cooper Eq. Pl. 281; Beames Pl. in Eq. 231, 232.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

the relief, which he prays, and the defendant can set up no defence in bar of that title ; yet if the defendant [*619] has an equal *claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interpose on either side.¹ This is particularly the case, where the defendant claims under a purchase or mortgage for valuable consideration without notice of the plaintiff's title, which he may plead in bar of the suit.² Such a plea must aver, that the person, who conveyed or mortgaged to the defendant, was seised in fee, or pretended to be so seised, and was in possession, if the conveyance purported an immediate transfer of the possession at the time, when he executed the purchase or mortgage deed.³ It must aver a conveyance, and not articles merely ; for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles.⁴ It must aver the consideration for and actual payment of it ; a consideration, secured to be paid, is not sufficient.⁵

§ 806. The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deed, and payment of the consideration ; and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person, who could claim under that title.⁶ If particular instances of notice, or circumstances of fraud, are charged, they must be denied as specially and particularly as charged in the Bill.⁷ The special and particular denial of notice

¹ We have already had occasion to suggest that this plea seems equally good in answer to a title by the plaintiff in his Bill set up as a *legal* title, as it is to an equitable title. Ante § 604, a. ; *Payne v. Compton*, 2 *Younge & Coll.* 457 ; *Wood v. Mann*, 2 *Sumner R.* 507, 508.

² Ante § 603, § 604.

³ Ante § 662.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Mitf. Eq. Pl. by Jeremy*, 275, 276.

⁷ *Ibid.*

or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency. But the notice of fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud will not be in issue.¹ The general denial by a plea of *all notice whatsoever, includes constructive, [*620] as well as actual notice. It is not the office of a plea to deny particular facts of notice, even if such particular facts are charged.² Notice or fraud thus put in issue,

¹ Mitf. Eq. Pl. by Jeremy, 274 to 276; Id. 288; Cooper Eq. Pl. 281 to 285; Gilb. For. Rom. 57, 58; Beames Pl. in Eq. 233 to 243; Meadows v. Duchess of Kingston, Ambl. R. 756; Hoare v. Parker, 2 Bro. Ch. R. 578; S. C. 1 Cox R. 224; Mitf. Eq. Pl. by Jeremy, 277, note (s); 2 Story Eq. Jurisp. § 1502 to 1505; Hare on Discov. 89 to 104; Jackson v. Rowe, 4 Russ. R. 514. If the conveyance does not purport to be an immediate transfer of the possession at the time of executing the purchase or mortgage deeds (as in a plea of title from one having a particular estate, of which he was not in possession as a reversion), it has been held, that in such case the plea must set out, how the granting party became entitled to such reversion. But it is not necessary, that the defendant should in such plea aver, that he himself is in possession; nor is it necessary, that he should actually be so, or even appear entitled thereto; this plea not being a mere shield to defend the actual possession. As where a Bill was brought by tenant in tail under a marriage settlement for a discovery and delivery of title deeds; a plea of a mortgage by a tenant for life, alleging himself to be seized in fee, and in possession of the estate and of the deeds, as apparent owner, was allowed. Cooper Eq. Pl. 281, 282, and cases there cited; Beames Pl. in Eq. 236, 237.

² Pennington v. Beachey, 2 Sim. & Stu. 282; Cork v. Wilcock, 5 Madd. R. 328. It is said in a note (s), (I presume by Mr. Jeremy), to Mitf. Eq. Pl. by Jeremy, 276, that "It has been lately declared, that it is not the office of the plea to deny particular facts of notice; but that it is sufficient, where such facts are alleged, to make a general denial, which will include constructive, as well as actual notice; yet if circumstances be specially charged, as evidence of notice, they must be denied by averments in the plea, and by an answer accompanying the same. 2 Sim. & Stu. 282." I do not understand the Vice Chancellor in that case to have held, that the special matters, charged as evidence, should be specially denied by averments in the plea as well as in the answer; but only, that,

if proved, will effectually open the plea at the hearing of the cause.¹

[*621] *§ 807. In this situation of purchasers for a valuable consideration all the persons stand, who claim under a marriage settlement, which they may plead in the same manner. But if the settlement is made after marriage, in pursuance of an agreement before marriage, the agreement, as well as the settlement, must be stated in the plea; and where that is not done, the plea will be overruled.² Upon this principle, also, a jointress may plead her settlement in bar of a Bill, filed against her by the heir at law, if the Bill does not offer to confirm the jointure, and the plaintiff is competent or able so to do. But a plea of this nature must set forth the settlement, and the lands comprised in it, with sufficient certainty.³ And though the defendant has purchased, or has taken a mortgage from a tenant for life only, representing himself to be owner of the inheritance; yet, if he has paid a valuable consideration, and had no notice of the defect of title, the Court will not take any steps against him, even though the plaintiff, and not such purchaser, is in possession of the estate.⁴

§ 808. A person, affected by notice, has the benefit of the want of notice by intermediate parties. Therefore, a purchaser with notice from a purchaser without

to require an answer to accompany the plea, the matters should be specially charged in the Bill; and should also be specially charged, as evidence of notice of the title of the plaintiff. See, on this last point, the remarks of Mr. Wigram, in his *Points of Discovery*, 169 to 181, 1st edit.; *Id.* 142 to 171; *Id.* 185, 186, 2d edit. See also, *Phelps v. Sproule*, 1 *Mylne & Keen*, 231; *Cork v. Wilcock*, 5 *Madd. R.* 328, on the same point.

¹ *Mitf. Eq. Pl. by Jeremy*, 277; *Beames Pl. in Eq.* 239, 240.

² *Cooper Eq. Pl.* 284, 285; *Mitf. Eq. Pl. by Jeremy*, 278, 279; *Beames Pl. in Eq.* 241, 242.

³ *Ibid.*

⁴ *Ibid.*

notice,¹ may shelter himself under the first purchaser.¹ But notice to an agent is notice to the principal.² And where a person, having notice, purchased in the name of another, who had no notice, and knew nothing of the purchase; and the latter afterwards approved of it, and without notice paid the purchase-money, and procured a conveyance; the person first contracting was considered from the beginning as the agent of the actual purchaser, *who was therefore held affected with [*622] notice.³ But though notice to an agent is sufficient notice to the party himself; yet such notice must be confined to the same transaction; for notice in another transaction will have no effect.⁴

§ 809. A plea of a purchase for a valuable consideration will protect a defendant from giving any answer to a title set up by the plaintiff. But a plea of bare title only, without setting forth any consideration, will not be sufficient for that purpose.⁵ Upon a plea of purchase for a valuable consideration, to a Bill for a discovery of deeds and writings, the purchase-deed must be excepted; for it must be pleaded.⁶ A plea of a purchase for a valuable consideration without notice of the plaintiff's title, to a Bill to perpetuate the testimony of witnesses, has been allowed; though there are few cases, in which the Court will not give that assistance to the furtherance of justice.⁷ Thus, to a Bill to perpetuate the testimony of witnesses to a will, the defendant pleaded a purchase for a valuable consideration without notice of the will;

¹ Mitf. Eq. Pl. by Jeremy, 278, 279; *Varick v. Briggs*, 6 Paige R. 329; *Bennett v. Walker*, West's R. 130; *Jackson v. McChesney*, 7 Cowen R. 360.

² Mitf. Eq. Pl. by Jeremy, 278.

³ Ibid.

⁴ *Cooper Eq. Pl.* 284, 285; Mitf. Eq. Pl. by Jeremy, 275, 276, 277, 278; *Beames Pl. in Eq.* 243, 244; 1 Story Eq. Jurisp. § 87. a. p. 75; Id. § 108.

⁵ Mitf. Eq. Pl. by Jeremy, 279, 280.

⁶ Ibid.

⁷ Ibid.

and the plea was allowed.¹ But in this case, as reported, there appears to have been nothing to impede the plaintiff's proceeding at law, to assert his title under the will, against the defendant's possession; and there was apparently, therefore, no Equity to support the Bill.²

[*623] *§ 810. Care must be taken in case of a plea of a purchase for a valuable consideration without notice, not to make an answer to any statements in the Bill actually and properly covered by the plea; for, notwithstanding some doubts formerly entertained, it seems now established, that in such a case, if the defendant answers at all to the matters covered by the plea, he must answer fully; and if he puts in a general answer, he cannot protect himself by such a defence in his answer from answering fully.³

§ 811. (5.) A plea of title in the defendant. From what has been already said, the plea of a purchase for a valuable consideration without notice cannot be set up as a defence, by a party, who claims under a mere voluntary conveyance, or other voluntary title.⁴ But a

¹ Mitf. Eq. Pl. by Jeremy, 279, 280; Cooper Eq. Pl. 287, 288; Beames Pl. in Eq. 242, 243. But see Dursley v. Fitzhardinge, 6 Ves. 263; 2 Story on Eq. Jurisp. § 1503, note (2); Id. § 1510. It is very questionable, whether a person can protect himself against a Bill to perpetuate testimony by the plea of being a *bonâ fide* purchaser without notice, where the right is not at the time capable of being asserted by an action at law. See especially what Lord Eldon said in Dursley v. Fitzhardinge, 6 Ves. 263, and 2 Story on Eq. Jurisp. § 1503, note (2), and § 1510. In the Appendix to Beames Pl. in Eq. 341, 349, there will be found a copy of the plea of a purchase for a valuable consideration without notice, which was allowed by Lord Eldon, in Walwyn v. Lee, 9 Ves. 24.

² Ibid.

³ Ante § 606, and note (2); Ovey v. Leighton, 2 Sim. & Stu. 234; Portarlington v. Soulby, 6 Sim. R. 356; S. C. 7 Sim. R. 28; Mitf. Eq. Pl. by Jeremy, 307, note (h), and cases there cited; Hare on Discov. 247 to 289; Wigram on Points of Discov. 163, 164, 178 to 181, 1st edit.; Id. 136 to p. 171, 2d edit.; Verchild v. Paull, 1 Keen R. 87. But see Beames Pl. in Eq. 272.

⁴ Beames Pl. in Eq. 246.

mere volunteer may, however, plead his title against a Bill brought against him; for if his title be on the whole paramount to that of the plaintiff, there seems no reason, why it should not be an effectual bar to an adverse suit.¹ This plea of title in the defendant is generally founded (1.) on a will; or (2.) on a conveyance; or (3.) on a long, peaceable, and adverse possession.²

§ 812. (1.) To a Bill brought upon a ground of *Equity, by an heir at law against a devisee, to [*624] turn the devisee out of possession, the devisee may plead his title under the will, and that it was duly executed.³ (2.) Upon a Bill filed by an heir against a person, claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit.⁴ So, to a Bill brought to set aside a deed for fraud, a plea of a title paramount, under a former conveyance, may be pleaded by the defendant as a bar.⁵

§ 813. (3.) Length of time and adverse possession. This is a peculiar defence in Equity, in cases, which are not within the reach of the Statute of Limitations.⁶ Courts of Equity (as has been already intimated), have established the doctrine, that after a great lapse of time,

¹ Beames Pl. in Eq. 246, 247; Cooper Eq. Pl. 288; Mitf. Eq. Pl. by Jeremy, 263, 264; Wyatt Pr. Reg. 328; *How v. Duppa*, 1 Ves. & Beam. 511.

² Beames Pl. in Eq. 247.

³ Mitf. Eq. Pl. by Jeremy, 263; Cooper Eq. Pl. 288, 289; Beames Pl. in Eq. 248; Anon. 3 Atk. 17.

⁴ Mitf. Eq. Pl. by Jeremy, 262, 264; Cooper Eq. Pl. 289; Beames Pl. in Eq. 249.

⁵ *Howe v. Duppa*, 1 Ves. & Beames, 511; Beames Pl. in Eq. 249.

⁶ Ante § 756, § 757; Mitf. Eq. Pl. by Jeremy, 269, 271, 272, 273; Beames Pl. in Eq. 247; Wyatt Pract. Reg. 328; Cooper Eq. Pl. 288; 2 Story on Eq. Jurisp. § 1519 to § 1522; 1 Story on Eq. Jurisp. § 55, a. p. 73, § 529, and cases there cited. See also *Cowne v. Douglas*, 1 McClell. & Younge, 321.

and long peaceable possession, they ought not to interfere to grant relief; for the policy of the law is to give quiet and repose to titles; and Courts of justice ought not to countenance laches or long delays on the part of claimants.¹ Indeed, after a great lapse of time, Courts of Equity will raise a presumption of some legal or [*625] *equitable extinguishment of the adverse title, if the circumstances of the case will enable them to support it.²

§ 814. On this ground, where a Bill was brought upon an old mortgage, by the representatives of the mortgagee, for an account and satisfaction; and a Bill of revivor and supplement was brought a long time after the death of the original plaintiffs, which (to account for the lapse of time) charged generally, that owing to infancy, coverture, or other disabilities, the plaintiffs had not been able, during a considerable part of the time, to assert or prosecute their several rights to the mortgage debt; and that the original suit, though abated, has never been dismissed; a plea was put in by the defendants, that he, and those, under whom he claimed, had been in the undisturbed possession of the premises in question for forty years for their own absolute use and benefit, without any account or admission of any debt; and the plea was allowed by the Court.³ The

¹ *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 163 to 175, 192; *Mitf. Eq. Pl.* by Jeremy, 273, note (z); *Campbell v. Graham*, 1 Russ. & Mylne, 453; *Clay v. Smith*, Ambler R. 645; S. C. 3 Bro. Ch. R. 639; *Hercy v. Dinwoody*, 2 Ves. jr. 86; *Ellison v. Moffat*, 1 John. Ch. R. 46; *Arden v. Arden*, 1 John. Ch. R. 313; *Elmendorf v. Taylor*, 10 Wheat. R. 152; *Baldwin v. Pearl*, 1 Younge & Coll. 453, 460; *Brooksbank v. Smith*, 2 Younge & Coll. 58; *Galt v. Osbaldiston*, 1 Russ. R. 158; *Bradt v. Kirkpatrick*, 7 Paige R. 62.

² *Cholmondeley v. Clinton*, 2 Jac. & Walk. 163 to 175, and cases before cited.

³ *Cooper Eq. Pl.* 288; *Blewitt v. Thomas*, 2 Ves. jr. 669, 671.

Court also thought, that the allegation of infancy, coverture, &c., to account for the delay, was so completely vague, that no issue could be taken upon it ; and, therefore, that the plea was not affected thereby.¹

§ 815. So, where a Bill was filed for the payment of a rent charge, the defendant pleaded twenty-six years' possession of the premises, without accounting for, or paying over to the plaintiff any part of the rents and profits ; and the plea was allowed.²

§ 815. *a.* We have already had occasion incidentally to suggest, that the time, when the plea of the Statute of Limitations begins to run, where the case made by the Bill, is one founded on fraud or mistake, will in Equity be held to be from the time, when the discovery of the mistake become first known, and not from the time when the original transaction took place.³

¹ *Blewitt v. Thomas*, 2 Ves. jr. 669, 671 ; *Cooper Eq. Pl.* 288 ; *Beames Pl. in Eq.* 247, 248. The very plea is given at large in the Appendix to *Beames Pl. in Eq.* 331 to 333.

² *Baldwin v. Peach*, 1 Younge & Coll. 453 ; Ante § 587.

³ Ante § 754 ; *Brooksbank v. Smith*, 2 Younge & Coll. 58.

CHAPTER XV.

PLEAS TO BILLS OF DISCOVERY.

§ 816. HAVING thus considered the objections to Bills of relief, which extend to the relief, and likewise to the discovery sought for the purpose of obtaining the relief, it remains to treat of such objections, as are grounds of a plea to Bills of discovery, strictly so called, which seek no relief. These are nearly the same as those, which have been already mentioned, as causes of demurrer to a Bill of discovery, when the objection is apparent on the face of the Bill; and many of them are equally as good grounds for a plea to a Bill of discovery, as they are for a plea to a Bill of relief, when not so apparent. Upon this subject, therefore, our observations will be very brief.¹

§ 817. The grounds of pleas to Bills of discovery, are, then, either, (1.) Pleas to the jurisdiction; (2.) Pleas to the person; (3.) Pleas to the Bill, or frame of the Bill; (4.) Pleas in bar, properly so called. And first, pleas to the jurisdiction. These properly apply, where the plaintiff's case is such, as does not entitle a Court of Equity to compel a discovery in his favor, although, for the purpose of avoiding a demurrer, it is differently and falsely stated in the Bill.² The cases already suggested

¹ Mitf. Eq. Pl. by Jeremy, 281, 282; Cooper Eq. Pl. 291, 292; Beames Pl. in Eq. 249. See Wigram on Points of Discov. 147 to 153; 1st edit. p. 55; Id. 347, 348.

² Mitf. Eq. Pl. by Jeremy, 282; Cooper Eq. Pl. 292; Beames Pl. in Eq. 252; 1 Mont. Pl. in Eq. 261, 262, 263.

under the head of Demurrers and Pleas to Relief afford sufficient illustrations on this head.¹ Among them are the objection, that the subject of the suit is of a political nature; that another Court is competent to give the discovery; or that the tribunal, or the cause, is not of such a character, as the Court will aid by a discovery; as if the cause be before arbitrators; or be of a criminal nature;² or the plaintiff has no title or interest in the suit.³

§ 818. Secondly. Pleas to the person. These are (as we have seen) either to the person of the plaintiff; that he has no right, or title, or ability, to call on the defendant for the discovery; or that he (the defendant), is not liable, or compellable, to make the discovery sought by the Bill.⁴ The defendant may, therefore, to a Bill of discovery, plead that the plaintiff is outlawed; or excommunicated; or an alien enemy; or a person attainted; or an infant; or a *feme covert*; or an idiot; or a lunatic;⁵ or a bankrupt disabled to sue.⁶ So, if the plaintiff has no title to the character, which he assumes in the Bill of discovery; or if he sues as administrator, executor, heir, partner, or creditor; the defendant may, by plea, negative that he is administrator, executor, heir,

¹ Ante § 549 to 607; Ante § 710 to § 722.

² Beames Pl. in Eq. 252 to 254; Cooper Eq. Pl. 292, 293; Ante § 551 § 552, § 553, § 554, § 555; Hare on Discov. 110, 116, 119.

³ Mendezabel v. Machado, 1 Sim. R. 68; Hare on Discov. 41, 42, 46 to 60, 127; Mitf. Eq. Pl. by Jeremy, 154, 231, 233, 282; Tarlton v. Hornby, 1 Y. & Coll. 172; Quilter v. Mussendine, Gilb. Eq. Rep. 228, 229; Vernon v. Vernon, 2 Mylne & Craig, 145; Crouch v. Hitchin, 1 Keen R. 385.

⁴ Beames Pl. in Eq. 254, 255; Cooper Eq. Pl. 293, 294; Ante § 493, § 494, § 495, § 496; Mitf. Eq. Pl. by Jeremy, 228, 229, 230, 232, 233.

⁵ See Lowndes v. Taylor, 1 Madd. R. 423; S. C. 2 Rose R. 363; Mitf. Eq. Pl. by Jeremy, 232, 233, 282, note (n); Id. 66, 67; Tarlton v. Hornby, 1 Y. & Coll. 172; Beames Pl. in Eq. 254, 255; Ante § 495, § 516, § 726.

⁶ Ante § 722 to § 734.

partner, or creditor.¹ So, the defendant may, in like manner, plead to the discovery, that he has no interest in the subject-matter of the controversy; but he is a mere witness; or that he does not sustain the character, in which he is sued; such as administrator, executor, heir, partner, or creditor;² or that there is a want of privity between him and the plaintiff to sustain the Bill.³

§ 819. It should be here observed, that if a claim of interest is alleged by a Bill against a person, who has no interest in the subject-matter, he cannot by demurrer protect himself from a discovery; but he must resort either to a plea or to a disclaimer; by either of which means, it should seem, he may protect himself from making by answer that discovery, which he may properly be required to make, if called upon as a witness. In some cases, however, the Court has allowed a defendant to protect himself by answer, denying the charge of interest, from answering to matters, to which he may be afterwards called upon to answer, in the character of a witness. And perhaps, in justice to those, against whom he may be afterwards called upon to give evidence, as a witness, he ought not to be previously examined to the same matters upon a Bill, under the pretence of an interest, which he has not.⁴

§ 820. Thirdly. Pleas to the Bill, or to the frame of the

¹ Ante § 493, § 494, § 495, § 496; Beames Pl. in Eq. 120, 121, 122 to 128; Id. 254, 256, 257; Cooper Eq. Pl. 293, 294; Mitf. Eq. Pl. by Jeremy, 187, 230, 282, 283; Hare on Discov. 41, 42, 46.

² Mitf. Eq. Pl. by Jeremy, 188, 283; Beames Pl. in Eq. 130, 131, 256, 257; Hare on Discov. 63 to 83; Cooper Eq. Pl. 294, 295; Ante § 262, § 323, § 519, § 570, § 671.

³ Mitf. Eq. Pl. by Jeremy, 158, 159, 234; Hare on Discov. 63 to 68, 105 to 109; Ante § 513, § 571.

⁴ Mitf. Eq. Pl. by Jeremy, 188, 283, 284. But see Hare on Discov. 256 to 259.

Bill. The usual pleas, under this head, of the pendency of another suit, of want of parties, and of multiplying suits, do not apply to a Bill of discovery.¹ But, perhaps, the objection, that the Bill for a discovery is multifarious, would not fall under the same predicament; as it may compel the defendant to give answers and discoveries, as to matters, wholly distinct and independent, and which can, with no propriety, belong to any single suit, either at law, or in Equity.² Perhaps, also, the objection, that the parties are not the same in the suit in Equity, as in the suit at Law, in aid of which the discovery is sought, if not apparent on the Bill, may be brought forward by a plea;³ for, in such a case, there would be a clear misjoinder of parties.⁴ The same objection would seem to apply, if the defendant was not a party to the suit at law; for, ordinarily, a discovery

¹ Cooper Eq. Pl. 208, 295; Beames Pl. in Eq. 273, 274; Hare on Discov. 124 to 126; Mitf. Eq. Pl. by Jeremy, 200, 280; Ante § 610.

² Ante § 610. Lord Redesdale says (Mitf. Eq. Pl. by Jeremy, 200, 201), that a demurrer will not lie to a Bill of discovery, because the Bill has split matters, and is brought for the discovery of part of a matter only; for such a demurrer would only amount to an objection, that the discovery would be insufficient. But, he adds, that it should seem, that a demurrer for multifariousness would hold to a Bill of discovery for several distinct matters against several distinct defendants in one Bill. See also Ante § 287, § 610; 1 Montag. Eq. Pl. 262; Cooper Eq. Pl. 209; Beames Pl. in Eq. 273, 274. It may also be proper to remark, that a Bill is demurrable, if it prays relief against some of the defendants, and a discovery only against others. And the objection of a want of interest in a defendant equally applies, whether he is the sole defendant, or is joined with other defendants. Hare on Discov. 65.

³ Ante § 569; Glyn v. Soares, 3 Mylne & Keen, 450, 469 to 472.

⁴ But if the suit at law is brought by an agent in his own name, in behalf of his principal, it has been held, that the defendant in the suit at law may file a Bill in Equity for a discovery against the principal, in aid of his defence at law. Carr v. Soares, in Exchequer (England), in January, 1836, 14 Law Journ. 68. But the contrary has been since held. See Glyn v. Soares, 3 Mylne & Keen, 450, and Irving v. Thompson, 9 Sim. R. 17. See Ante § 569, § 610, note.

from him could not be material.¹ A plea, that the value of the matter in controversy is beneath the dignity of the Court, would also seem to be a good ground of a plea to the discovery sought.²

§ 821. Fourthly. Pleas in bar. Under certain circumstances, many of the pleas in bar to Bills of relief, already enumerated, may perhaps furnish a good ground for a plea in bar of a Bill of discovery. Thus, for example, a plea of a fine; or of a former judgment; or of a former decree upon the merits; a plea of the statute of frauds and perjuries; or of the statute of limitations; a plea of a release, or of a stated account, or of an award, may be so pleaded.³ In such cases, however, the plea would be applicable only, when no circumstances were stated in the Bill, to avoid the effect of the bar; for, if they were so stated, the discovery could not be withholden; since the plea would amount to a denial of the means necessary to establish the grounds, on which the suit, in aid of which the discovery is sought, was brought.⁴

¹ Ante § 569; *Glyn v. Soares*, 3 Mylne & Keen, 450, 469 to 472; *Irving v. Thompson*, 9 Sim. R. 17; Ante § 569, to § 610, and note.

² *Cooper Eq. Pl.* 193; Ante § 500 to § 502; *Smets v. Williams*, 4 Paige R. 364.

³ *Beames Pl. in Eq.* 274, 275; *Baillie v. Sibbald*, 15 Ves. 185; *McGregor v. East India Company*, 2 Sim. R. 452; *Gait v. Osbaldistone*, 1 Russ. R. 158; S. C. 5 Madd. R. 428; *Hare on Discov.* 50, note (x); *Wigram Points in Discov.* 156 to 162, 1st edit.; *Id.* p. 32 to p. 43, 2d edit.; *Mendizabel v. Machado*, 1 Sim. R. 68, 78; *Hare on Discov.* 50, 53, 54, 55, 56; *Id.* 289 to 297; *Leigh v. Leigh*, 1 Sim. R. 319, 371, 373; *Jeremy v. Best*, 1 Sim. R. 373; *Cork v. Willock*, 5 Madd. R. 331. But see *Hindman v. Taylor*, 2 Bro. Ch. R. 7; S. C. 2 Dick. R. 651.

⁴ *Ibid.* See this subject discussed in *Beames's Pl. in Eq.* 274 to 278, who maintains the validity of a plea under such circumstances. But see *Mr. Belt's* opinion in a note to *Hindman v. Taylor*, 2 Bro. Ch. R. 7; S. C. 2 Dick. 651. In *Debigge v. Howe*, cited 3 Bro. Ch. R. 155; S. C. Mitf. Eq. Pl. by *Jeremy*, 187, it was held, that the objection, if apparent on the record, might be taken by demurrer, that the plaintiff had no right of action. The question has been asked—Why not by plea, if the objection

§ 822. Be this doctrine as it may, it seems certain, that the defendant may plead a perfect title to the premises in himself, in bar of any discovery sought by a Bill relative thereto.¹ Thus, where a plaintiff, claiming as heir at law of her mother, filed a Bill for a discovery and injunction to restrain the defendant from setting up outstanding terms, a plea of a fine levied in 1764 by the mother and her husband, and a deed, declaring the uses of the fine to the husband in fee; and a conveyance for a valuable consideration by the husband to the persons, under whom the defendants were stated in the Bill to have derived their alleged title, with an allegation of a quiet possession from the time of the conveyance down to the filing of the Bill, was held a good plea to the discovery and the relief.²

§ 823. And, where the question raised upon the state of the pleadings in the suit at law, in aid of which a discovery is sought, appears to be a mere question of law, it may be pleaded in bar of a discovery of any facts, which might, if the pleadings had terminated in an issue of fact, have been important at the trial; for while any mere question of law is under the consideration of the Court, which may dispose of the whole cause, a Court of Equity will not interfere by anticipation of an event, which may render a discovery useful; but it will await that event.³ Therefore, where the action at law was brought for a supposed libel, and a plea of justification

is not apparent on the record? See *Mendizabel v. Machado*, 1 Sim. R. 68; S. C. cited 4 Sim. 172. See Hare on Discov. 34, 41; Id. 46 to 56; Id. 57 to 62; where the subject is also discussed. Mr. Wigram (Points of Discov. 153, 156 to 162, 1st edit.; Id. p. 32 to 43, 2d edit.) dissents from the doctrine of Lord Thurlow in *Hindman v. Taylor* (2 Bro. Ch. R. 7); and his reasoning on the subject is very able.

¹ *Gait v. Osbaldiston*, 1 Russ. R. 158, reversing the same case in 5 Madd. R. 428.

² *Ibid.*

³ *Stewart v. Lord Nugent*, 1 Keen R. 201.

was put in, to which the plaintiff in the action filed a demurrer, pending which a Bill of discovery was brought, in support of the matters of fact stated in the justification; the Court held a plea, setting forth the state of the pleadings in the suit at law, and averring, that the demurrer was good in law, and would be allowed, to be a good plea against the discovery; for, upon such a state of the pleadings, it was impossible for the Court to say, that the discovery, if given, could ever be used in the suit at law.¹

§ 824. The pleas in bar, however, which are most usual, and are peculiarly appropriate to Bills of discovery, are those, which render it improper for a Court of Equity to compel the discovery sought. These pleas are, (1.) that the discovery may subject the defendant to pains, or penalties, or a criminal prosecution; (2.) That it will subject him to a forfeiture, or something in the nature of a forfeiture; (3.) That it will betray the confidence reposed in him as counsel, attorney, solicitor, or arbitrator; and, (4.) That he is a purchaser for a valuable consideration, without notice of the plaintiff's title.²

§ 825. The doctrines, applicable to these different defences, have been already anticipated in treating of the same subject under the head of demurrers and

¹ *Stewart v. Lord Nugent*, 1 Keen R. 201. The substantial parts of the plea in this case are given in the Report, and may serve as a useful precedent in cases of this nature.

² Mitf. Eq. Pl. by Jeremy, 284; Cooper Eq. Pl. 295; Beames Pl. in Eq. 258, 263, 271, 272, 278. It might be here added, that it would also be a good plea in bar, that the Bill sought a discovery of the defendant's title, and not merely of the plaintiff's title, if the facts should be so disguised in the Bill as not to be open to a demurrer. See Ante § 572; Wigram on Points in Discovery, 151 to 190; Id. 213, 214; Id. 47, 1st edit.; Id. p. 32 to 45; Id. 364, 365; Id. 67, 2d ed.; *Belwood v. Wetherell*, 1 Y. & Coll. 211.

pleas to Bills of relief, and of demurrers to Bills of discovery.¹ In relation to the plea, that the discovery will

¹ Upon this head, that the discovery may subject the defendant to a penalty, forfeiture, or criminal prosecution, see Ante § 521 to 526; *Id.* § 575 to § 598. See also *Maccullum v. Turton*, 2 Younge & Jer. 183; *Nelme v. Newton*, 2 Younge & Jer. 186, note (b). See also *Mitf. Eq. Pl. by Jeremy*, 284 to 288; *Cooper Eq. Pl.* 295 to 300; *Hare on Discov.* 131 to 156. In relation to pleas of a purchase for a valuable consideration without notice, see Ante § 603, § 606, § 805 to § 813; *Mitf. Eq. Pl.* 199, 274, 284, 288; *Beames Pl. in Eq.* 277, 278, and cases there cited; *Cooper Eq. Pl.* 281, 300; 2 *Story on Eq. Jurisp.* § 1502 to § 1505. As to pleas, that the discovery will compel the party to betray the confidence reposed in him as counsel, attorney, or arbitrator, see Ante § 599 to § 602; *Mitf. Eq. Pl. by Jeremy*, 199, 274, 284, 288; *Cooper Eq. Pl.* 295 to 300; *Beames Pl. in Eq.* 271, 272, where, in the notes, the authorities to each head are distinctly collected. The principal authority cited for the case of arbitrators is *Anon.* 3 Atk. 644. See the form of a plea, that the discovery would subject the defendant to penalties and forfeitures, in *Beames Pl. in Eq. Appendix*, 333 to 336, being the actual plea in *Hutchins v. Landar*, *Cooper Eq. Rep.* 34, allowed by Lord Eldon. Mr. Hare (*Hare on Disc.* 290, 291, 292-) has made some important remarks on the subject of pleas to discovery, and the difficulty in many cases of so framing them, as to avoid the necessity of an answer. "The validity of a plea," (says he) "is frequently determined upon considerations apart from the merits of the case; and it may be objected, that the judgment against the plea on a point of form should not be conclusive upon the discovery. It might impose upon the defendant the necessity of disclosing important matters, with regard to which the plaintiff may, after all, have no concern. This argument seems to possess peculiar force, where the Bill seeks discovery in aid of a trial at law. The rules with regard to pleading are so essentially different at law and in Equity, that it is more easy to point out distinctions, than to suggest analogies. The important question of duplicity affords a pregnant example of the difficulty of reconciling their respective forms. The defendant is entitled to be protected from discovery of matters, which are not in issue at law; and for this purpose he must resort to a plea. But it is often impossible to frame his plea in Equity sufficiently extensive to cover all such matters, without rendering it double, and therefore bad. 'The defence,' it was argued in one case, 'consists of a great number of facts, not of one short fact, that might be pleaded, or of a combination of facts involving one point.' In law, there would be no difficulty; the rule there is reciprocal: it applies both to the plaintiff and defendant; to the declaration, as well as to the plea. In Equity, it is an obstacle to the defendant, and not to the plaintiff; an objection to the plea, and not to the Bill. In support of the strictness of equitable pleas, it is said, that a plea is not the only mode of defence in

expose the defendant to penalties and forfeitures, it should distinctly appear, that the penalties and forfeitures would accrue, if not apparent on the Bill. If the defendant should answer generally, he must answer fully; and if he means to object in any answer, that particular discoveries will expose him to penalties and forfeitures, he must set up in his answer that, as a specific ground of objection to answering.¹ In relation also [*634] to the plea, that the defendant is a *purchaser for a valuable consideration without notice of the plaintiff's title, it may, for the purpose merely of adding another illustration, be repeated, that a Court of Equity will not, in general, compel him to make any discovery, which may affect his own title.² Thus, if a Bill is filed for a discovery of goods purchased of a bankrupt, the defendant may plead, that he is a purchaser *bonâ fide* for a valuable consideration, paid before the commission of bankruptcy issued, and without any notice of the bankruptcy.³

Equity. But this argument is inapplicable, where the Bill is for discovery; for then the plea is the only defence; and in such cases discovery is frequently given, in which the event of the cause proves the plaintiff not to have had any interest. This, however, is an inconvenience attending the administration of justice, rather than a defect in the system of Equity. The determination of the rights of property, which are in dispute, is the end; discovery is but the means of eliciting truth, for the attainment of that end. It is incidental to litigation, that parties must be sometimes harassed by inquiries with respect to subjects, which in the result appear to have been unnecessarily agitated. But against this evil there are many circumstances, which operate as safeguards; and the objections, which may be taken to the discovery of matters, that are immaterial to the question in dispute, or the disclosure of which would be dangerous or prejudicial to the defendant, afford, when they are properly insisted upon, the means of an ample protection." See also *Robertson v. Lubbock*, 4 Sim. R. 101; Ante § 503 to § 526, § 565 to § 604.

¹ *Sloman v. Kelly*, 3 Younge & Coll. 573.

² Mitf. Eq. Pl. by Jeremy, 288; Cooper Eq. Pl. 300; Beames Pl. in Eq. 277, 278; Hare on Discov. 89 to 104; *Perrat v. Ballard*, 2 Ch. R. Cas. 72, 73.

³ *Ibid.*

CHAPTER XVI.

PLEAS TO BILLS NOT ORIGINAL.

§ 826. HITHERTO we have been considering pleas with reference to original Bills only ; and of these a Bill of interpleader rarely gives rise to any plea ; and a Bill of certiorari, from the nature of the proceedings upon it, will not, in general, admit of a plea.¹ Let us now proceed to the consideration of pleas to Bills not original, which will detain us but for a short time ; since the same grounds of plea will in many cases hold to these kinds of Bills, according to their respective natures, as do to original Bills. Some of them, however, as we have already seen, admit of a peculiar defence ; and that defence may sometimes be urged by way of plea.² We shall pass rapidly over the subject, as no extended notice of these Bills seems necessary.

§ 827. First ; As to pleas to supplemental Bills, and Bills in the nature of supplemental Bills. If a plaintiff is not entitled to file a supplemental Bill, and the objection does not appear upon the face of it, so that the defendant may demur, he must state his objection by way of plea.³ Thus, as has been already mentioned, if a Bill is filed by or against a tenant in tail, in respect of the estate tail, the remainder-man will in general be bound by the proceedings, and a supplemental Bill,

¹ Mitf. Eq. Pl. by Jeremy, 288, 289, 290 ; 1 Mont. Eq. Pl. 240, 241, 245.

² Mitf. Eq. Pl. by Jeremy, 288, 289, 290 ; Ante § 611 to 646.

³ Ibid.

therefore, will be sufficient to make him a party to them.¹ But, if there are special circumstances in the case, as, that the Bill was filed, not in respect of charges, created upon the inheritance by the donor, but in respect of contracts by the tenant in tail, such particular circumstances may, it should seem, be offered by way of plea to the supplemental Bill.²

§ 828. If a supplemental Bill is brought upon matter, which arose before the original Bill was filed, and this is not apparent on the Bill, the defendant may plead that fact, to defeat it.³ On the other hand, if a Bill is amended by stating a matter, which has arisen subsequent to the filing of the Bill, and which consequently ought to have been the subject of a supplemental Bill, advantage may be taken of the irregularity by way of plea, if it does not sufficiently appear on the Bill to found a demurrer. But if the defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing.⁴

§ 829. Secondly ; As to pleas to Bills of revivor, or Bills in the nature of a Bill of revivor. If a Bill of revivor is brought without sufficient cause to revive a suit against the defendant, and this is not apparent on the Bill, the defendant may plead the matter necessary to show, that the plaintiff is not entitled to revive the suit against him.⁵ Or, if the plaintiff is not entitled to revive the suit at all, though a title is stated in the Bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea.⁶ Indeed, it seems to have been thought, that a defendant could

¹ Cooper Eq. Pl. 303 ; Beames Pl. in Eq. 298 to 302 ; Ante § 612, § 613, § 614, § 615, § 616.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 290, 293, 294 ; Cooper Eq. Pl. 303, 304.

⁴ Ibid.

⁵ Mitf. Eq. Pl. by Jeremy, 289, 290.

⁶ Ibid.

only object to a Bill of revivor by way of plea or demurrer.¹ And there may be great convenience in thus making the objection; for, if the defendant objects by answer merely, the point can only be determined by bringing the cause regularly to a hearing.² But if the objection is taken by plea or by demurrer, it may in general be immediately determined in a summary way.³ However, if a defendant objects by answer only, or does not object at all; yet, if it appears to the Court, that the plaintiff has no title to revive the suit against the defendant, he can take no benefit from it.⁴

§ 830. The want of proper parties may also be objected to a Bill of revivor. As, if a suit is by tenants in common, and one dies, the representative of the deceased tenant in common must make the surviving tenant in common a party to a revivor by him; and if the objection does not sufficiently appear on the face of the Bill to ground a demurrer, it may be taken advantage of by way of plea.⁵ If a Bill of revivor is filed in a case, requiring a supplemental Bill, it seems, that the defendant may plead such supplemental matter; for though such a plea was overruled in a recent case; yet it was only on account of a defect in form, the Court admitting it to be clearly good in substance.⁶ But a defendant to a Bill of revivor cannot plead to that Bill, a plea which has been pleaded by the original defendant, and overruled.⁷

§ 831. If a person, who is entitled to revive a suit, does not proceed in due time, he may be barred by the Statute of Limitations of actions, which may be pleaded

¹ Mitf. Eq. Pl. by Jeremy, 289, 290, 293, 294; Cooper Eq. Pl. 302, 303; Beames Pl. in Eq. 293 to 298; Id. 350, 351; Ante § 617 to § 627.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Cooper Eq. Pl. 302, 303; Beames Pl. in Eq. 296; Fallows v. Williamson, 11 Ves. 306; Merriwether v. Mellish, 13 Ves. 435; Ante § 622.

⁶ Ibid.

⁷ Ibid.

to a Bill of revivor afterwards filed.¹ As, for example, if the Bill in Equity be for an account, or other personal demand, a plea, that the suit had not been revived within six years since the abatement by the death of the intestate (who was the original plaintiff), would be a good bar.² But in such a case, the plea should set forth, that the six years had elapsed since the taking out of administration by the personal representative, who seeks to revive the suit; for the bar does not begin to run until an administration is taken out.³

§ 832. Thirdly; As to pleas to cross Bills. Cross Bills are liable to all the pleas in bar, to which original Bills are liable, as they differ in nothing from original Bills, except that they are occasioned by former Bills.⁴ And the converse of this is equally true, that a cross Bill is not liable to any plea, which will not hold to an original Bill.⁵ Pleas to the jurisdiction, and to the person, cannot be pleaded to a cross Bill, the defendant having, by filing his original Bill, affirmed the sufficiency both of the person and of the jurisdiction.⁶ But if a cross Bill should be filed by a plaintiff, who is not capable of suing alone, as by an infant, a feme covert, an idiot, or a lunatic, it should seem, that a plea to the person would be good.⁷ A defendant cannot, by a cross Bill, compel the plaintiff in the original Bill to discover the evidence of his (the defendant's) title; and, therefore, it

¹ Mitf. Eq. Pl. by Jeremy, 272, 290; Cooper Eq. Pl. 302; Beames Pl. in Eq. 293, 296; Hollingshead's case, 1 P. Will. 742; S. C. cited 2 Sch. & Lefr. 632.

² Ibid. Hollingshead's case, 1 P. Will. 742; Earl of Egremont v. Hamilton, 1 B. & Beatt. 531; Perry v. Jenkins, 1 Mylne & Craig, 118.

³ Perry v. Jenkins, 1 Mylne & Craig, 118; Murray v. East India Company, 5 B. & Ald. 204.

⁴ Cooper Eq. Pl. 304; Mitf. Eq. Pl. by Jeremy, 290, 291; Beames Pl. in Eq. 302, 303; Ante § 628 to § 634.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

should seem, that the objection may be taken by plea ; and it may also be insisted on by answer.¹

§ 833. Fourthly ; As to pleas to Bills of review, and Bills in the nature of Bills of review. It has been already mentioned, that a part of the constant defence to a Bill of review, for error apparent on a decree, has been by a plea of the decree and a demurrer against opening the enrollment ; but that a demurrer seems to be the proper defence, where the decree is fairly stated ; and that the books of practice give the form of a demurrer only to such a Bill.² Where any matter beyond the decree, as length of time, a purchase for a valuable consideration, or any other matter, is to be offered against opening of the enrollment, that matter must be pleaded.³ If a demurrer to a Bill of review has been allowed, and the order, allowing it, is enrolled, it is an effectual bar to a new Bill of review on the same grounds, and may be pleaded accordingly.⁴ To a Bill of review of a decree for payment of money, it has been objected by plea, that, according to the rule of the Court, the money decreed ought to have been first paid.⁵ But the rule appears to have been dispensed with on security given ; and, as the Bill of review would not stay process for compelling payment of the money, it may be doubted, whether the objection can be properly so made.⁶

¹ *Bellwood v. Wetherell*, 1 Y. & Coll. 211 ; *Glegg v. Legh*, 1 Bligh R. 302, N. S. ; *Cherry v. Legh*, id. 306.

² Ante § 634 ; *Mitf. Eq. Pl. by Jeremy*, 203, 291 ; *Webb v. Pell*, 3 Paige R. 368. ³ *Ibid.* ⁴ *Ibid.* ⁵ *Ibid.*

⁶ *Mitf. Eq. Pl. by Jeremy*, 291, 292 ; *Cooper Eq. Pl.* 304, 305 ; *Beames Pl. in Eq.* 304 to 307 ; Ante § 634 to § 487. Mr. Beames, in his Pl. in Eq. 306, says, "The case of *Hartwell v. Townsend* (2 Bro. Parl. R. 107, Tomlins's edit.) contains an important distinction with respect to this subject, that though the plaintiff in a Bill of review is confined to errors

§ 834. A Bill of review upon the discovery of new matter, seems liable to any plea, which would have avoided the effect of that matter, if charged in the original Bill.¹ It has been doubted, whether the fact of the discovery of the new matter, thus alleged to support a Bill of review, can be traversed by a plea, after the Court, upon evidence of the fact, has given leave to bring the Bill, even if the defendant could traverse the fact by the positive assertion of some fact, which would demonstrate, that the matter was within the knowledge of the party, so that he might have had the benefit of it in the original suit. But the doubt seems not well founded ; for, if the fact of the discovery is in issue in the cause, it ought to be proved, to entitle the plaintiff to demand the judgment of the Court on the matter alleged, as ground for reviewing the decree ; and it may consequently be disproved by evidence on the part of the defendant.²

§ 835. The other Bills, in the nature of Bills of review, seem to be in the same situation. Upon a supplemental Bill, in nature of a Bill of review of a decree not signed and enrolled, upon the alleged discovery of new matter, it has been said, that if the defendant can show, that the allegation is false, he must do so by plea, and

upon the face of the record, and cannot go out of it ; yet the defendant is at liberty to allege every matter relevant to his defence, whether in or out of the record, by way of plea, as a release, &c., to prevent disturbing the decree ; nor has he any other method of introducing it. And when pleaded, the Court is to judge, whether the matter alleged is sufficient to preclude the plaintiff from the review he seeks. That case also decides, that, whilst neither an assignee nor a devisee can have relief by a Bill of review, all the parties to the original Bill must be made parties to the Bill of review, on that principle of justice, that a party is not to be condemned without being heard."

¹ Mitf. Eq. Pl. by Jeremy, 89, 292, 293 ; Cooper Eq. Pl. 304, 305 ; Beames Pl. in. Eq. 307.

² Ibid.

that it is too late to insist upon it by answer. But as the Bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should seem, that it is equally liable to traverse by answer, and by evidence, as any other fact stated in a Bill.²

§ 836. Fifthly; As to pleas to impeach decrees for fraud. The proper defence to a Bill, seeking to impeach a decree on the ground of fraud, is a plea of the decree, denying the fraud, supported by an answer also, meeting the charges of fraud.³ And where a decree, establishing a modus, was pleaded to a Bill for tithes, in which Bill the plaintiff stated, that the defendants set up the decree as a bar to his claim; and, in order to avoid the effect of the decree, charged, that it had been obtained by collusion; and stated facts, tending to show collusion; the Court was of opinion, that the defendants, not having, by averments in the plea, denied the collusion, although they had done so by an answer in support of the plea, the plea was bad in form; and it was overruled accordingly.⁴

§ 837. Sixthly; As to pleas to carry decrees into execution. Any person, interested under a decree, may bring a Bill to carry it into execution. Any creditor, upon the same principle, may prosecute a decree for an account.⁵ But if a plaintiff, filing a Bill to carry a decree into execution, happens to have no right or interest, and such fact is not so apparent on the Bill, as to admit of a demurrer, the defendant may offer it by way of plea.⁶

¹ Mitf. Eq. Pl. by Jeremy, 293, and note (g); Cooper Eq. Pl. 305; Beames Pl. in Eq. 304, 307; Lewellen v. Mackworth, 2 Atk. 40.

² Ibid.

³ Cooper Eq. Pl. 305; Mitf. Eq. Pl. by Jeremy, 293; Beames Pl. in Eq. 214, 217, 307; Ante § 639.

⁴ Ibid.

⁵ Cooper Eq. Pl. 305, 306; Mitf. Eq. Pl. by Jeremy, 293; Beames Pl. in Eq. 307, 308; Ante § 641.

⁶ Ibid.

CHAPTER XVII.

OF DISCLAIMERS.

§ 838. WE come, in the next place, to another mode of defence, that by a disclaimer. A disclaimer is, where the defendant renounces all claim to the subject of the demand made by the plaintiff's Bill.¹ A disclaimer is distinct in substance from an answer, though sometimes confounded with it.² But it can seldom be put in without an answer; for, if the defendant has been made a party by mistake, having had an interest, which he may have departed with, the plaintiff may require an answer, sufficient to ascertain, whether that is the fact, or not; and if, in truth, it is so, an answer seems necessary, to enable the plaintiff to make the proper party, instead of the defendant disclaiming.³ And though, perhaps, a mere witness may avoid answering by a disclaimer; yet an agent, charged by a Bill with personal fraud, cannot, by disclaiming any interest, avoid answering fully.⁴

§ 838. *a.* Indeed, it may be laid down as a general rule, that in no case can a party get rid of his liability to answer a suit by a mere disclaimer, if his answer may properly, under all the circumstances, be required.⁵ Thus, for example, if his disclaimer does not show, that he is under no liability in respect to the matters of the

¹ Cooper Eq. Pl. 309; Mitf. Eq. Pl. by Jeremy, 318, 319; Hinde's Ch. Pract. 208. ² Ibid. ³ Ibid. ⁴ Ibid.

⁵ Glassington v. Thwaites, 2 Russ. R. 458; Whiting v. Rush, 2 Younge & Coll. 546, 552; Graham v. Coape, 9 Sim. R. 102; S. C. 3 Mylne & Craig, 638.

Bill, it will be bad.¹ So, if the Bill alleges some other facts, as, that the defendant has mixed himself up with the whole transaction, and has by his personal conduct made it necessary, that the Bill should be filed, a mere disclaimer will not entitle him to be dismissed from further answering the suit; for under such circumstances justice might not be done to the other party.² Generally speaking, therefore, a mere disclaimer is

¹ *Glassington v. Twaites*, 2 Russ. R. 453; *Whiting v. Rush*, 2 Y. & Coll. 546, 552; *Graham v. Coape*, 9 Sim. R. 102; S. C. 3 Mylne & Craig, 638.

² *Graham v. Coape*, 9 Sim. R. 102; 3 Mylne & Craig, 638. Lord Cottenham, in delivering his judgment in this case, said; "It is to be observed, that the appellants are not made defendants in respect of their having an interest, in which case a simple disclaimer would enable the plaintiff to prosecute his suit, and give to him all the benefit he seeks. On the contrary, it alleges that they have no interest, but that, pretending to have some, they have prevented the plaintiff from obtaining the property from the trustees; and, upon that ground, it prays, that the appellants, and the other defendants, who stand in the same situation, may pay the costs of the suit. The appellants were quite aware, that a simple disclaimer would not meet the case made against them; and they have therefore put in an answer and disclaimer, not only disclaiming all interest, but denying that they ever had or pretended to have any right, title, or interest in the property in question. But although they have found it necessary so to meet the case made by the Bill, they have not answered any of the allegations by means of which the plaintiff proposes to prove the affirmative of his proposition, and so to support his title to compel them to pay the costs of the suit. Upon what ground can a defendant be entitled so to defeat the case alleged against him, by refusing to answer the allegations in the Bill, and putting in a general denial of the Equity asserted by the Bill? *Glassington v. Thwaites* (2 Russ. 458), and other cases were cited upon the point; but *De Beauvoir v. Rhodes*, not reported in that stage of it, more precisely meets this case. There the plaintiff filed his Bill to set aside a building lease, and made the attorneys, who had been employed in the transaction by the person under whom he claimed, defendants to the Bill, charging that they had been parties to the alleged fraud, and had secured to themselves a benefit by getting from the tenant a contract to employ them in preparing the sub-leases, and praying that they might pay the costs of the suit. Those defendants put in a disclaimer, which Sir John Leach, then Vice Chancellor, ordered to be taken off the file, upon the ground, that the plaintiff prayed relief against them, and that they could not escape by simply disclaiming. In

scarcely to be deemed sufficient or proper, except where the Bill simply alleges, that the defendant claims an interest in the property in dispute, without more ; for, under such circumstances, if he claims no interest, that is a sufficient answer to the allegation.¹

§ 839. As a defendant may disclaim and answer ; so he may demur to one part of the Bill, plead to another, answer to a third, and disclaim to a fourth ; but all these defences must clearly refer to separate and distinct parts of the Bill.² For a demurrer will be overruled by a plea, or by an answer to the same part of the Bill, as is demurred to.³ A plea also will be overruled by an answer under [*643] the same *circumstances.⁴ The reason is, that a demurrer demands the judgment of the Court, whether the defendant shall make any plea or answer ; and a plea, whether he shall make any other answer than what is contained in the plea ; of course the party necessarily waives his objection when he does the very thing which he has by his demurrer or plea objected to do.⁵ And if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.⁶

§ 840. A defendant cannot, by a disclaimer, deprive the plaintiff of the right of requiring a full answer from him, unless it is evident, that the defendant ought not, after such disclaimer, to be retained as a party to the suit.⁷ For, a plaintiff may have a right to an answer, notwithstanding a disclaimer ; and in such a case the defendant cannot shelter himself from answering by

that case, as in this, the defendants were made parties upon an alleged claim of interest, and upon a demand for costs arising from imputed misconduct. With respect to the former, the disclaimer might be sufficient, but to the latter it is wholly inapplicable.” ¹ Ibid.

² Cooper Eq. Pl. 309, 310 ; Mitf. Eq. Pl. by Jeremy, 319, 320.

³ Ibid. ⁴ Ibid. ⁵ Ibid.

⁶ *Glassington v. Twaites*, 2 Russ. R. 458 to 462 ; *Graham v. Coape*, 6 Sim. R. 102 ; S. C. 3 Mylne & Craig, 638.

alleging, that he has no interest.¹ Though he has no interest, others may have an interest in it against him. He may be deeply accountable; and the very statement, that he is deeply accountable, may, in one sense, be an allegation, that he has an interest in the suit. A man cannot disclaim his liability.² Under such circumstances, it may be necessary to revive a suit against the personal representatives of a deceased defendant, who has himself disclaimed, and against whom the plaintiff waives all relief.³

§ 841. If a defendant puts in a disclaimer, and afterwards discovers, that he had an interest, which he was not apprised of at the time, when he disclaimed, the Court will, upon the ground of ignorance, or mistake, permit him to make his claim.⁴ But the Court will, in such a case, require the defendant to show a strong ground by affidavit, to get rid of the disclaimer upon the record.⁵

§ 842. If the defendant disclaims, and it appears, that the Bill was exhibited for vexation only, the Court will *dismiss the Bill with costs against the plaintiff.⁶ [*644] But, if the plaintiff had probable cause or reason to exhibit his Bill against such defendant, he may, if he pleases, pray a decree against such defendant, and all claiming under him since the Bill was exhibited; and it is commonly granted without costs on either side.⁷ As the Court will dismiss the Bill with costs, when it appears to have been vexatiously filed; so, if the defendant disclaims, the plaintiff must not file a replication to such disclaimer. If he does, and serves the defendant with a subpœna to rejoin, the defendant may have costs against the plaintiff for such vexation.⁸ But it is otherwise, if

¹ *Glassington v. Twaites*, 2 Russ. R. 458 to 462; *Graham v. Coape*, 6 Sim. R. 102; S. C. 3 Mylne & Craig, 638.

² *Ibid.*

³ *Ibid.*

⁴ *Cooper Eq. Pl.* 310, 311.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

the disclaimer is only to a part of the Bill, and there is an answer to the other part.¹

§ 843. On the other hand, the Court has sometimes refused costs to a defendant disclaiming. As, where a Bill of foreclosure was filed against the mortgagor, who by his answer stated, that he had made a subsequent mortgage; and the Bill being amended by adding such mortgagee a party, he disclaimed, stating, that after the Bill filed, but before the amendment, he had made a second assignment; the Court refused costs to the defendant disclaiming, and laid it down as a principle, that, in such a case, the subsequent mortgagee can have no costs.²

§ 844. Though a disclaimer is in substance distinct from an answer; yet it generally adopts in most respects the formal parts of an answer, the words of course, preceding and concluding an answer, being used in a disclaimer.³ But Lord Redesdale has observed, that the form [*645] of a disclaimer alone seems to be simply an assertion, that the defendant disclaims all right and title to the matter in demand; and that the forms given in the books of practice are all of an answer and disclaimer.⁴

¹ Cooper Eq. Pl. 310, 311; Mitf. Eq. Pl. by Jeremy, 319; Hinde's Ch. Pract. 208.

² Cooper Eq. Pl. 311.

³ Cooper Eq. Pl. 311; Mitf. Eq. Pl. by Jeremy, 319; Hinde's Ch. Pract. 209. See Hare on Discov. 258, 259. The following form is given of a mere disclaimer, in Vanheythuysen's Equity Draftsman, p. 451. "The disclaimer of A. B., the defendant, to the Bill of complaint of C. D. complainant. This defendant, saving, &c. (here follow the words of course, which precede an answer), saith, that he doth not know, that he, this defendant, to his knowledge and belief, ever had, nor did he claim, or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises, situate, &c. in the said complainant's Bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to the said estate and premises in, &c. in the said complainant's Bill mentioned, and every part thereof. (Here follow the words of course, which conclude an answer.)" See also in 2 Grants's Ch. Prac. 480, 481, the form of an answer and disclaimer.

⁴ Ibid.

CHAPTER XVIII.

ANSWERS.

§ 845. WE come, in the next place, to the fourth and last mode of defence; and that is by an answer. It has been already mentioned, that every plaintiff is entitled to a discovery from the defendant of the matters charged in the Bill, provided they are necessary or proper to ascertain facts, material to the merits of his (the plaintiff's) case, and to enable him to obtain a decree.¹ The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense. He is also entitled to a discovery of the matters necessary to substantiate the proceedings, and to make them regular and effectual in a Court of Equity.²

→ § 846. When, therefore, a defendant is called upon by a Bill to make a discovery of the several charges contained in the Bill, he must do so by a general answer to those charges, unless he can protect himself from it either by a demurrer, or by a plea, or by a disclaimer.³ For, if a defendant is compelled to answer, he must in general answer fully to all the charges of the Bill not so covered by a demurrer, or a plea, or a disclaimer.⁴

¹ Mitf. Eq. Pl. by Jeremy, 9, 301, 307; Ante § 572.

² Mitf. Eq. Pl. by Jeremy, 307.

³ Cooper Eq. Pl. 312.

⁴ Cooper Eq. Pl. 312; Ante § 606; Mitf. Eq. Pl. by Jeremy, 307, note (h); Id. 316, note (q); Hare on Discov. 247 to 262; Wigram on Points of Discov. 192 to 195, 1st edit.; Id. p. 85 to p. 122; Id. p. 190; Id. p. 347, 348. The rule, that if a defendant answers, he must answer fully, is a rule, that exists in the Court of Chancery only in England; and it does not extend to cases in the Exchequer. Mr. Hare has

→ There are some exceptions to this rule ; but they are few.
 (1.) He is not bound to answer to matters, which are

given the reasons of this difference at large in his work on Discovery, p. 298 to 301. "The rule in Chancery," (says he) "that a defendant, who submits to answer, must answer fully, does not apply generally in the Court of Exchequer. The inconvenience and inconsistency, which have been adverted to, as the consequences of the temporary innovation upon the ancient practice of the former Court, do not occur in the latter ; for, in the Exchequer, the exceptions for insufficiency are argued before the Court in the first instance. There seems, however, to be some want of uniformity in the principle, upon which the sufficiency of answers has been determined. The statement of the present rule in the Exchequer will be much assisted, by referring to that, which was adopted in the Court of Chancery during the suspension of the usual practice there. It is to be observed, that the distinction in the two Courts of Equity is a distinction of form, and not of substance. The principle expressed by Sir J. Leach, V. C., is universally applicable to the jurisdiction :—'A defendant cannot by answer deny the plaintiff's title, and refuse to answer as to facts, which may be useful evidence in support of that title.' And the same may, with equal truth, be said of a plea. The cases, in which the difference of practice chiefly prevails, are, where the defendant denies the title, which the plaintiff alleges, and upon that denial resists the discovery of matters, which are merely a consequence of the alleged title. It was held by Lord Chief Baron Parker, that where the Bill sought an account or discovery of assets, if the fact, upon which the plaintiff founded his title were denied, and if it were a fact, lying in the knowledge of the defendant, the plaintiff was not entitled to a discovery of assets. But if the fact did not lie in his knowledge, though he denied it ; yet he should set out an account. This decision imports, that a defendant cannot protect himself from setting forth an account, unless he possesses a personal knowledge of the facts insisted upon as a foundation of the title. But the distinction does not appear to have been taken in subsequent cases. It seems to have been considered in a recent judgment, that the defence to discovery by way of answer is more particularly adapted to the case of objections, which do not extend to the entire Bill. It was said by Graham, B., that 'there is often great inconvenience in a plea ; and a defendant ought not to be unnecessarily driven to plead in a case of this nature. In the cases cited, there must have been some grave point of Equity raised, and to be determined, which, it was supposed, if established, would operate as a bar to the suit ; and, in such a case, a plea may be very proper and needful, in order to bring the question distinctly before the Court.'—'In a late case, we held, that there was no necessity for splitting the record by insisting on a plea, where a party could sufficiently protect himself by answer from answering certain parts of the Bill. That is a

purely scandalous, or impertinent, or immaterial, or irrelevant.¹ (2.) He is not bound to answer to any thing, which may subject him to any penalty, forfeiture, or punishment.² (3.) He is not bound to answer, what would involve a breach of professional confidence.³ (4.) He is not bound to discover the facts respecting his own title; but merely those, which respect the title of the plaintiff.⁴ In each of these cases, if the defendant does not think

sufficient reason for holding, that he might do so in this Court, without being driven to put his objections on the record by plea, where they do not go to the entire suit. Where, indeed, the objection would affect the whole merits, it may be very proper to compel the party to put the case upon that single issue by means of a plea.' And Lord Chief Baron Alexander observed; 'We must take, what appears to us to be the most convenient course under the circumstances in every case. There are, undoubtedly, many occasions, on which a defendant must plead his defence, in order to give it the operation of a bar to the whole Bill; as in the instance of a partnership. But that is not applicable to such a defence as this, where the matter insisted on only goes to a small part of the Bill. I must say, that I consider the exception should be disallowed.' See also the cases in 11 Ves. 305, 2 Sim. & Stu. 275, and *Capon v. Mills*, 13 Price R. 770, and other cases cited by Mr. Hare, in support of his text. See also *Gresley on Evidence*, 17, 18; *Cooper Eq. Pl.* 315, 316; *Wigram Points of Discov.* 192 to 198, 1st edit.; *Id.* p. 190 to 199, 2d edit.; *Bank of Utica v. Messereau*, 7 Paige R. 517.

¹ Ante § 266 to 270, § 566, § 820; *Mitf. Eq. Pl. by Jeremy*, 307, note (h); *Id.* 316, note (q); *Gresley on Evidence*, 17, 18; *Report of Chancery Commissioners*, 9th March, 1826; *Wigram Points of Discov.* 195 to 198, 1st edit.; *Id.* p. 190 to 199, 2d edit.

² Ante § 521 to § 525, § 575 to 594, § 825; *Mitf. Eq. Pl. by Jeremy*, 307; *Cooper Eq. Pl.* 312; *Hare on Discov.* 264 to 266, 279, 280; *Agar v. Regent's Canal Company*, *Cooper Rep.* 212, 215; *Wigram Points of Discov.* 196; 1st edit.; *Id.* p. 191 to p. 194, 2d. edit. If the defendant means to rely on this objection he should specially set it up as a ground for refusing the particular discovery in his answer. *Sloman v. Kelly*, 3 *Younge & Coll.* 673; Ante § 607, note.

³ Ante § 599 to § 602, § 632; *Stratford v. Hogan*, 2 B. & Beatt. 164; *Hare on Discov.* 266 to 268; *Greenough v. Gaskell*, 1 *Mylne & Keen*, 99; *Wigram Points of Discov.* 195, 196; 1st edit.; *Id.* p. 191 to p. 194, 2d edit.

⁴ Ante 572, § 825; *Hare on Discov.* 268 to 273; *Wigram Points of Discov.* 21, 22, 111, 113, 147, 148, 149, 195, 196, 1st edit.; *Id.* p. 261 to p. 346, 2d edit.

proper to defend himself from a discovery by a demurrer, or by a plea, he has been permitted by answer to insist, that he is not obliged to make the discovery. In each of these cases, the plaintiff may except to the defendant's answer as insufficient; and upon that exception, it will be determined by the Court, whether the defendant is, or is not, obliged to make the discovery.

§ 847. In most, if not in all other cases, the rule applies, that, if the defendant answers at all, he must answer fully.¹ Indeed, it may be laid down as a general rule subject to the exceptions above stated, that the defendant cannot by answering excuse himself from making a full answer of discovery.² And, therefore, it

¹ Ante § 606, § 846; *Bank of Utica v. Messereau*, 7 Paige R. 517, 520; *Hare on Discovery*, 247 to 262.

² *Hare on Discovery*, 255, 256; 2 *Daniell's Ch. Pract.* 248, 249; *Bank of Utica v. Messereau*, 7 Paige R. 517. In this last case, Mr. Chancellor Walworth said (p. 518); "It is a general rule of pleading in this court, that if the defendant attempts to make his defence by answer, instead of pleading or demurring to the Bill, he must answer fully; that is, he must answer the whole of the statements and charges contained in the Bill, and all the interrogatories legitimately founded upon them, so far as they are necessary to enable the complainant to have a complete decree against him. This was the ancient course of proceeding in this court, as recognised by Lord Macclesfield in *Stephens v. Stephens*, and followed by the decisions of Lord King in *Edwards v. Freeman* and in *Richardson v. Mitchell*, (Sel. Cas. in Chan. 51.) And it proceeds upon the principle, that the complainant is entitled to a full discovery of all facts alleged in the Bill, which may be important to the complainant in the suit, in case he should succeed in showing, that the particular defence attempted to be set up in the answer is false or unfounded. If the defendant pleads or demurs to the Bill, the complainant is not deprived of any part of his discovery if the defence intended to be insisted on is unfounded in law or untrue in point of fact. For if the plea or demurrer is disallowed, the defendant may still be compelled to put in his answer and make the discovery sought by the Bill; and if the plea is overruled as false, at the hearing, the complainant will be entitled to a decree according to the case made by his Bill; and the defendant, if necessary, may be examined on interrogatories. But where the defendant puts in



is very far from being generally true, as is sometimes alleged in the books, that a defendant may, by answer,

an answer denying some particular allegation, which is necessary to the complainant's title to relief, and puts every other allegation in the Bill in issue by a general traverse in the usual form, it is evident, that the complainant at the hearing will be required to prove many things, as to which he was entitled to a discovery, if the particular defence set up in the answer should turn out to be false and unfounded. It is not a little surprising, therefore, that the ancient rule of pleading should ever have been departed from in the court of chancery in England, except in those cases, where the discovery sought was of such a nature, that the defendant could not, under any circumstances, be required to make it; as where it would be a breach of professional confidence, or would criminate himself, or subject him to a penalty or forfeiture. Shortly after the American revolution, however, the ancient rule on this subject was attempted to be changed in the English court of chancery; or rather exceptions were introduced from time to time, which, if continued, would in the end have left but very little difference in substance between an answer and a plea. When Lord Eldon afterwards held the great seal, he became dissatisfied with this new practice, of permitting a defendant, by his answer, to refuse to give a full answer; though I am not aware, that his Lordship repudiated it by any direct decision. The cases of *Rowe v. Teed*, (15 Ves. 372,) and *Somerville v. Mackay*, (16 Idem, 382,) show, however, that he was prepared to do so, whenever a case should come before him, presenting that point directly for his decision. And Sir John Leach, one of the best Equity judges, who has occupied a seat upon the bench of the English court of chancery since the time of Lord Hardwicke, soon after, in the case of *Mazarredo v. Maitland*, (3 Mad. Rep. 70,) declared in favor of the ancient rule on this subject; saying in terms, that he thought it so useful a rule, that he should always adhere to it. Since which time the ancient rule of pleading appears to have been followed in England."

→ Mr. Daniell says; "It is to be observed, that this rule is applicable to all cases, where the defence, intended to be set up by the defendant, extends to the entire subject of the suit; such, for instance, as that the plaintiff has no right to equitable relief—or that he has no interest in the subject—or that the defendant himself has no interest in the subject—or that he is a purchaser for a valuable consideration—that the Bill does not declare a purpose, for which equity will assume a jurisdiction to compel a discovery—or that the plaintiff is under some personal disability, by which he is incapacitated to sue: in all these cases a defendant, who does not avail himself of the objection to answering, either by demurrer or plea, but submits to answer the Bill, must answer it fully (*Hare on Disc.* 256.); unless he comes within any of the cases, which have been before pointed

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avail himself of, and insist upon every ground of defence, which he could use by way of demurrer, or of plea, to the Bill.¹ Thus, for example, it is now set-

out, as affording a special ground for objecting to the discovery sought, either because the discovery may subject him to pains and penalties, or to a forfeiture, or to something in the nature of a forfeiture; or because it is immaterial to the relief prayed; or because it may lead to a disclosure of matters, which are the subject of professional confidence, or of the defendant's own title, in cases where there is not a sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it. The principle, upon which the court proceeds, in exempting a defendant from a discovery under any of the above circumstances, has been fully discussed in considering the grounds, upon which a defendant, although he does not object to the relief, provided the plaintiff makes out a case, which may entitle him to it, may demur to the discovery sought. It is only necessary, therefore, to repeat in this place, what has been before stated, that if a defendant objects to a particular discovery upon any of the grounds above stated, he may, where the grounds, upon which he may object, appear upon the Bill, decline making such discovery by submission in his answer." 2 Daniell's Ch. Pr. 248, 249; S. P. Hare on Discov. 255, 256.

¹ Cooper Eq. Pl. 312; Ante § 439, § 606, 607, note (3), § 647, § 846, and note; Mitf. Eq. Pl. by Jeremy, 209; — v. Harrison, 4 Madd. R. 252. The question, whether a party can by a disclaimer by answer, and insisting, that he had no title, avoid a full answer, has given rise to some diversity of opinion. See Mitf. Eq. Pl. by Jeremy, 283; Id. 188; Hare on Discov. 256 to 259; Ante § 838, § 838 a. It was also formerly thought that the defendant might avail himself by answer, of the protection of being a *bonâ fide* purchaser for a valuable consideration without notice. But that doctrine is now overturned. Portarlington v. Soulbey, 7 Sim. R. 28; Mitf. Eq. Pl. by Jeremy, 307, note (h); Id. 188; Id. 283; Ante § 603, § 810. There are, however, some cases, which appear to interfere with the general rule stated in the text. Lord Redesdale has commented on them in the following passage:—"Although the defendant by his answer denies the title of the plaintiff; yet in many cases he must make a discovery prayed by the Bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a Bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes; though the defendant insists upon a modus, or upon an exemption from payment of tithes, or absolutely denies the plaintiff's title; he must yet answer to the quantity of land and value of the tithes. Or, if a Bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt. But,

tled, that a defendant cannot by answer set up as a defence to a Bill for discovery and relief, that he is a

where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not generally compelled to make any discovery, not material to the trial of the question of title. Thus, where a testator devised his real estate to his nephew for life, with remainder to his first and other sons in tail, with reversion to his right heirs, and made his nephew executor and residuary legatee of his will; and on the death of the nephew, his son entered as tenant in tail under the will; upon a Bill filed by the heir at law of the testator, insisting, that the son was illegitimate, that the limitations in the will were therefore spent, and the plaintiff became entitled, as heir to the real estate, and praying an account of the personal estate, and application in discharge of debts and incumbrances on the real estate; the defendants, against whom the account was sought, insisted on the title of the son, as tenant in tail under the will, and that they were not bound to discover the personal estate, until the plaintiff had established his title. Exceptions having been taken to the answer, and allowed by the Master, on exception to his report, the exceptions to the answer were overruled; the Court distinguishing this case, which showed a *prima facie* title in the defendant, the son of the nephew, from a mere denial of the plaintiff's title. So, when a Bill claimed the title of rabbits on an alleged custom, and the defendant denied the custom, it was determined, that the defendant was not bound to set forth an account of the rabbits, alleged to be tithable. And a like determination was made upon a claim of wharfage against common right, the title not having been established at law. But where a discovery is in any degree connected with the title, it should seem, that a defendant cannot protect himself by answer from making the discovery. And in the case of an account required, wholly independent of the title, the Court has declined laying down any general rule; deciding, ordinarily, upon the circumstances of the particular case. Thus, to a Bill stating a partnership, and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting, that the plaintiff was only his servant; and the Court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account. And, where a plea has been ordered to stand for an answer, with liberty to except to it, as an insufficient answer, the Court has sometimes limited the power of excepting, so as to protect the defendant from setting forth accounts, not material to the plaintiff's title, where that title has been very doubtful." Mitf. Eq. Pl. by Jeremy, 310 to 313. See Hare on Discov. 247 to 255; Id. 256 to 260, 298, 299, 300. See also Cooper Eq. Pl. 315, 316; Ante § 681, a.

bonâ fide purchaser for a valuable consideration without notice ; but if he means to insist upon it, he must do it by way of plea ; because, if he answers at all, he must answer fully.¹ On the other hand, it is equally clear, that the statute of limitations and lapse of time may be relied upon as a defence by answer, as well as by plea and demurrer.²

[*650] *§ 848. We shall now proceed to the consideration of the nature and form of an answer, premising, however, that, where there are several defendants, each [*651] is entitled, *if he chooses (subject to an ultimate question, as to costs, if the proceeding is oppressive), to put in a separate answer, although they have a common defence. But, under the latter circumstances, it is most common for them to put in a joint answer.³ It may also be here added, that a defendant need not generally answer to any part of the charges of a Bill, except what apply to, or concern himself.⁴

§ 849. And, in the first place, in relation to the nature of an answer. An answer generally controverts the facts stated in the Bill, or some of them, and states other facts to show the rights of the defendant in the subject of the suit. But sometimes it admits the truth of the case made by the Bill, and, either with, or without stating additional facts, submits the questions, arising

¹ *Portarlington v. Soulby*, 7 Sim. R. 28 ; *Ovey v. Leighton*, 2 Sim. & Stuart, 234 ; Ante § 603, § 810 ; Post, § 851.

² Ante § 503, § 751 ; 2 Story on Eq. Jurisp. § 1520, § 1521. See also *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 138 to 152 ; *Elmendorf v. Taylor*, 10 Wheat. R. 168 ; *Pratt v. Vattier*, 9 Peters R. 405, 416, 417 ; *Boone v. Chiles*, 10 Peters R. 177.

³ *Van Sandau v. Moore*, 1 Russ. R. 441 ; S. C. 2 Sim. & Stu. 509.

⁴ *Mitf. Eq. Pl.* by Jeremy, 309, note (m) ; *Cooper Eq. Pl.* 315 ; *Newman v. Godfrey*, 2 Bro. Ch. R. 332 ; *Gresley on Evid.* 17, 18 ; *Hare on Discov.* 160, 161, 162.

upon the case thus made, to the judgment of the Court.¹ If an answer admits the facts stated in the Bill, or such, as are material to the plaintiff's case, and states no new facts, or such only, as the plaintiff is willing to admit, no further pleading is necessary. The answer is considered as true ; and the Court will decide upon it.² But, if the answer does not admit all the facts in the Bill material, to the plaintiff's case, or states any fact, which the plaintiff is not disposed to admit, the truth of the answer, or of any part of it, may be denied ; and the sufficiency of the Bill to ground the plaintiff's title to the relief, which he prays, may be asserted by a replication, which in this case also concludes the pleadings according to the present practice of the Court.³

→ *§ 850. An answer in cases, where relief is [*652] sought properly consists of two parts ; and, in fact, performs a double office. It consists, first, of the defence of the defendant to the case made by the Bill ; and secondly, of the examination of the defendant on oath, as to the facts charged in the Bill, of which a discovery is sought, and to which interrogatories are usually addressed.⁴ It combines together, therefore, two proceedings, which in the civil law are completely separated ; and which also are separated in the practice of the Ecclesiastical Courts, though not always in the Courts of Admiralty.⁵ In the civil law, as we have seen, the defendant first puts in his defensive allegation to the claim made by the plaintiff ; and, after an answer to that is put in, the plaintiff propounds, in a sort of supplemental libel, called the *libellus articulatus*, his interrogatories respecting the charges made in the positions of the plaintiff, as they are

¹ Mitf. Eq. Pl. by Jeremy, 15, 16. ² Ibid. ³ Ibid. ⁴ Ibid.

⁵ Gilb. For. Roman. 90, 91, 218 ; Ante § 39 ; Gresley on Evidence, 16.

called, (that is, in his Bill of complaint); and the defendant then responds to those interrogatories.¹ In the Ecclesiastical Courts, where also the defendant is required to make an answer or discovery upon oath, the answer to the interrogatories is in a wholly distinct instrument from the responsive allegation (as it is called) to the libel, which contains the defence of the defendant.² In a Bill in Equity, both of these distinct parts are united in one instrument, called an answer. And this ambiguity in the use of the word, answer, importing this double sense and office, has sometimes led to erroneous decisions, and to no small confusion in language.³

→ [*653] *§ 851. There are many cases, in which a defendant cannot avail himself of his defence, in any other form than by an answer. Thus, if a defence, which can be made to a Bill, consists of a variety of circumstances, so that it is not proper to be offered by way of plea; or if it is doubtful, whether, as a plea, it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much, as goes in bar, as if it had been pleaded to the Bill.⁴ Or, if the defendant can offer a matter of plea, which would be a complete bar; but he has no occasion to protect himself from any discovery sought by the Bill, and can offer circumstances, which he conceives to be favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner.⁵ Thus, if a purchaser for a valua-

¹ Gilb. For. Roman. 90, 91, 218; Ante § 39.

² Gresley on Evid. 16; Hare on Discov. 223 to 228; Wigram on Points of Discov. 11, 94, 113, 114, 1st edit; Id. p. 10, 11, 18, 261 to 268; 298 to 324, 2d edit; Ante § 39, and note (1).

³ Ibid.

⁴ Mitf. Eq Pl. by Jeremy, 308.

⁵ Ibid.

ble consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favor, which he cannot set forth by way of plea, or of answer in support of a plea, such as the expending of a considerable sum of money in improvements with the knowledge of the plaintiff; it may be more prudent to set out the whole by way of answer, than to rely on the single defence by way of plea; unless it is material to prevent the disclosure of any circumstance attending his title. For, a defence, which, if insisted on by plea, would protect the defendant from a discovery, will not in general do so, if offered by way of answer.¹

→ § 852. An answer must be full and perfect to all the material allegations in the Bill. It must state facts, and not arguments.² It is not sufficient, that it contains a *general denial of the matters charged; but [*654] there must be an answer to the sifting inquiries upon the general subject.³ It should also be certain in its allegations, as far as practicable.⁴ To so much of the Bill, as it is necessary and material for the defendant to answer, 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.⁵ And, wherever there are particular precise charges, they must be answered particularly and precisely, and not in a general manner, though the gen-

¹ Mitf. Eq. Pl. by Jeremy, 308, 309; Wigram on Points of Discovery, 191 to 198, 1st edit; Id. p. 190 to 202, 2d edit; Ante § 847.

² Cooper Eq. Pl. 313.

³ Cooper Eq. Pl. 313; Mountford v. Taylor, 6 Ves. 792; Hepburn v. Durand, 1 Bro. Ch. R. 502; Prout v. Underwood, 2 Cox, 135.

⁴ 1 Montag. Eq. Pl. 184.

⁵ Mitf. Eq. Pl. by Jeremy, 309, 310.

eral answer may amount to a full denial of the charges.¹ Thus, where a Bill required a general account, and at the same time called upon the defendant to set forth, whether he had received particular sums of money specified in the Bill, with many circumstances respecting the times, when, and of whom, and on what accounts, such sums had been received; it was determined, that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient. And the plaintiff, having excepted to the answer on this ground, the exception was allowed; the Court being of opinion, that the defendant was bound to answer specifically to the specific charges in the Bill; and that it was not sufficient for him to say generally, that he had in the schedule set forth an account of all sums received by him.²

→ [*655] *§ 853. The answer should, in general, also be full to all the interrogatories, founded on the matters charged in the Bill, unless indeed they are clearly immaterial.³ And one test of materiality is, to ascertain, whether, if the defendant should answer in the affirmative, the admission would be of any use to the plaintiff in the cause, either to assist his Equity, or to advance his claim to relief. If it would, it must be answered, for it is material; if not, it is immaterial, and need not be answered.⁴

¹ Mitf. Eq. Pl. by Jeremy, 309, 310; Cooper Eq. Pl. 314.

² Ibid. Gresley on Evid. 17, 20, 21; Wigram on Points in Discov. 111, and note (g). 1st edit.; See Idem. p. 286, note (i), 2d edition. An answer, which is manifestly evasive, may be considered as no answer, and will be liable to be taken off the files of the Court. *Thomas v. Lethbridge*, 8 Ves. 463; *Smith v. Serle*, 14 Ves. 415.

³ *Kuypers v. Dutch Reformed Church*, 6 Paige R. 570, 573.

⁴ *Gresley on Evid.* 17, 18, 20; *Hirst v. Pierce*, 4 Price R. 394; and

→ § 854. In general, if a fact is charged, which is in the defendant's own knowledge, as if it is done by himself, he must answer positively, and not to his remembrance or belief, or least if it is stated to have happened within six years before.¹ But as to the facts, which have not happened within his own knowledge, he must answer as to his information and belief, and not to his information merely, without stating any belief either one way or the other. As to recent facts, however, within his own knowledge, he must answer positively, and not on

see *Bally v. Kenrick*, 13 Price R. 291; *Bally v. Williams*, 1 McClell. & Younge R. 334; *Hare on Discov.* 160, 161, 162; *Id.* 298; Report of Chancery Commissioners, March 1826, Appendix, p. 2, 3. Mr. Bell, in his evidence before the Chancery Commissioners, speaks of the practice thus; "In respect of the immateriality, it is very difficult to draw a line, as to what is material, and what is immaterial. A case very frequently occurs, that a clerk, in the interrogatory part of the Bill, has not distinguished between what interrogatories belong to one individual, and what belong to another; that he has gone through, and interrogated a trustee with exactly the same particularity, as he has one of the material defendants in the cause. Any gentleman, who saw that, would not think it necessary to go through the whole minutiae of the case in the trustee's answer; but would probably put in a short answer, that he was trustee under such a deed, and that he has or has not acted under that trust, and is perfectly willing to act, as the Court shall direct. But, if there are exceptions taken to that answer, there may be a great number of cases put, I think, where questions might be found, some of which it might be useful to the plaintiff to have had answered, even in those cases, where they would not be evidence against any person, except the party himself; as where they might be extremely useful in extracting evidence from other parties. The general rule, I conceive to be, that he is bound to answer every question, that is asked him, without reference to, whether it is, or is not, material. The Court would probably take care, that that rule was not applied in such a way as to be oppressive to the parties." Ch. Comm. App. 3, Q. 21, 22; and see Q. 23, Q. 33, &c. See *Agar v. Regent's Canal Co. Coop. R.* 212; *Jones v. Wiggins*, 2 Y. & J. 385; and see *Gresley on Evid.* 17, 18, note (g).

¹ Cooper Eq. Pl. 314.

belief, though not so as to the result of a conversation.¹ There is great practical difficulty on this head; for though the answer must meet, in some way or other, every statement in the Bill, and the defendant is required to speak "to the best of his knowledge, remembrance, information, and belief;" yet there will be partial admissions and denials of every shade and character; some delivered in terms of uncertainty; some mixed up with explanatory or qualifying circumstances; and some very loose and general in their language and import.²

§ 855. It was with a view to meet this difficulty, that Lord Clarendon's order was made, declaring, that an answer to a matter, charged as a defendant's own act, must regularly be without saying, "To his remembrance," or, "As he believeth," if it be laid to be done within seven years before; unless the Court, upon exception taken, shall find special cause to dispense with so positive an answer. And if the defendant deny the fact, he must traverse or deny it (as the case requires) directly, and not by way of negative pregnant. As, if he be charged with the receipt of a sum of money, he must deny or traverse, that he hath not received that [*657] *sum, or any part thereof, or else set forth, what part he hath received. And, if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the Bill; but he must answer the point of substance positively and certainly.³ However, it is plain, that no positive rule can

¹ Cooper Eq. Pl. 314; Mitf. Eq. Pl. by Jeremy, 309, 310; Hall v. Wood, 1 Paige, 404; Utica Insurance Co. v. Lynch, 3 Paige R. 210.

² Gresley on Evidence, 20.

³ Beames Orders in Chancery, 179; Id. 28, 29; Mountford v. Taylor, 6 Ves. 792; Gresley on Evid. 21.

fully provide for all the various difficulties in cases of this sort; and each case must, therefore, be decided upon its own circumstances.¹

→ *§ 856. Where there is the general clause of [*658] combination only in the Bill, the defendants need not, though they usually do, answer to it. Where a particular combination is charged in a Bill, a particular answer must be given, and a general denial will not do. A defendant is not obliged to answer facts, which are inter-

¹ See *Neate v. Duke of Marlborough*, 2 Younge & Coll. 3; Ante § 35, § 38. Mr. Bell, in his examination before the Chancery Commission, declared, that "he had always had a very great doubt, and never could bring his mind completely to any general rule on the subject, whether the defendant, when challenged, for not answering with sufficient particularity, might allege, that the question was no more particular than his answer." He gave as an instance to explain the difficulty; "The allegation being that the person had received such a sum of money;" the interrogatory has been, "Have you not received such a sum of money?" and by accident the words "or any person or persons by your order, or for your use," have been omitted; I have known the Master say, under these circumstances, I "will not go beyond your interrogatory." Now, it appeared to me to be an error not to allow an exception on those grounds. It is to let off a man by means of a negative pregnant. I conceive in this case, it would be very proper to report the answer insufficient for not going further, although the words, I mentioned, were not inserted in the interrogatory. But, if you get into a case a little more complicated, it is very difficult to say, how far a defendant should go in explanation. Unless it is clear, you are avoiding a disclosure of the truth by a negative pregnant, I think, you are not bound to go further in your answer than the interrogatory." *Gresley on Evidence*, 20, 21; *Report of Chancery Commissioners*, Appx. 3, Q. 6; Ante § 38, note (2); Ante § 46, note (1). If a Bill state a fact, which is not denied by the answer, and by the answer it appears, that the defendant has the means of answering, as to his belief, by making an inquiry as to that fact, he must answer as to the result of that inquiry; and his stating, that he is unable to set forth, &c. is not sufficient. *Neate v. Duke of Marlborough*, 2 Younge & Coll. 3. If a defendant is interrogated in Equity, in aid of a suit at law, as to the consideration given for a Bill of exchange, the defendant in Equity is bound to state not only the consideration, which he gave for the Bill itself, but that, which he knows another to have given. *Glengall v. Edwards*, 2 Younge & Coll. 125, 126; *Hall v. Wood*, 1 Paige R. 404.

rogated to, without being stated, or charged in the Bill.¹ But if the defendant does answer to such facts, and the plaintiff replies to his answer, they are properly put in issue, though they were not charged in the Bill.² A general charge, however, as to the fact of payment, enables the plaintiff to put all questions upon it, that are material to make out, whether it was paid; and it is not necessary to load the Bill by adding to the general charge, that it was not paid, that so it would appear, if the defendant would set forth, when, where, and other particulars.³ In a suit for an account, an answer going no further, than to enable the plaintiff to go into the Master's office, is not sufficient. He is entitled to the fullest information the defendant can give him by answer, not by long schedules in an oppressive way; but by giving the best account possible, stating, how it is, and referring to books of account and other vouchers, so as to make them part of the answer, and giving the fullest opportunity of inspection.⁴

➤ § 857. Where the defendant has answered all the circumstances of his own case, and as far, as he has any concern in the matters of the Bill, he will not (as has been already stated) be compelled to answer the further [*659] matters *or circumstances of the Bill.⁵ Yet, if he does answer a part of the circumstances, or state a part of a conversation, he will be compelled to state the whole.⁶

➤ § 858. In respect to the necessity and propriety of

¹ Cooper Eq. Pl. 314, 315; *White v. Williams*, 8 Ves. 193; *Fau'der v. Stuart*, 11 Ves. 296; Ante § 36, § 37.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Cooper Eq. Pl. 315; Mitf. Eq. Pl. by Jeremy, 309, note (m); *Hare on Discov.* 160, 161, 162; *Gresley on Evid.* 17, 18; *Newman v. Godfrey* 2 Bro. Ch. R. 332; *Jones v. Wiggins*, 2 Y. & Jerv. 385.

⁶ Cooper Eq. Pl. 315; *Cookson v. Ellison*, 2 Bro. Ch. R. 252.

making a discovery of documents and papers, called for by the Bill, in the answer, a good deal of discussion has of late years been had ; and the subject does not seem free from all difficulties. It seems clear, that the plaintiff is not entitled, as a matter of right, to the discovery and production of any documents or papers called for by the Bill, except those, which appertain to his own case or the title made by his Bill.¹ Documents and papers, which wholly and solely respect the defendant's title or defence, he is not compellable by his answer to discover, or to produce.²

§ 859. But the difficulty, which has been most pressed, is, whether, when the defendant does answer and refer to documents and papers in his answer, he is bound to produce them for the inspection of the plaintiff, upon motion. The question (it has been said), may arise under three different aspects of an answer. (1.) The documents and papers may not be referred to in the answer ; but they may be admitted to be in the defendant's possession. (2.) They may be referred to in the answer, and not be admitted to be in the defendant's possession. (3.) They may be in part set forth, or shortly stated in the answer, as in the defendant's possession, and referred *to in the answer for [*660] greater certainty, when produced ; or, according to the common form, "as will appear by the said documents and papers, to which, for greater certainty, the defendant craves leave to refer."³ In the first case, the ques-

¹ Wigram on Points of Discov. 18, 19, 90, 111 to 146, 1st edit. ; Id. p. 15, 16 ; Id. 46 to 260 ; Id. 260 to 348 ; Id. 363 to 365, 2d edit. See also, Mitf. Eq. Pl. by Jeremy, 9, 53, 54, 190, 191 ; Hardman v. Ellames, 2 Mylne & Keen, 745 to 758 ; Hare on Discovery, 183 to 244 ; Ante § 572 and note (3) ; Id. § 575, and note (1). ² Ibid.

³ Hardman v. Ellames, 2 Mylne & Keen, 755, 756.

tion, whether the defendant shall produce the documents and papers, or not, is determined by considering, whether the documents, do or do not relate to the plaintiff's title. If they relate solely to the defendant's title, they will not be required to be produced. If they relate to the plaintiff's title, they will.¹ In the second case, the Court cannot order the production of the documents and papers, unless they respect the plaintiff's title; and unless, although stated not to be in the possession of the defendant, they happen to be in the hands of some person, over whom the defendant evidently has a control.² In the third case, it seems, that although the documents and papers solely respect the defendant's title, yet the Court will require their production; for the defendant has, by his mode of referring to them, made them a part of his answer.³

¹ *Hardman v. Ellames*, 2 Mylne & Keen, 756.

² *Id.* 756, 757.

³ *Hardman v. Ellames*, 2 Mylne & Keen, 757, 758; Ante § 572, note (3); *Id.* § 574, note (1); Cooper Eq. Pl. 317, 318. This last point is the great question discussed in Mr. Wigram's *Points in Discovery*. He controverts the decision in its favor, in the case of *Hardman v. Ellames*, and insists, that the defendant is not, in such a case, bound to produce documents or papers, which respect his own title. See, especially, Wigram on *Points of Discovery*, 18, 19, 111, 113 to 146; *Id.* 198 to 210; *Id.* 212 to 215, first edition. See also Wigram on *Discovery*, second edition, p. 15, 16, 46 to 260; *Id.* 260 to 348; *Id.* 363, 364, 365. The latter pages contain his conclusions upon the whole subject, in each edition. See Hare on *Discovery*, part 3, ch. 4, p. 183 to 244, where the same subject is largely discussed. See also Gresley on *Evidence*, 25 to 37. The doctrine thus stated, and especially the last point in *Hardman v. Ellames*, was expressly affirmed by Lord Cottenham in *Adams v. Fisher*, 3 Mylne & Craig R. 526, 548, 549. See also *Neate v. Latimer*, 2 Younge & Coll. 257, 262, 263, 264; S. C. 11 Bligh R. 112, 156. Mr. Wigram has commented on the case of *Adams v. Fisher*, in his second edition at large; and the learned reader will (I trust), not deem the following extract, although long, unacceptable. "In *Adams v. Fisher* (3 Mylne & Craig, 526), the plaintiff, (as personal representative of a deceased testator) stated by his Bill, that the defendant Fisher had acted as his solicitor,

→ § 860. If the defendant, in a case, seeking for the discovery of a correspondence, sets forth extracts of letters, and swears, that those are the only parts of the corres-

and had, in that character, received various sums of money on account of the testator's estates, for which he had not accounted ; and that he had in his possession books and papers relating to the testator's estate ; and called for a schedule, and production of such books and papers, and also prayed an account. The defendant admitted collecting the estate of the testator, and the possession of books and papers relating to the estate, and set out a schedule of them, but insisted that he was not the plaintiff's solicitor, but the solicitor of Fisher, who was the person employed by the plaintiff to collect the estate, and that he was accountable to Fisher only, and not to the plaintiff. Upon a motion for the production of the documents in the schedule, the Lord Chancellor refused the motion. In the course of the argument, the Lord Chancellor said ; ' Suppose a Bill is filed by a person claiming to be a creditor or legatee, or in any other assumed character, and the defendant denies, that the plaintiff is, what he is alleged to be ; but states, on the contrary, that he is a perfect stranger, and denies, in short, every thing, on which the plaintiff proceeds ; but, not having protected himself by plea, he is obliged to answer ; is the plaintiff, as a matter of course, to ask for all the documents in the possession of the defendant, which relate to any of the matters introduced in the Bill ? I only want to know, how far you carry the principle ; whether as a mere matter of course, documents which, if the defendant's allegation is true, have nothing to do with proving the case made by the Bill, are to be produced for the plaintiff's inspection ? If a Bill is filed by a person as a creditor, and he asks for all the title deeds of the real estate, is the plaintiff entitled to see the title deeds of a person's estate, because he calls himself a creditor, which the defendant denies that he is ? ' In giving judgment, his Lordship said, ' Here the defendant has denied the plaintiff's interest ; he has, on the record stated, that which, as it stands, in my opinion excludes the plaintiff from instituting this suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents. In deciding, whether a defendant shall be permitted by answer to protect himself against discovery, in cases like *Adams v. Fisher*, the Court has four courses of practice open to it : 1. That of giving to the answer, to all intents and purposes, the force and effect of a demurrer, or plea ; 2. That of giving to the plaintiff the same full right of discovery before the hearing, as he would be entitled to, if his right to relief were admitted or proved, and the only question between the parties was the amount of his demand ; 3. That of laying down some definite intermediate rule, by which the extent of a plaintiff's right to discovery, where by answer the defendant denies his right, may be determined ; and, 4. That

pondence upon that subject, it is sufficient. And the practice is, when such a reference is made to extracts

of leaving the question undefined by any rule, except that which may be described as the 'discretion of the Court.' With respect to the first of these courses, the author is not aware, that it has ever been held in judgment, or suggested in argument, that a defendant can have the same full benefit of a defence by answer, as by demurrer or plea, in withholding discovery. In the case before suggested, of a Bill for an account, if the defendant should plead the statute of limitations, or any plea in bar, he could not be obliged to give any answer to so much of the Bill as related only to the plaintiff's original title to an account, for the plea would admit that. But, if he relied upon the same defence by answer, he would clearly (it is conceived) be bound to give a full answer to so much of the Bill as related to the plaintiff's original title; for a defence by answer does not, even for the purposes of argument, admit any of the Bill to be true, to which the admissions in the answer do not in terms apply. Again; in the case before suggested, of a Bill for an account, the amount of the plaintiff's demand would be part of the 'plaintiff's case.' If a release were pleaded, the plea would shut out all actual discovery, even an answer to the most simple and direct questions relevant to that amount. Now, it admits not of controversy, that if, in the same case, the defence be made by answer, the plaintiff may, by apt charges in his Bill, compel the defendant to answer specific charges, stating or showing the amount of the plaintiff's demand; and it is equally clear, that a defendant, who, by means of such specific charges, has got an admission with which he is satisfied, may take a decree at the hearing of the cause for the amount appearing by the answer to be due to him, instead of going to an account before the Master. This example alone is sufficient to prove, that the plaintiff's right to discovery, where the defence is by answer, attaches, to some extent at least, upon parts of the Bill which a demurrer or plea might wholly cover. The state of the record in *Adams v. Fisher* did not raise this question, and the language of the judgment appears to exclude the supposition, that the Lord Chancellor considered, that an answer could have, to all intents and purposes, the effect of a demurrer or plea. 'Now I took leave,' said the Lord Chancellor (3 Mylne & Craig, 546), 'to ask Mr. Anderdon, how far he carried the principle; and he very properly limits it within its true bounds; that is, he admits, as to every document not necessary to make out the plaintiff's Equity, that the plaintiff is not entitled to see it. Whatever may make out the plaintiff's title he may have a right to see. The documents in question, however, are not to make out Adams's title to have the Bill taxed, and the production of them could not possibly aid the assertion of the Equity which Adams has asserted by his Bill.' The second course above suggested, is

from books of accounts, to have those parts, which the defendant swears to be immaterial, left sealed up. And

that, which the author had considered the rule of the Court prior to the case of *Adams v. Fisher*, but which that decision has undoubtedly displaced. The two extreme courses of practice above suggested, appear, therefore, to be excluded. Before adverting to those, which remain, the author ventures to suggest some difficulties in principle, convenience, and authority, which may be experienced in upholding the decision in *Adams v. Fisher*, and by reference to which (if the decision itself be not affected by them), the future practice of the Court must in a great degree be regulated. First, as to principle. If a defendant, who denies a plaintiff's right of suit may, as in *Adams v. Fisher*, insist by answer, that he is not bound to give discovery upon points subordinate to the question of the plaintiff's title (as the amount of his demand), some difficulty may reasonably be experienced in understanding, how demurrers or pleas barring a plaintiff's right of suit, should in practice have obtained a place among pleadings in Equity. A defendant, who demurs, indeed, may have the benefit of every objection, which is apparent upon the face of the Bill, and a decision in favor of a demurrer, if submitted to by the plaintiff, will put a more speedy termination to a suit, than a defence by answer. But this possible advantage is purchased at the price of a premature discussion of the case, of which, if the demurrer should be unsuccessful upon argument, or the plaintiff be permitted to amend his Bill, or if he should file a new Bill, he will not fail to take advantage. The injurious consequences of such discussions have, almost universally, induced counsel of the greatest experience to advise against the practice of demurring, except where it was of paramount importance to the defendant to avoid some of the discovery sought by the Bill. The necessity for demurring could never have existed, if a defendant could by answer be protected against the discovery, which the demurrer would cover. A plea, which raises a question of law only, is in the same predicament as a demurrer. A plea, however, which raises a question of fact, is open to observations of a graver character, which would necessarily supersede its use, if a defendant might by answer protect himself against discovery, save that, which may be necessary to try the plea itself. If the defendant has several grounds of defence, he will by plea lose the benefit of all, except that which his plea may raise,—whereas by answer he may have the benefit of them all. If circumstances exist, as in the case put by Lord Redesdale, by which the plaintiff's right to relief may be qualified, the defendant, by pleading, may lose the benefit of those qualifying circumstances, which an answer would save. And, if the ground of defence be single, the defendant will obtain no advantage by a plea, which an answer will not equally afford him, but will subject himself to the disad-

though papers, specifically referred to, and admitted to be in the defendant's custody, may be inspected by the

vantage of a premature discussion of his case, which has already been adverted to. Negative pleas were (although reluctantly) admitted in Equity pleadings, because, without such a mode of meeting a case, the defendant was without the means of protecting himself against discovery, although he should deny the plaintiff's right of suit,—a reason, which negatives the supposition, that an answer could have performed the same office. In the cases, which have most frequently, if not exclusively, given rise to discussions upon the point decided in *Adams v. Fisher*, the discovery, against which the defendant has sought protection, has been discovery relevant only to the amount or extent of the plaintiff's demand, the validity of the demand itself being denied by the answer. It is certainly difficult to understand the principle, which, where the defence is by answer, denies the plaintiff's right to discovery material to the proof of the amount or extent of his demand. If the plaintiff may ask a decree at the hearing of the cause for payment of the amount admitted by the answer to be due to him (*Rowe v. Teed*, 15 Ves. 375), which unquestionably he may do, and if, for the purpose of getting that admission, he may compel the defendant to answer specific questions applicable only to the amount of his demand (a power respecting which no doubt can exist), upon what principle shall he be denied discovery, which may be necessary to enable him to suggest those questions to the defendant, by means of which alone he can obtain the admission, upon which a decree for immediate payment of his demand may be founded? The amount of the plaintiff's demand is a point in the 'plaintiff's case,' upon which a decree may be made at the hearing. The admission of the defendant is evidence, upon which that decree may be founded. Discovery from the defendant as to the account sought by the Bill, and documents in his possession relevant to it, are material evidence, by which the requisite admission may be obtained. Upon what principle can a plaintiff, who is permitted to make the immediate payment of his demand the subject of decree at the hearing of the cause, be deprived of any legitimate evidence by means of which the amount of that demand may be established? The effect of denying the plaintiff a right to such discovery, is either to deprive him of his right to a decree for payment at the hearing, or to compel him to take that decree upon imperfect evidence. In the case of a Bill of discovery in aid of a trial at law, where the judgment upon the right and upon the amount of it, are contemporaneous, it would be difficult, if not impossible, to apply the rule. Nor is this the only difficulty in the case. The question, whether a defendant, who defends by answer, must not answer 'throughout,' is capable of being raised in one way only, namely, by exceptions to his answer. In the Court of Chan-

plaintiff upon an order of the Court, which will be granted in such case for that purpose ; yet, if an answer only admits the execution of an instrument, craving leave to refer to it, when produced, it is not a sufficient ground to apply to the Court for the production ; such an answer not admitting, that it is in the possession or power of the defendant.¹ So, a qualified submission to produce a deed, if the Court shall require it, does not fix the defendant, and deprive him of the discretion of the Court, as to the propriety of the production of it. The effect of setting forth the contents of an instrument in an answer, and referring to the instrument for the truth of the statement, in effect, makes the instrument part of the answer.² But it is very different, if a defendant only mentions the existence of a deed in his custody, which destroys the plaintiff's claim (as a release), without going on in the answer to describe it, or offering to produce it ; for, in such a case, the Court will not order the production.³

§ 861. An answer may either contain matter, which

cery, this question always goes before a Master in the first instance. Now, the Court never has allowed the Master to decide, how far a point suggested by the answer is good as a defence to the whole or part of a Bill, nor could it with propriety do so. And, accordingly, as Lord Eldon has pointedly observed, the Master is under a necessity of allowing the exceptions, and the Court is afterwards required to reverse the Master's judgment without being in a position to say, or meaning to say, that the Master was wrong. The practice in the Court of Exchequer differs from that of the Court of Chancery upon the point last adverted to. In the Exchequer, exceptions to an answer come before the Court in the first instance, but even in that Court, authority has by no means recognised, to the full extent, the practice which the case of *Adams v. Fisher*, if followed up, must establish." Wigram on Discovery, § 153 to § 161, pp. 89-98, 2d edit. 1840. See also the comments of Mr. Wigram on *Neate v. Latimer*, Wigram on Discov. § 312 to § 315, p. 227 to 237 ; *Id.* § 437 to § 440, p. 352 to p. 362, 2d edit. 1840 ; Ante § 572, and note.

¹ Cooper Eq. Pl. 317, 318.

² *Ibid.*

³ *Ibid.*

is scandalous ; or it may contain matter, which is impertinent ; or it may be objectionable on the ground of insufficiency in not answering fully the statements and allegations of the Bill.¹

→ § 862. And, first, as to scandal in the answer. If an [*662] *answer goes out of the Bill to state any thing scandalous or improper, the scandal will be expunged by order of Court.² Thus, where it was about bartering for boroughs, it was ordered to be taken off the file. So, if any matter, not material to the defendant's case, is stated, it will be deemed impertinent ; and such matter, upon application to the Court, may also be expunged.³ But, as in a Bill, so in an answer, nothing relevant can be deemed scandalous. It is not the nature of the matter in an answer, which makes it scandalous ; for, if the matter is relevant, according to the case made by the Bill, whatever may be the nature of such matter, it is not scandalous ; and it may have an influence upon the decision of the suit, notwithstanding the nature of it.⁴

§ 863. Secondly. As to impertinence in an answer. We have already seen, that impertinence is, where the pleading is stuffed with long recitals, or with long unnecessary digressions, or where a deed is stated, which is not prayed to be set forth.⁵ So, such objectionable matter may be contained in a schedule ; as if a defendant sets forth a long account, where the Bill does not pray that an account may be set forth.⁶ So, where a Bill called upon the defendant, a solicitor, to set forth, how he computed, and made out his demand upon the plaintiff, with all the particulars relating thereto, and contained interrogatories pointed to particular items, and a

¹ Cooper Eq. Pl. 318.

² Cooper Eq. Pl. 318 ; Mitf. Eq. by Jeremy, 313.

³ Ibid.

⁴ Ibid

⁵ Ante § 266, § 267.

⁶ Cooper Eq. Pl. 318 ; Mitf. Eq. Pl. by Jeremy, 313

minute comparison of two Bills of costs, which had been delivered ; the Court held a schedule to an answer, containing at full length a Bill of costs and observations, with reference to a Bill formerly delivered for the same business, impertinent ; because the defendant, by referring to the Bills delivered, would have fully answered all that *interrogatory.¹ Even though the matter is in sub- [*663] stance proper for the schedule ; yet the mode of expression may constitute scandal. As where the relator was a clergyman, and the defendant, in a schedule of accounts, made a charge for a sum of money paid by him for an order of filiation of a bastard child made upon the plaintiff ; the Court held, on an exception to the Master's report, that, though the defendant might possibly be entitled to such a charge in an account ; yet that the mode of bringing it forward, and stating it, was intended to drive the plaintiff out of his parish ; and it allowed the exception accordingly.²

§ 864. Thirdly. As to insufficiency in an answer. If a plaintiff conceives an answer to be insufficient, he may take exceptions to such answer, which exceptions are always in writing, stating the parts of the Bill, which, the plaintiff alleges, are not answered, and praying that the defendant may in such respects put in a further and full answer to the Bill.³ Exceptions must be signed by counsel, and are then delivered to the proper officer. This must be done within a limited time, according to the course of the Court, though upon application further time will be allowed for the purpose within certain restrictions.⁴ If there are two or more defendants to a Bill, and the defendants answer separately, separate excep-

¹ Cooper Eq. Pl. 318, 319 ; Mitf. Eq. Pl. by Jeremy, 313, 314.

² Ibid.

³ Ibid.

⁴ Ibid.

tions must be taken to each answer.¹ But exceptions to a joint answer may be allowed as to one defendant only. Care must be taken in drawing exceptions, that all the points of insufficiency are stated ; for, after the answer to the exceptions, the plaintiff cannot add to his exceptions. But, upon a clear mistake, as where the plaintiff sent his counsel the wrong draft of the Bill, or where there were [*664] *two causes, and the exceptions were taken from one Bill, instead of the other, the Court having permitted an amendment to be made of the exceptions.²

§ 865. If a defendant conceives his answer to be sufficient, or if for any other reason he does not submit to answer the matter contained in the exceptions, one of the Masters of the Court is directed to look into the Bill, the answer, and the exceptions, and to certify, whether the answer is sufficient in the points excepted to, or not.³ If the Master reports the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the Bill, in which the Master conceives the answer to be insufficient ; unless, by excepting to the Master's report, the defendant brings the matter before the Court, and there obtains a different judgment.⁴ But if a defendant has insisted on any matter, as a reason for not answering, though he does not except to the Master's report ; yet he is not absolutely precluded from insisting on the same matter in a second answer, and taking the opinion of the Court, whether he ought to be compelled to answer further to that point, or not.⁵ If, after the plaintiff has taken exceptions, he obtains the usual order to amend his Bill, and that the defendant may answer the exceptions and

¹ Cooper Eq. Pl. 319, 320 ; Mitf. Eq. Pl. by Jeremy, 315, 316, 317.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

amendments together, he cannot afterwards take a new exception, as to any thing in the original Bill. But he must go before the Master upon the old exceptions, as they apply to the original Bill, and upon the new exceptions, as to the new matter introduced by the amendments; which, however, the Master may consider with reference to such parts of the original Bill, as apply to them.¹

* § 866. Where a defendant demurs to any [*665] part of the discovery sought by a Bill, and answers likewise, the plaintiff cannot take exceptions to the answer before the demurrer has been argued.² If he does, it will have the effect of admitting the validity of the demurrer; the foundation of which seems to be, that it is impossible to determine, whether the answer is sufficient or not, unless the demurrer is admitted to be good.³ But a plaintiff has been permitted in such case to withdraw the exceptions, paying the costs, without prejudice to filing exceptions, if the demurrer should be allowed.⁴ It is the same, where the defendant pleads to part of the discovery, and answers likewise.⁵ But if a demurrer or a plea is only to the relief prayed by the Bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the demurrer or the plea is argued.⁶ If a plea or a demurrer is filed without any answer, and is overruled, the plaintiff need not take exceptions; but the defendant must answer the whole Bill, as if no defence had been made. But if a plea or a demurrer is accompanied by an answer to a single fact, even to the denial of combination, and the plea or the demurrer is overruled, the plaintiff must except to the answer, as insufficient.⁷

¹ Cooper Eq. Pl. 320, 321; Mitf. Eq. Pl. by Jeremy, 316, 317.

² Ibid. ³ Ibid. ⁴ Ibid. ⁵ Ibid. ⁶ Ibid.

⁷ Cooper Eq. Pl. 321; Mitf. Eq. Pl. by Jeremy, 317.

§ 867. Scandal and impertinence in an answer must be disposed of, before its sufficiency can be considered.¹ A reference, therefore, of a defendant's answer for impertinence is good cause against dissolving an injunction, which the plaintiff has obtained.² A reference of an answer for impertinence is waived by a subsequent [*666] reference for insufficiency.³ After a reference *for insufficiency, an answer cannot be referred for impertinence ; but it may for scandal.⁴ Not only the plaintiff, but any of the defendants, may refer an answer of another defendant for scandal against them.⁵ But after a replication has been filed by the plaintiff to an answer, he cannot, in general, either refer it for impertinence, or take exceptions on the ground of its insufficiency.⁶

§ 868. A further answer is in every respect similar to, and, indeed, is considered as forming part of, the first answer.⁷ So, an answer to an amended Bill is considered as part of the answer to the original Bill.⁸ Therefore, if the defendant in a further answer, or in an answer to an amended Bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, or is otherwise necessary, or expedient, will be considered as impertinent. And, if, upon reference to a Master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel, who signed the answer.⁹

§ 869. In the next place, let us proceed to the consideration of the form of an answer. An answer always begins with its title, specifying of which of the defendants it is the answer, and the names of the plaintiffs in

¹ Cooper Eq. Pl. 321, 322.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Mitf. Eq. Pl. by Jeremy, 318 ; Cooper Eq. Pl. 322.

the cause, in which it is filed as an answer.¹ An answer, purporting to be the joint answer of five defendants, cannot be sworn as the answer of three only; but it ought to be amended.² It will be convenient here to observe, that defendants should answer jointly, unless their titles are different; though, upon Bills by rectors and vicars for *tithes, it has been allowed to the defendants to [*667] split their titles in their defence.³ An answer, misnaming the plaintiff, is considered as no answer, and the defendant therefore is not bound by it. If there is an immaterial mistake in a name, the answer may be taken off the file, and resworn.⁴ But, where there is a misnomer of the plaintiff in the cause, and a proper answer is afterwards put in, the first answer will be ordered to be taken off the file, by the description of a paper writing, purporting to be an answer.⁵

§ 870. After the title of the answer, it proceeds to reserve to the defendant all advantages, which might be taken by exception to the Bill; a form, which is probably intended to prevent a conclusion, that the defendant, having submitted to answer the Bill admits every thing, which by his answer he does not expressly controvert, and especially such matters, as he might have objected to by demurrer or by plea.⁶ It will not, however, in general, have that effect, as has been already mentioned.⁷ The substance of the answer, according to the defendant's knowledge, remembrance, information and belief, then follows, in which the matter of the Bill, with the interrogatories founded thereon, are answered one after the other, together with such additional matter, as the defendant thinks necessary to bring forward in

¹ Cooper Eq. Pl. 323; Mitf. Eq. Pl. by Jeremy, 313, 314; Griffith v. Wood, 11 Ves. 62.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

his defence, either for the purpose of qualifying, or of adding to, the case made by the Bill, or of stating a new case on his own behalf.¹ This is followed by a general traverse or denial of all the unlawful combination charged in the Bill, and of all other matters therein contained.² Where, however, such a general traverse is omitted at the end of an answer, it has been held, that [*668] the answer, notwithstanding, *is good; and it is not to be suppressed as improper.³ This general traverse was first introduced in ancient times, when the defendant used only to set forth his case in the answer, without answering every clause in the Bill; and for this reason, it became the practice for the defendant to add, at the end of the answer, this general traverse. But, though it is the practice now to answer every clause in the Bill, and a general traverse therefore seems impertinent, and has been held to be unnecessary; yet this formulary is still continued in answers.⁴

§ 871. The answer of an infant being expressed to be made by his guardian, the general reservation at the beginning, the denial of combination, together with the general traverse at the conclusion, common to all other answers, are omitted.⁵ The reason of this is, that an infant is entitled to every benefit, which can be taken by exception to a Bill, although he does not make such reservation, or expressly make the exception. He is also considered as incapable of entering into unlawful combination; and his answer cannot be excepted to for insufficiency; nor can any admission made by him be binding.⁶ Even the admission in a deceased heir's answer of the will of the testator, has been held not to be

¹ Cooper Eq. Pl. 323, 324, 325; Mitf. Eq. Pl. by Jeremy, 313, 314.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

binding upon the infant heir, who has succeeded him.¹ If a defendant is reduced to a state of second childhood by age and infirmity, the course is for him to answer by a guardian, in the same manner as an infant.² The answer of an idiot, or a lunatic, is also expressed to be made by his committee, as his guardian, or by the person appointed as his guardian, by the Court to defend the suit.³

¹ Cooper Eq. Pl. 324, 325; Mitf. Eq. Pl. by Jeremy, 314, 315. The following form, taken from Barton's Suit in Equity, p. 115 to 121, will explain fully this and the succeeding passages. It is an answer by the executors of a will to a Bill for a legacy, admitting assets, &c.; and is in the most simple form, which can ordinarily arise in practice. "The joint and several answers of Edward Willis and William Willis, two of the defendants to the Bill of complaint of James Willis, an infant, by John Willis, his father and next friend, complainant. These defendants now, and at all times hereafter, saving and reserving to themselves all manner of benefit, and advantage of exception, to the many errors and insufficiencies in the complainant's said Bill of complaint contained, for answer thereunto, or unto so much, and such parts thereof, as these defendants are advised is material for them to make answer unto. They answer and say, they admit, that Thomas Atkins, in the complainant's Bill named, did duly make and execute such last will and testament in writing, of such date, and to such purport and effect, as in the complainant's said Bill mentioned and set forth; and did thereby bequeath to the complainant, James Willis, such legacy of £800, in the words for that purpose mentioned in the said Bill, or words to a like purport or effect. And these defendants, further answering, say, they admit, that the said testator, Thomas Atkins, did by such will appoint these defendants, Edward Willis and William Willis, executors thereof; and that the said testator died on, or about, the 20th day of December, 1748, without revoking or altering the said will. And these defendants, further answering, say, that they admit, that they, these defendants, sometime afterwards, to wit, about the month of January, 1750, duly proved the said will in the Prerogative Court of the Archbishop of Canterbury; and took upon themselves the burthen of the execution thereof, and these defendants are ready to produce the said probate, as this honorable Court shall direct. And these defendants, further answering, admit, that the said complainant, James Willis, by his said father and next friend, did several times, since the said legacy of £800 became payable, apply to them, these defendants, to have the same paid or secured for the benefit of the said

² Ibid.

³ Ibid.

§ 872. The form of the answer, as well as the protestation, seems to have been borrowed from the civil law ; [*670] *for, in the civil law, the form of the answer begins, *Sub protestatione de nimia generalitate, ineptitudine, obscuritate, nullitate, et indebita specificatione dicti libelli*. The oath too, administered in case of an answer, was, *De scientia, in his, quæ proprium tuum factum decernunt, et de credibilitate in facto alieno*.¹

§ 873. A married woman generally answers with her husband ; but sometimes she answers separately by order of the Court ; in which case she answers by her next friend.² Where a marriage has clearly taken place only to defraud creditors, a feme covert may be made to answer, as if she were sole.³ And it has been held, that, where a husband and wife have answered jointly, and

complainant, which these defendants declined, by reason, that the said complainant was, and still is, an infant, under the age of twenty-one years. Wherefore these defendants could not, as they are advised, be safe in making such payment, or in securing the said legacy in any manner for the benefit of the said complainant, but by the order and direction, and under the sanction of this honorable Court. And these defendants, further answering, say, that, by virtue of the said will of the said testator, they possessed themselves of the real and personal estate, goods, chattels, and effects of the said testator to a considerable amount ; and they do admit, that assets of the said testator are come to their hands sufficient to satisfy the complainant's said legacy, and which assets they admit to be subject to the payment thereof, and are willing and desirous, and do hereby offer to pay the same, as this honorable Court shall direct, being indemnified therein. And these defendants deny all unlawful combination and confederacy in the said Bill charged ; without that, that any other matter or thing material or necessary for these defendants to make answer unto, and not herein, or hereby, well and sufficiently answered unto, confessed, or avoided, traversed, or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain, and prove, as this honorable Court shall direct ; and humbly pray to be hence dismissed with their reasonable costs and charges, in that behalf most wrongfully sustained." See also forms in Van Heythusen's Eq. Drafts. 385 to 414.

¹ Gilb. For. Roman. 90.

² Cooper Eq. Pl. 325 ; Ante § 71.

³ Ibid.

the Bill is afterwards amended, and then the husband goes abroad, the wife remaining in this country, and being the material defendant, there must be an order upon her to answer separately, or it will not be any contempt of the Court in her, if she refuses to answer.¹

§ 874. An answer is always under oath, unless the plaintiff chooses to dispense with it ; and then the Court * will order the answer of the defendant to be [*671] taken without oath.² If, indeed, the defendant is entitled to the privilege of peerage, or he is a Lord of Parliament (which, since the union with Ireland, has been held to extend to Irish peers), or if the defendant is a corporation aggregate, no oath is required ; and in such first-mentioned case, the answer is upon the honor of the defendant, and in the last under the seal of the corporation.³ A quaker is allowed to put in his answer upon his solemn affirmation and declaration. Where a defendant files an answer as a quaker without oath, he undertakes that he is a quaker ; so that, if he should be indicted for perjury upon it, he will not be permitted to contradict the assertion.⁴ A Jew is sworn on the Pentateuch, and generally with his hat on.⁵ In the case of a foreigner, not acquainted with the English, an order must be obtained for an interpreter ; and the answer being engrossed in a foreign language, a translation of it must be made by the interpreter, and such translation must be annexed to it.⁶ The foreigner must be sworn to his answer. The interpreter attending is previously sworn to interpret truly, and conveys to the foreigner the language of the oath, and at the same time he swears to the translation as just and true to the best of his ability.⁷

¹ Cooper Eq. Pl. 325 ; Thorold v. Hay, 1 Dick. R. 410 ; Carlton v. McKenzie, 10 Ves. 442.

² Cooper Eq. Pl. 325, 326.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

§ 875. When an oath is not required, generally there must be the signature of the defendant to the answer.¹ But, where the defendant to a Bill of foreclosure was an officer in the army, and had gone abroad under orders, immediately after service of the subpœna and appearance, and before he had time to put in his answer, the answer was, by the consent of parties, ordered to be received *without signature.² The same order was made where the defendant was appointed to a judicial situation in the East Indies, and in the hurry of going abroad had forgotten to sign his answer.³ So, where a person abroad had given a general power of attorney to another person, residing here, to defend suits, &c. in his absence, the answer was directed to be received without any signature at all, rather than to take the signature of any other person for the defendant.⁴ Upon the same principle, where a father had authority to act for his two sons, who were out of the jurisdiction, their answers were ordered to be taken without any oath or signature. But a similar permission was refused in the case of a mere trustee, who was in such an infirm state both of body and mind, as to be wholly incapable of putting in her answer.⁵ The proper course in such a case would be to appoint a guardian to put in the answer; for it is much better, where there is no commission of lunacy, to throw around a person, under such circumstances, the protection of some other person, who is capable, than to let the defendant answer at all hazards, without any oath or signature.⁶

§ 876. An answer must be signed by counsel, unless

¹ Cooper Eq. Pl. 326, 327; — v. Lake, 6 Ves. 171; — v. Guillim, 6 Ves. 285; Bayley v. De Walkiers, 10 Ves. 441; Harding v. Harding, 12 Ves. 159; Wilson v. Grace, 14 Ves. 172.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

it is taken by commissioners in the country under the authority of a commission issued for the purpose.¹ In the latter case the signature by counsel is not required, the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant, as in fact was formerly done.²

¹ Mitf. Eq. Pl. by Jeremy, 315; Cooper Eq. Pl. 327.

² Ibid.

CHAPTER XIX.

REPLICATIONS, AND THEIR CONSEQUENCES.

→ § 877. AFTER the defendant has put in his answer, the plaintiff is to judge, whether the answer is sufficient, and also whether he will amend the Bill. If he neither excepts to the answer for insufficiency, nor amends his Bill, the usual step next taken by him is to file a replication.¹ The replication is the plaintiff's avoidance or denial of the answer or defence, and the maintenance of the Bill, to draw the matter to a direct issue, which may be proved or disproved by testimony.² After the plaintiff has thus replied to the defendant's plea, or answer, he must content himself with the answer, and he cannot then go back to except for its insufficiency, he having admitted the answer to be sufficient, however imperfect it may be.³ In some cases, however, the Court will allow the plaintiff to withdraw his replication, paying the costs, that have been incurred.⁴ Sometimes, no replication is necessary to be filed at all ; as where the defendant, by his answer, admits the plaintiff's case, or sufficient of it to enable him to go to a hearing without the examination of witnesses.⁵ But, as in this last-mentioned case the whole of the answer of the defendant is taken to be true, because he has been precluded from substantiating it by evidence ; it behoves the plaintiff to look attentively into the answer, to see, that the effect of the defendant's

¹ Cooper Eq. Pl. 328, 329.² Ibid.³ Ibid.⁴ Ibid.⁵ Ibid.

admissions is not avoided by any new matter there introduced.¹

§ 878. Formerly, replications were either general, or special, as they still are at law. A general replication, which alone is now used in Equity, is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter, alleged in it, to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the Bill.² A special replication was occasioned by the defendant's introducing new matter into his plea or answer, which made it necessary for the plaintiff to put in issue some additional fact on his part, in avoidance of such new matter, introduced by the defendant.³ This, it seems, was in use in Lord Nottingham's time.⁴ The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication.⁵ And, if the parties were not then

¹ Cooper Eq. Pl. 328, 329. Gilbert For. Rom. 45, has explained the reasons of these proceedings, which are manifestly borrowed from the modes of proceeding in the Ecclesiastical and Civil Law Courts. "When the answer comes in" (says he), "that is the *litis contestatio* in relation to the Bill. But the replication contests the answer; for it avers the Bill to be true, and denies the answer. But if no replication be filed, and the cause be set down upon the Bill and answer only, the answer stands for truth; because, if you do not reply to the answer, there is no *litis contestatio* in relation to it, and then it must be admitted to be true. So, if you file a replication, and do not serve a subpœna to rejoin, and on such subpœna to rejoin, move, that the defendant may examine his witnesses within a definite time, or at least move without a subpœna to rejoin, that the defendant may examine witnesses within a definite time, or that the cause may be set down upon the pleadings; if neither of these ways be taken, and the cause be set down upon Bill, answer, and replication, the answer must be likewise taken to be true; because you do not assign a probatory term to the defendant; and the replication alone is not a proper *litis contestatio* of the answer, unless you join issue, by assigning a probatory term to the defendant."

² Cooper Eq. Pl. 329, 330; Mitf. Eq. Pl. by Jeremy, 321, 322.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

at issue, by reason of some new matter disclosed in the rejoinder, which required an answer, the plaintiff might file a surrejoinder, to which the defendant in his turn might put in a rebutter.¹ The pleadings in ancient times in this manner frequently proceeded to a surrejoinder and rebutter.² But the inconvenience, expense, and delay of these proceedings, occasioned an alteration of the practice.³ Special replications have gone quite out of use; so that, if any material charge is omitted in the Bill, although it is alleged by way of replication, it is not pertinent, nor will it affect the defendant.⁴ In the room of special replications, amendments of the Bill have been substituted; and the plaintiff must now always be relieved according to the form and matter, either originally or by amendment, contained in his Bill.⁵ To the matter thus introduced by the plaintiff, the defendant may put in a further answer, whether required by the plaintiff so to do, or not; and thus he has the advantage and effect of a special rejoinder.⁶

§ 879. But although, according to the present course of the Court, rejoinders, surrejoinders, and rebutters are

¹ Cooper Eq. Pl. 329, 330; Mitf. Eq. Pl. by Jeremy, 321, 322; Gilb. For. Roman. 45, 109, 110; Ante § 676, 677. The form of a general replication is as follows:—"This repliant, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants for replication thereunto, saith, that he doth and will aver, maintain, and prove his said Bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law, to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable Court shall direct, and humbly prays as in and by his said Bill he hath already prayed." Barton's Suit in Equity, 144, 145.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

disused ; yet the plaintiff, after replication, must serve upon the defendant a subpœna, requiring him to appear to rejoin, unless he will appear gratis.¹ A rejoinder is, however, seldom, or never actually filed ; but cases may arise, in which a rejoinder may possibly be necessary.² As where the plaintiff has examined a witness *de bene esse*, and afterwards replied, without proceeding to serve a subpœna to rejoin ; the defendant may immediately file a rejoinder, and compel the plaintiff to examine in chief his witness examined *de bene esse* ; and the *neglect of this will render the depositions taken [*676] *de bene esse* nugatory, if the witness lives long enough to be examined in chief.³

§ 880. The effect of a replication and rejoinder is to put the cause completely at issue between the parties ; for, immediately after the defendant has appeared to rejoin gratis, or after the return of a subpœna to rejoin served on the defendant, and which, by an order obtained of course, is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses to support the facts, alleged by the pleadings on each side.⁴

§ 881. Replications and rejoinders are never drawn, perused, or signed by counsel, but are wholly managed by solicitors. There are, therefore, many cases, which come to a hearing, in which, if the pleadings were

¹ Mitf. Eq. Pl. by Jeremy, 323 ; Cooper Eq. Pl. 330.

² Ibid.

³ Cooper Eq. Pl. 330 ; Mitf. Eq. Pl. by Jeremy, 323. This is the English practice. But in America, generally, if not universally, the pleadings terminate with the replication, and no rejoinder is filed ; and the cause is deemed fully at issue upon the filing of the replication. This is the general practice in the Courts of the United States.

⁴ Cooper Eq. Pl. 330 ; Mitf. Eq. Pl. by Jeremy, 323.

looked into, it would be found, that no issue had been joined between the parties.¹ If it is discovered, that a replication has never been filed, and yet witnesses have been examined, the Court will permit the replication to be filed, *nunc pro tunc*. It is not, however, in general, until after replication and rejoinder, that the parties are required to join in a commission and to proceed to the examination of witnesses.²

¹ Cooper Eq. Pl. 331, 335 ; Mitf. Eq. Pl. by Jeremy, 323 ; Rodney v. Hare, Moseley R. 296. The replication, and the proceedings thereon, were apparently also borrowed from the civil law, as the following extract from Gilb. For. Roman. 113 and 114, will show. "The replication is the contestation of the answer ; and this must be filed, in order to put the answer in issue. By the ancient civil law, the plaintiff was to give security (as is herein before mentioned), to prosecute his suit in two months ; and if he did not, he was to be dismissed, and answer damages to the party. This begot the rule, that the plaintiff must reply in three terms ; and if he did not, the defendant might move for a dismissal, with costs. The rule in the Exchequer is more according to the form of the common law ; for, after plea pleaded, the plaintiff was to reply the then next term ; and if he did not, the defendant gave him a rule to reply in a week of the subsequent term, and if he did not, there was an order for dismissal, as in such cases there was judgment at law, for want of a replication. But if there were several defendants, one could not get an order for dismissal, till a full answer came in from them all ; because the plaintiff cannot go to proof against one only, since publication must pass against them all, before the decree can be obtained. But then the plaintiff must, without delay, pursue the process of the Court against the other defendants. Whenever the replication is filed, in order to close the *litis contestatio*, there must be a subpœna to rejoin, which is according to the old civil law, which required a citation, in order to form the act of the Court ; and, therefore, the first citation was to answer ; the second to rejoin, upon which the probatory term was formed ; and the third was the subpœna or citation to hear judgment. But if the defendant delayed the plaintiff upon the first citation, the Court very justly might impose terms upon him, such as to rejoin gratis, and that he should consent to form the probatory term, without the service of a subpœna to rejoin. If the plaintiff replies, the defendant can never dismiss the Bill, without hearing the cause ; because the defendant may rejoin gratis, and prove his answer, and so bring the cause to a hearing. But this rule is now altered ; for if a plaintiff replies, and never serves the defendant with a subpœna to rejoin, nor takes any step towards the making of proof, but sleeps for three

² Ibid.

§ 881. *a.* In this connection it may be proper to say a few words as to scandal and impertinence in interrogatories to witnesses and in depositions, as we have already made some remarks upon scandal and impertinence in Bills and answers.¹ It is obvious, that it is indispensable for the purposes of justice, that Courts of Equity should prevent improper interrogatories and depositions containing matters, which are either scandalous and impertinent, from being introduced into the cause, when they have nothing to do with the merits, and are designed to create false impressions, or unfounded prejudices. Upon a suggestion, therefore, that the interrogatories exhibited, or depositions taken by either party in a cause, the Court will order them to be referred to a Master to report, whether they contain any scandalous or impertinent matter; and if the Master should report them to be so, the Court will direct such matter to be expunged, and costs paid by the offending party or witness.²

terms, the defendant may dismiss the plaintiff by re-joining, or setting down the cause; because they look upon the replication, though it be a contestation of the answer, to be only matter of form; and, therefore, if the plaintiff afterwards sleeps for three terms, he acquiesces in a dismissal. And the mere filing of the replication, though it does put the defendant in a capacity of making proof of his answer; yet, if the plaintiff will acquiesce, and not take any steps towards the proving of his Bill, it would be very hard, that the defendant should be put to the trouble and charge of setting it down at his own request. But if witnesses have been examined, and publication passed; there, though the plaintiff should sleep three terms, it must be set down *ad requisitionem defendantis*; because the Court cannot make a decree upon acquiescence, when the plaintiff might have proved the allegations of the Bill." See also, Gilb. For. Rem. 45, 108.

¹ Ante § 48, § 266, § 267, § 268, § 269, § 270; Id. § 861, 862, § 863.

² Gude v. Mumford, 2 Younge & Coll. 445, 446.

CHAPTER XX.

AMENDMENTS AND OTHER INCIDENTS OF PLEADING.

§ 882. HAVING thus gone over the various kinds of pleadings in Equity, it remains only to add a few remarks in this place, upon some incidents, which have not been fully noticed before, and seem necessary to complete our survey of the subject.

§ 883. As, in Courts of Equity, mispleading in matter of form is never allowed to prejudice any party, the real and substantial merits of the case are always looked to.¹ No exceptions to formal minutiae in the pleadings are usually insisted on ; or, if insisted on, they are never allowed by the Court to prevent a hearing upon the merits.² For the Court will, upon the discovery of any errors of this sort, allow an amendment of them ; or will wholly overlook them at the hearing, as waived, by not being excepted to in an early part of the proceedings.³ In many cases, also, Courts of Equity will allow substantial defects to be amended, if the cause is in such a stage, as that they can be properly amended ;⁴ and the circumstances, therefore, under which amendments are allowed to be made, constitute a proper subject of our further inquiries.

§ 884. And, first, as to amendments by the plaintiff. Amending the Bill may be useful for various purposes ;

¹ Cooper Eq. Pl. 332.

² Ibid.

³ Ibid.

⁴ Id. ; Mitf. Eq. Pl. by Jeremy, 324, 325.

for the correction of mistakes ; or for the suppression of impolitic admissions in the original statements ; or for adding new parties ;¹ or for inquiring into additional facts ; or for the further investigation of facts, which have been only partially disclosed ; or for putting in issue new matter, stated in the answer.²

§ 885. If the plaintiff, after he has filed his Bill, finds, that he has omitted to state any matter, or to join any person, as party to the suit, which he ought to have done, he may supply such defect by amending his Bill.³ Or, if, after the defendant has put in his answer, the plaintiff thereby obtains new lights, as to the circumstances of his case, he may amend his Bill, in order to shape his case accordingly.⁴ And, in general, any imperfection in the frame of a Bill may be remedied, as often as occasion shall require. If any necessary parties are omitted, or unnecessary parties are inserted, the Court, upon application, will permit the proper alteration to be made upon terms, according to the nature of the case.⁵ But the matter introduced by amendment, must not be matter, which has happened since the filing of the Bill (which is termed new matter), unless, indeed, the defendant has not put in his answer, in which case the Bill may be amended by adding supplemental matter.⁶

§ 886. The application by the plaintiff to amend

¹ Ante § 237, § 541, as to what amendments may be made under the general order to make new parties. See also *Stephens v. Frost*, 2 Younge & Coll. 297 ; *Milligan v. Mitchell*, 1 Mylne & Craig, 433, 442.

² *Gresley on Evid.* 21, 22, 23 ; *Hare on Discov.* 22, 23, 24.

³ *Mitf. Eq. Pl. by Jeremy*, 55, 325, 326 ; *Post* § 887.

⁴ *Mitf. Eq. Pl. by Jeremy*, 55, 325, 326.

⁵ *Ibid.*

⁶ *Cooper Eq. Pl.* 332, 333 ; *Mitf. Eq. Pl. by Jeremy*, 207, 290, 324, 325, 326 ; *Id.* 55 ; *Ante* § 328, § 335, § 336.

must also be at the proper stage of the cause, in which amendments are, by the practice of Courts of Equity, allowed. The proper time to apply for leave to amend is, before the cause is at issue.¹ And the cause is pro- [*680] perly *at issue, when the replication is in, and the pleadings are closed; and, at farthest, when the subpœna for a rejoinder, if one is required, is returned, or the rejoinder is put in.²

§ 887. However, the Court, if the commissions have not issued to examine witnesses, will allow the replication to be withdrawn, in order to enable the plaintiff to make an amendment in his Bill. And, indeed, if no witness has been examined, an amendment has been permitted, even after publication has passed.³ But, after witnesses have been examined, the Court will not, unless under very special circumstances, or in consequence of some subsequent event, allow the Bill to be altered or amended.⁴ An exception has been admitted in the case

¹ Cooper Eq. Pl. 333; Gilb. For. Roman. 49, 108; Mitf. Eq. Pl. by Jeremy, 55, 324, 325; Ante § 332, § 614. Although it is usual to allow amendments to be made in Bills at any time before issue joined; yet it is not always a matter of course; for under particular circumstances, the Court has refused to allow material amendments to be made after the answer has been put in, especially where laches were imputable to the plaintiff. Thus, where underwriters brought a Bill for discovery after the answer was put in, they moved for leave to amend by adding charges relative to matters, which might, with proper diligence have been originally put in issue by the Bill, the amendment was refused by the Court. *Mills v. Campbell*, 2 Younge & Coll. 398, 399. So, where after a plea was allowed and replied to, the plaintiff moved to withdraw his replication, and to amend the Bill so as to vary the case originally made, the Court refused the application, although perhaps, it might have been granted if applied for at the time the plea was allowed. *Barnett v. Grafton*, 8 Sim. R. 72.

² Cooper Eq. Pl. 330; Mitf. Eq. Pl. by Jeremy, 323; *Hare on Discov.* 22, 23, 24.

³ Cooper Eq. Pl. 333.

⁴ Mitf. Eq. Pl. by Jeremy, 325.

of the plaintiff's discovering the necessity of new parties, which the plaintiff may add at any time by leave of the Court, limiting his amendment to that purpose.¹ Sometimes, leave has also been given to amend the prayer of the Bill under particular circumstances, after the proper time has passed; as where the prayer has been omitted by mistake; or the prayer for the proper relief has not been made.² But these are rare exceptions, and not easily allowed.

§ 888. If the necessity of adding new parties arises from the death or marriage of any of those, who were first made parties to the Bill, this cannot be done by amendment; but, the cause being abated, a Bill of revivor must be exhibited, in order to bring such new parties before the Court.³ So, if the fact, desired to be stated on *the record, has arisen subsequent to the filing [*681] of the original Bill, and of the defendant's putting in his answer; such as the bankruptcy of one of the parties, or a devise of the lands in question, in case lands constitute the subject of the suit; in each of these cases a supplemental Bill must be filed.⁴ So, if the plaintiff thinks some discovery from the defendant, which he has not obtained, is wanting to support his case, he may file a supplemental Bill to obtain that discovery.⁵ Any matter also, at any time, which cannot be made the subject of an amendment may be charged in a supplemental Bill.⁶ But the plaintiff cannot, upon such a supplemental Bill,

¹ Cooper Eq. Pl. 333; Mitf. Eq. Pl. by Jeremy, 325.

² Cooper Eq. Pl. 333; Mitf. Eq. Pl. by Jeremy, 325, 331.

³ Cooper Eq. Pl. 333; Mitf. Eq. Pl. by Jeremy, 325, 326.

⁴ Cooper Eq. Pl. 333, 334.

⁵ Cooper Eq. Pl. 334.

⁶ Ibid.

examine witnesses to any fact put in issue by the original Bill.¹

§ 889. The original rule, as to the time of allowing amendments, was probably borrowed from the civil law, according to which the plaintiff, by the leave of the Court might add any new positions to the libel before the replication was filed; for the replication was the contestation of the answer. And after the answer was contested, there could be no new positions; but the parties went immediately to the proofs.²

[*682] *§ 890. Hence, also, the rule is derived, that, before issue joined, the only way to introduce new matter, which occurred before the filing of the Bill, is by way of amendment. It cannot be introduced by way of a supplemental Bill.³ The reason assigned is, because the original cause is then but *in fieri*. After issue joined, a supplemental Bill (as we have seen) may be filed by leave of the Court; because the first cause is closed. But such supplemental Bill cannot be brought without leave of the Court; because the plaintiff cannot introduce

¹ Cooper Eq. Pl. 333, 334; Mitf. Eq. Pl. by Jeremy, 325, 326; Ante § 334, § 335, § 336, § 345 to 350.

² Gilb. For. Roman. 108; Id. 48; 2 Bro. Civil and Adm. Law, 347, 348. Gilbert, in his For. Roman. p. 48, 49, has added some explanatory observations. "By the canon law," (says he) "the libel cannot be amended *post litem contestationem*. This rule was exceedingly strong in the old civil law; for the *litis contestatio* being before the prætor, the judge had only a commission to hear that cause; and he could not alter or change it. And therefore he did not take the *judicium* to be *ceptum*, till the *litis contestatio*. But after the *litis contestatio*, they were supposed to be under a *quasi contractus*, to submit to the sentence; because they received the judges by agreement of both parties from the prætor. And though there was the same judge both for the *litis contestatio*, and the sentence in the canon law; yet they allowed the time for reforming the libel to be only *ante litem contestatam*, and that *post litem contestatam* it comes too late; for that would be to make another cause, which is not in contest."

³ Ante § 332.

new matter into the same cause, after the time for amendment has passed, so as to make it a part of it, without the permission of the Court.¹

* § 891. After a plea is set down for argument, [*683] the plaintiff may amend his Bill; and, though taking exceptions to an answer, accompanying a plea, is an admission of the plea, as has been before mentioned;² yet amending the Bill, after a plea, is said not to have the effect of allowing the plea.³ So, at any time before a demurrer is allowed, the plaintiff may amend the Bill.⁴ If, upon the hearing the cause, the plaintiff appears entitled to relief, but the case made by the Bill is insufficient to ground a complete decree, the Court will not allow

¹ Gilb. For. Roman. 49; Ante § 333, § 337, § 345 to 350. Gilbert has explained this matter more fully in his For. Roman. p. 108, 109. "But if any new matter," says he, "was discovered after replication, they might, by leave of the Court, file a supplemental Bill, touching any matter of fact, that was discovered after such replication; for the supplemental Bill was in the nature of a new cause, which might be brought, by leave of the Court, after the *contestatio litis* in the former cause; and the Court might lengthen the time for publication, after such supplemental Bill and answer came in; because the prolongation of the probatory term was very much in the breast of the Court. But, if the supplemental Bill be moved for after publication, the Court never gives them leave to examine any thing, that was in issue in the former cause, by reason of the manifest danger of subornation of perjury, where they have a sight of the examination of the witnesses. But for matter of account, there may be a supplemental Bill after publication; because they examine to such matters of account before the Master or deputy after publication. And this is from the necessity of the thing; because the charge or discharge must be made up privately before the Master or deputy; and therefore they being in charge and discharge, the particulars of which must be proved, such accounts being now kept by books or notes, and formerly by scores or tallies one against another. And therefore a supplemental Bill in matters of account is seldom refused. So likewise a supplemental Bill may be for any fact discovered after publication passed, that was not in issue in the same cause, and where such fact might vary the decree. But after the decree is pronounced and enrolled, it must be by Bill of review and reversal."

² Ante § 689.

³ Cooper Eq. Pl. 334.

⁴ Ibid.

an amendment ; but it will sometimes give the plaintiff leave to file a supplemental Bill, to bring before the Court such matter, as is necessary, in addition to the case made by the original Bill.¹ If the addition of parties is only wanted, an order is usually made for the cause to stand over, with liberty for the plaintiff to amend the Bill by adding the proper parties.² And in some cases, where a matter has not been put in issue by a Bill with sufficient precision, the Court has, upon the hearing of the cause, given the plaintiff liberty to amend the Bill, for the purpose of making the necessary alteration.³

§ 892. The Court, considering infants as particularly under its protection, will not permit an infant plaintiff to be injured by the manner, in which his Bill has been framed.⁴ Therefore, where a Bill, filed on behalf of an infant, submitted to pay off a mortgage, and upon hearing the cause, the Court was of opinion, that the infant was not bound to pay the mortgage, it was ordered, that the Bill should be amended by striking out the submission.⁵ And, where a matter has not been put by a Bill properly in issue, to the prejudice of the [*684] infant, *the Court has generally ordered the Bill to be amended.⁶

§ 893. Sometimes, upon the hearing of the cause, it has appeared, that a matter properly in issue, or at least stated in the proceedings, has not been proved against parties, who have admitted it by their answers, although not competent so to do, for the purpose of enabling the Court to pronounce a decree. In these cases, the Court

¹ Cooper Eq. Pl. 334, 335 ; Mitf. Eq. Pl. by Jeremy, 326, 327 ; Ante § 689.

² Ibid.

³ Ibid.

⁴ Mitf. Eq. Pl. by Jeremy, 327 ; Cooper Eq. Pl. 335.

⁵ Ibid.

⁶ Ibid.

has permitted the proper steps to be taken to obtain the necessary proof; and for this purpose has suffered interrogatories to be exhibited.¹ And, where the plaintiff has neglected to file a necessary replication, the Court has allowed him to supply the defect.² Thus, where a Bill was filed on behalf of creditors, for satisfaction out of real and personal estates, devised to trustees for that purpose, and, subject to that charge, in strict settlement; and the answers of the tenant for life, and of the first remainder-man in tail, who was an infant, were not replied to; the Court on the hearing, directed, that the plaintiff should be at liberty to reply to those answers, and to exhibit interrogatories, and to prove their debts against those defendants, as they had before proved them against the trustees; and it reserved the consideration of the directions necessary to be given upon such new proof.³

§ 894. Secondly; as to amendments on the part of the defendant. A defendant may amend his pleading; but this is allowed with much more caution than in the *case of a plaintiff.⁴ A demurrer cannot, as a [*685] plea, be good in part and bad in part, with reference to its extent, or to the quantity of Bill covered by it; and if it is too general, it must be overruled.⁵ But the Court has a discretion, if a fair case is made, to give the defendant leave to amend, and narrow it, upon proper terms, which is a guard upon the practice.⁶

¹ Mitf. Eq. Pl. by Jeremy, 329, 330; Cooper Eq. Pl. 335. Mr. Cooper (Eq. Pl. 335) has added in this connexion—"And where a plaintiff set down his cause to be heard on Bill and answer; and had a decree against the defendant by default; and when the defendant came to show cause against the decree, it was altered in his favor, the plaintiff petitioned to rehear the cause, and at the rehearing prayed leave to reply to the defendant's answer, which the Court granted." 1 Eq. Abridg. 43.

² Ibid.

³ Ibid.

⁴ Cooper Eq. Pl. 336; Mitf. Eq. Pl. by Jeremy, 327, 328.

⁵ Ante § 443, § 692.

⁶ Cooper Eq. Pl. 336.

§ 895. With respect to the amendment of pleas, there certainly have been cases, in which the Court has permitted them to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient.¹ Yet the Court always expects to be told precisely, what the amendment is to be, and how the slip happened, before it will allow the amendments to take place.² But, though it is not usual to refuse leave to amend pleas; yet the defendant will be tied down to a very short time, in which to amend.³ And where a plea seemed incapable of amendment, the defendant had leave to withdraw it, and to plead *de novo* in a fortnight.⁴ Where a plea is clearly good in substance, but is considered as objectionable in point of form, as for not concluding either in bar or otherwise, and for not stating some other necessary things, leave has been given to amend.⁵

§ 896. But in the case of answers, and of pleas put in upon oath, the Court will not, for obvious reasons, easily suffer an amendment to be made.⁶ In a small matter, however, the defendant may amend; but not in a material one, unless upon evidence to the Court of [*686] surprise.⁷ *The most common case of amending an answer is, where, through inadvertency, a defendant has mistaken a fact, or a date; there, the Court will give leave to amend, to prevent the defendant from being prosecuted for perjury.⁸ In general, however, this indulgence is confined to cases of mere mistake or surprise in the answer.⁹

¹ Cooper Eq. Pl. 336; Newman v. Wallis, 2 Bro. Ch. R. 143, 147; Nobkissen v. Hastings, 2 Ves. jr. 85; Ante 701.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Cooper Eq. Pl. 336, 337; Mitf. Eq. Pl. by Jeremy, 327, 328.

⁷ Ibid.

⁸ Ibid.

⁹ Mitf. Eq. Pl. by Jeremy, 327, 328.

§ 897. A distinction has also been made between the admission of a fact, and the admission of a consequence in law, or in Equity. Therefore, where a defendant, after putting in an answer, discovered a ground of defence to the Bill, of which he was not before informed, viz., a purchase by the person, under whom he claimed, without notice of the plaintiff's title, which could only be used by way of defence, and could not be the ground of a Bill of review ; the Court allowed the answer to be taken off the file, and the new matter to be added, and the answer to be resworn.¹

§ 898. But where the application was to strike out of the defendant's answer several words, importing, that he had received £1300 in full of his advancement from his father in his lifetime, which he refused to bring into hotchpot ; and the defendant afterwards swearing, that he had mistaken the law in that point, desired to be at liberty to waive any admission he had made as to it, and to wait, till the Master had made his report ; it was refused.²

*§ 899. So, where a Bill was brought by the [*687] next of kin against an executor for an undisposed-of surplus, and the executor answered, and waived the benefit of the surplus by mistake of the law ; though he afterwards proved, that the testator intended him to have the surplus ; yet he was not suffered to amend his answer.³ But a defendant, after a general admission of assets, has been permitted to amend his answer, by ad-

¹ Mitf. Eq. Pl. by Jeremy, 328 ; Cooper Eq. Pl. 337 ; Patterson v. Slaughter, Ambler R. 292, and Mr. Blunt's note (1).

² Cooper Eq. Pl. 337 ; Pearce v. Grove, Ambl. R. 65 ; Mitf. Eq. Pl. by Jeremy, 328.

³ Ibid.

mitting assets to pay the plaintiff's debt only, if the same did not exceed £400.¹

§ 900. So, on an application to amend a schedule to the defendant's answer, an indictment for perjury having been preferred, or, at least, threatened, the Court refused to interfere, although it was taken to be clear, that the defendant did not mean to perjure himself, as he had no interest in so doing.² That question was properly the subject of consideration before the grand jury, who, if they thought, that the defendant did not mean to perjure himself, would throw out the indictment. On the other hand, if there were any ground for the indictment, it would be wrong for the Court to interpose.³

§ 901. In proceedings upon oath, as in the case of an answer, where there is a clear mistake, the answer was, by the old practice, allowed to be taken off the file, and a new answer put in.⁴ But Lord Thurlow adopted a better course, not taking the answer off the file, but permitting a sort of supplemental answer to be filed; that course leaving the parties the effect of what had been sworn before, with the explanation given by the supplemental answer.⁵ But to obtain such permission, [*688] the *defendant must state by affidavit, that, when he put in his answer, he did not know the circumstance, upon which he applies, or any other circumstances, upon which he ought to have stated the fact otherwise.⁶ However, where an answer had misnamed the plaintiff, it was considered as no answer, and the de-

¹ Cooper Eq. Pl. 337, 338; *Rawlins v. Powell*, 1 P. Will. 297; *Dagly v. Crump*, 1 Dick. 35.

² Cooper Eq. Pl. 338; *Verney v. Macknamara*, 1 Bro. Ch. R. 319, and Mr. Belt's note (1).

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

defendant therefore not bound by it ; and a proper answer being put in, the former was ordered to be taken off the file, by the description of a paper writing, purporting to be an answer.¹ Exceptions also to an answer have been permitted to be amended, where there has been a mere mistake.²

§ 902. Upon the hearing of a cause, the same indulgence will be granted to a defendant, as to a plaintiff. If it has appeared, that the defendant has not put in issue facts, which he ought to have put in issue, and which must necessarily be in issue, to enable the Court to determine the merits of the case ; he will be allowed to amend his answer for the purpose of stating those facts.³ Thus, where to a Bill for tithes, a *modus* had been set up as a defence, and it appeared from the evidence in the cause, that there was probably a good ground for opposing the plaintiff's claim, though the defendant had mistaken it ; the Court permitted him to amend his answer.⁴ But on the rehearing of a decree, an answer cannot be amended, but by consent of parties.⁵

§ 903. Where a fact, which may be of advantage to a defendant, has happened subsequent to his answer, it cannot with propriety be put in issue by amending his answer.⁶ But, if it appears to the Court on the hearing, *the proper way seems to be, to order the cause [*689] to stand over until a new Bill, in which the fact can be put in issue, can be brought to a hearing with the original suit.⁷ A Bill for this purpose seems to be in the

¹ Cooper Eq. Pl. 338, 339 ; Jennings v. Merton College, 8 Ves. 39 ; Wells v. Wood, 10 Ves. 401 ; Dolder v. Bank of England, 10 Ves. 284.

² Ibid.

³ Cooper Eq. Pl. 339 ; Mitf. Eq. Pl. by Jeremy, 327, 328.

⁴ Ibid.

⁵ Ibid.

⁶ Cooper Eq. Pl. 340 ; Mitf. Eq. Pl. by Jeremy, 329.

⁷ Ibid.

nature of a plea *puis darrein continuance* at the common law.¹ So, where new matter in an account is discovered before the hearing, but after a replication is filed, the Court will permit a supplemental answer to be put in.²

§ 904. In most of these cases, the indulgence, given by the Court, is allowed to the mistakes of the parties, and with a view to save expense. But when an injury may arise to others, the indulgence has been more rarely granted.³ And so far as the pendency of a suit can affect either the parties to it, or strangers, the matter, brought into a Bill by amendment, will not have relation to the time of filing the original Bill; but the suit will so far be considered as pending only from the time of the amendment.⁴ But, where a Bill seeks a discovery from a defendant, and having obtained that discovery, the Bill is amended by stating the result, it should seem, that the suit may, according to circumstances, be considered as pending from the filing of the original Bill, at least, as to that defendant, and perhaps as to the other parties, if any, and to strangers also, so far as the original Bill may have stated any matter, which might include in general terms the subject of the amendment.⁵

[*690] *§ 905. Even upon the hearing, as has been already noticed, the Court, having the whole case before it, and being embarrassed in its decision by defects in the pleadings, has permitted amendments, both of Bills and answers, under very special circumstances.⁶

¹ Cooper Eq. Pl. 340; Mitf. Eq. Pl. by Jeremy, 329.

² Ibid.

³ Mitf. Eq. Pl. by Jeremy, 330, 331; Cooper Eq. Pl. 340. Mr. Cooper has in this connexion added—"And not only the parties to a suit are allowed all fair and liberal indulgence; but it is even extended to witnesses in a cause, whose depositions are permitted to be amended in case of clear mistake; the Court always aiming to act upon broad principles of justice, disentangled as much as possible from little technicalities."

⁴ Ibid.

⁵ Ibid.

⁶ Mitf. Eq. Pl. by Jeremy, 331.

Where new matter has been discovered, either by the plaintiff or the defendant, before a decree has been pronounced, deciding on the rights of the parties, a supplemental or a cross Bill has been permitted, to bring such matter before the Court, to answer the purposes of justice; instead of allowing an amendment of a Bill or answer, where the nature of the matter discovered would admit of its being so brought before the Court.¹ And after a decree, upon a similar discovery, a Bill of review, or a Bill in nature of a Bill of review, has been allowed for the same purpose; both these forms of proceeding being in their nature similar to amendments of Bills or answers, calculated for the same purposes, and generally admitted under similar restrictions.² It may, however, happen, that by the mistake, or negligence, or ignorance, of parties, their rights may be so prejudiced by their pleadings, that the Court cannot permit important matter to be put in issue by any new proceeding without so much hazard of inconvenience, that it may be better, that the individual should suffer an injury, than that the administration of justice should be endangered by allowing such proceeding.³

§ 906. The remarks contained in the last section, constitute the closing paragraph of Lord Redesdale's great work on Equity Pleadings; and they furnish a fit admonition for the close of the present imperfect Commentaries. *Upon a careful review of the whole [*691] 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

¹ Mitf. Eq. Pl. by Jeremy, 331, 332.

² Ibid.

³ Ibid.

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 him for all his toils. 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 command 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.

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