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An Analysis of the Principles of Equity Pleading : Containing a Compendium of the High Court of Chancery, and the Foundation of Its Rules : Together with an Illustration of the Analogy Between Pleadings at Common Law and in Equity

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THE PRINCIPLES

OF

EQUITY PLEADING

AN ANALYSIS

OF THE

PRINCIPLES OF EQUITY PLEADING

CONTAINING A

COMPENDIUM OF THE PRACTICE OF THE HIGH COURT OF CHANCERY, AND THE FOUNDATION OF ITS RULES, TOGETHER WITH AN ILLUSTRATION OF THE ANALOGY BETWEEN PLEADINGS AT COMMON LAW AND IN EQUITY.

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Τὰ κοινὰ καινῶς.

"Colligere tantum eadem, et disponere, paullo significantius conor."
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EDITOR'S PREFACE.

Since the publication in 1823 by Mr. D. G. Lubé of his Principles of Equity Pleading that work has been recognized by the profession as a standard treatise upon that subject. The two generations of lawyers and judges who have come and gone since Lubé wrote have contributed little to the art and science of equity pleading, so that to-day Lubé's work is the best in existence. In this edition of the second part of his work the Editor has added little to the text of importance and has omitted substantially nothing. The only object he had in view in preparing this edition was to obtain a text suitable for the use of the student.

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PREFACE.

It has long been a subject of reproach that the study of the law has degenerated from a liberal and scientific pursuit into a mere mechanical process of acquiring forms by dint of manual labor at the desk. How far this general censure on the profession may be just, we will not now stop to inquire; but this much we may be permitted to observe, that they who would confine the education of a lawyer to mere books, without affording the student the advantages to be derived from the practice of an office; and those who, on the other hand, recommend to have the pupil immersed in all the details of business, without a previous competent knowledge of the theory, would equally pursue a system erroneous and unprofitable.

Precision of language is so essential to law proceedings that the change or omission of a word frequently frustrates the object in view; and hence has arisen the custom of adhering to such forms as experience has determined to be adequate. Without settled forms the most extensive and profound acquaintance with the theory could not secure the practicer against overlooking, in the hurry of business, some point, or, perhaps, some phrase, important to his case.* No general course of reading will ever suffice to draw the attention to these minute, but necessary points, the knowledge of which can be derived from practice alone in the office of some experienced guide who, in rectifying the errors and supplying the omissions of the pupil's first efforts, can at the same time inform him of the reasons and rules of law which suggest the propriety of the alteration. This at once serves as an illustration of the theory of the law, and impresses its maxims on the memory, and thus the pupil gradually increases in confidence, until he feels himself competent to enter the lists of the profession, and perform his duty to his client with facility and dispatch.

On the other hand, to plunge the student at once into all the servile drudgery of copying precedents, and literally adhering to

* "Nihil simul inventum est, et perfectum." Co. Litt. 230, a.

forms, the origin and meaning of which is seldom comprehended, and frequently never investigated, is to begin at the wrong end, and is certainly liable to all the animadversions cast upon that illiberal mode of education which degrades one of the noblest and most useful sciences into a narrow and insignificant art, and which has given occasion to all the obloquy from time to time heaped on a profession, thus requiring a very ordinary degree of capacity in the acquisition. A man so trained may be an expert mechanic, but can never be a sound lawyer. Besides, a system of this kind enfeebles and contracts the mind, by bindfng it down to a timid and obsequious subservance to the very syllable and letter of the form, from which it durst not deviate because ignorant of its utility and effect. Hence the worse than useless prolixity of deeds and other law writings, and the accumulation of unnecessary phraseology everywhere to be met with in the written proceedings. The student who has gone through an ordeal of this kind, previous to his admission to the bar, comes out the "*leguleius cautus atque acutus auceps syllabarum cantor formularum.*" But such a process of initiation is abhorrent to the mind imbued with the taste of classic literature and fresh from the spring of genuine science. The study of the law, however, when properly pursued, is perfectly congenial to the most enlightened intellect, connected as it is with ethics, legislation and rhetoric.

If, as Mr. Locke has affirmed, morality be capable of demon stration, *a fortiori* are the propositions of law, the terms of which are precise and well defined, susceptible of proof. The laws of our country, in fact, form a connected and well digested system of mutually dependent rules, even to its minutest ramifications, and those propositions which, when isolated, appear arbitrary, and sometimes even attended with hardship, if traced to their source, will be discovered as necessarily flowing from some fixed and just principle of legislation. On this principle the following pages attempt to pursue the course of the subject under investigation, up to its fountain head, rather than track the several channels of its divergence; their design is more to point out the origin and *rationale* of the rule, than to hunt after the shades of difference in its application; "*potius fontes expectere quam sectari rivulos.*" By this process of analytical research, the student will sometimes be surprised to find himself landed on a conclusion, by necessary infer-

ence, which he may elsewhere meet with as an unsupported dictum, or resting only on the authorfty of decision. Indeed, it seems to be the prevalent fault of our law tracts that they heap together a multitude of independenl rules, for the accuracy of which they are contented to refer to the cases where they occur, without ever once adverting to the grounds of their adoption; and the work is esteemed in proportion to the diligence with which cases are collected, and to the number of references in the margin. This may be abundantly useful, as the plan of a work of consultation, for the benefit of such as are satisfied with point-learning, but cannot be advantageous as an elementary treatise. On the contrary, the attention is distracted and the intellect wearied by the infinity of minute distinctions, and it requires the most patient industry and indefatigable zeal to draw any general conclusion from a multitude of apparently contradictory authorities.

A treatise intended for instruction should do little more than sketch an outline of first principles, carefully discriminating between those propositions which are essential to the understanding of the subject, and those superfluous corrollaries which only create embarrassment. The student thus conversant with the elements of his science, will be able to reason *a priori* upon every new case that is presented to him, instead of being obliged to have recourse to analogy, which is oftentimes a fallacious, and at best, a laborious test. He will have less occasion to depend on the exercise of his memory, and at every step that he advances, he will find order and harmony throughout the whole progress of his acquirement. Even the monotonous routine of the office, in the place of a mindless task of copying forms, is raised by him to intellectual dignity, and he finds, even in that employment, a new and beautiful application of foregone knowledge to present practice.

With this object in view, various books have been written to assist the student, both in conveyancing and special pleading; but nothing of the same kind seems to have been attempted in equity drafting, partly from the notion that there is less nicety required in equity pleadings, which are not so liable to be vitiated by verbal flaws, or errors of form, and partly, perhaps, from an idea that there can be no systematic arrangement of the subject—an opinion that is countenanced by the latitude of indulgence prevalent in equity, and its apparent deviations from the technical subtleties of

common law. But that this is a mistake arising from want of sufficient attention to the forms of pleading in equity, will, it is imagined, be apparent from a perusal of the following sheets. We have endeavored to reduce the pleadings in equity into a scientific method, to show their analogy to the pleadings at common law, and of both to the principles of dialectics. Hitherto the pupil has been left without any other guide than a few imperfect precedents, and the scanty observations that are to be found scattered among books of practice; added to which, he has to struggle against a very faulty enumeration of the parts of a bill calculated to mislead and perplex him. The deficiency in this particular has long been sensibly experienced, and the following analysis is an attempt to supply the desideratum.

As the original design was principally for the instruction of pupils, the author thought it right to prefix an epitome of the practice; which, however, from his anxiety not to omit anything which might be of utility, has gradually been raised into an important portion of the work. He trusts, at the same time, that this part of the performance will not be found superfluous; as, not satisfied with seeing that *ita lex scripta est*, he has endeavored throughout to discover the origin and reason of the rule. This attempt is, for the most part, entirely new; nnd so far as he has been enabled to succeed, is elucidatory of many points, which otherwise appeared confused and irrelevant. He has carefully abstained from encumbering the memory with any disjointed matter, while he has been diligent not to overlook anything material to a just apprehension of the subject, being desirous of making it a useful as well as convenient compendium. In this point of view, solicitors who wish to acquire a knowledge of the principles of practice, will find it advantageous, at the same time that it is sufficiently copious for the purposes of general reference.

The author ventures to hope that a previous acquaintance with the present work would materially abridge both the labor and duration of the pupil's service in the equity draftsman's office; and as such, he recommends it to those young friends who are destined for that branch of the profession. He also suggests the propriety of not hastening too cursorily over the subject, as many parts of it may appear at first somewhat difficult and abstruse. The pupil should advance cautiously, secure of understanding previous points,

before he presses on to their deducibles, and proceed always *a notioribus ad minus nota.*

With this advice the author takes his leave—concluding with the exhortation of Cicero to his friends—"*Quamobrem pergite, ut facitis, adolescentis; atque in id studium, in quo estis, incumbite, ut et vobis honori, et amicis utilitati, et reipublicæ emolumento esse possitis.*"*

* Cic. de Oratore, Lib. 1.

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CHAPTER I.

OF PLEADING IN GENERAL.

"And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading; and therefore I counsaile thee especially to imploy thy courage and care to learne this."—*Littleton.*

1. The science of pleading has been so long regarded by those who are ignorant of its true nature and objects as a system invented for the purpose of evasion and perversion of justice, an opinion which is unfortunately countenanced by the frequent miscarriages of causes upon small and trivial niceties in pleading, [*a*] that it will be necessary for us to enter into the consideration of pleading in general, its use and design, in order to rescue it from undeserved obloquy, and to endeavor to remove from the mind of the pupil the unfavorable impression he is apt to conceive on his first entrance upon the study.

2. From the number of minute and intricate rules laid down in the treatises on this subject, collected from decisions in an infinite variety of cases, the compilers of which consider it quite sufficient to refer to the authorities without stating the reason upon which the rule is founded, the student finds himself involved in a net of inextricable difficulties and niceties, for which he in vain seeks for a solution. He is terrified in approaching a subject which

[*a*] Hale's Hist. Com. Law, 212.

at first seems necessary to be committed to memory in order to be mastered. He is in despair when he observes its complication and minute magnitude, and he too often throws it up in disgust, from supposing that substantial justice is, in many instances, intercepted by mere technical, and, to him, apparently unmeaning forms. Add to this, that from the abuses that from time to time have crept into the system, "special pleading" has been long a byword for sophistry and the splitting of straws. We cannot, therefore, be much surprised at the number of prejudices to be overcome, on commencing the study of this branch of the profession, that so few ever become acquainted with its real principles, and that so little has been done towards bringing back the science to that ancient simplicity and perfection to which it had attained in the reign of Edward the Third. [*a*]

3. It will be our business, then, to make an effort to justify the encomiums of Littleton upon it; and to prove, as Lord Mansfield says, that the "substantial rules of pleading are founded in strong sense and in the soundest and choicest logic; and so appear, when well understood and explained;" but which (as he remarks in the same case) "by being misunderstood and misapplied, are often made use of as instruments of chicane." [*b*] To this purpose we must commence, by endeavoring to arrive at a clear and precise notion of what it is a man does when he is said to bring an action, or institute a suit against another. When a person feels himself aggrieved, and cannot otherwise have redress, he applies to the law to interpose its authority, in order to restore to him a right that is withheld, or to give him reparation for an injury sustained. But the law will not interfere by its minis-

[*a*] *Vide* Hale's Hist. Com. Law. Co. Litt., 304, b. (*h*).
[*b*] 1 Burr., 319.

terial officers, upon the bare suggestion of injury; it requires that the wrong shall be proved, and the right substantiated, for otherwise it might be turned into an instrument of violence. For this purpose courts of judicature have been erected, where the claims of the parties may be contested and the judgment of the law ascertained, before its sanction is awarded. The courts of law have, on their part, laid down certain rules and formulæ of proceeding, which long experience has taught to be the best adapted to the purpose of arriving at a speedy and just decision; a departure from which rules must occasion great inconvenience, and sometimes a manifest defect of justice. Hence causes are frequently delayed by the raising of mere technical, and, to a common observer, frivolous objections. And although this is an evil much to be regretted, it is one that arises more from the ignorance of practicers than from any inherent blemish in the law. [*a*] This is an observation which applies with peculiar force to pleading, the propriety and utility of the rules in which are not always so discernable as in the other branches of practice.

Section I.

Analysis of the Pleadings at Common Law.

4. Upon complaint being made to a court of justice, its first step is to summon the defendant to appear and answer the allegations made against him. As it would be

[*a*] 1 Bos. & Pul., 59; where it is observed by Eyre, Chief Justice, that "infinite mischief has been produced by the facility of the courts 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."

contrary to justice to pronounce an opinion "*altera parte inaudita*," the defendant thereupon comes and contests the plaintiff's right, either by disputing its legality or denying the facts, or some particular fact, on the ground of which such right is claimed; or alleging on his own behalf, such matter as would operate to avoid the plaintiff's demand, by showing that no cause of complaint existed; or if it once existed, was subsequently removed. These are such answers as go to the *merits* of the point in dispute. But independently of these, there are *preliminary* objections which may be taken, to excuse the defendant from entering into any contest about the matter—as that the court applied to by plaintiff for relief, is not the one proper to take cognizance of the suit; or that the plaintiff is, for some reason foreign to the cause of action, not entitled to claim the assistance of a court of justice; or lastly, that there is some defect in the mode of proceeding, which would ultimately render the interference of the law abortive.

5. These disputations of the parties were originally delivered "*ore tenus*" in court, and were noted down by the officer, that the court might understand what was the real point of controversy. And if any objection arose upon the law of the case, it was at once decided on argument. If the dispute turned upon a question of fact, it was sent to be ascertained, according to its appropriate mode of trial. In process of time, however, as the business of the courts increased, the parties were sent out of court to settle among themselves the terms of the question upon which the judgment of the court was demanded, or the verdict of a jury required; and thenceforward the counsel on both sides drew up, in writing, the several allegations and answers of their respective clients, until, in course of the altercation, they arrive at some disputed point of law,

or some material fact, distinctly alleged on one side and denied by the other; for not until then did they require the assistance of the court or jury. These preliminary disputations of the parties are termed *Pleadings;* and the point to which they arrive, is called the *Issue.*

The foregoing view at once furnishes us with the true end and design of pleadings, which is nothing more than to disencumber the question at issue between the parties of all irrelevant and perplexing matter; that so the court and jury may be saved from embarrassment by having the points submitted to their consideration distinct and material, and that the parties themselves may be spared the trouble and expense of unnecessary litigation. This accords with what Sir Matthew Hale says of "the art or dexterity of pleading," which, as he expresses it, in its use, nature and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty. [*a*]

6. The student will observe that the rules of pleading, how complicated or abstruse soever they may appear, are all built upon the foundation of this single principle, and all aim at the accomplishment of this one object. It may seem extraordinary to some, how so plain and definite an object could ever be lost sight of in stating the claims of the conflicting parties, or that a principle so obvious could give birth to a system of rules upon which volumes have been expended; but whoever will reflect upon the many arguments which arise in ordinary conversation, and how few of them are ever brought to any conclusion, solely in consequence of the disputants traveling out of the true point in debate, will cease to be surprised at the first; and when we come to consider that the most abstruse and extensive sciences are founded upon data,

[*a*] Hist. Com. Law, 212.

comparatively few and simple, and that pleading is, in fact, a very important branch of dialectics, or the art of right reasoning, we shall no longer be astonished at the complication and variety of its rules, which in reality, are no more than a counterpart of the rules laid down in the system of logic. Of this we shall have occasion to speak more at large by and by. These rules, when properly understood, are all conducive to the same end, and are perfectly intelligible when referred to the principle above stated. It is only when they are regarded as so many independent propositions, and grounded upon mere authority (in which light our writers on pleading are too much accustomed to treat them), that they appear to the student as an arbitrary and unmeaning collection, calculated to involve and embarrass the real justice of every case.

7. We shall now proceed to show the application of these principles to the several pleadings on either side, taking each of them separately as they occur on the part of the plaintiff and defendant: and first, of the *statement of the injury* suffered by the plaintiff, and his *application for redress.* Here then are two points to be considered: first the nature of the wrong sustained, and how it is to be set out; and, secondly, the plaintiff's right to make the application to *the particular court*, and the form of such application. Of each of these in their order:

8. First, as to *the statement of the injury.* "Wrongs convey to us an idea merely negative, as being nothing else but a privation of right." [*a*] In complaining of a wrong done to him, therefore, the plaintiff does nothing more than to set out a *right* of which he has been deprived. This leads us to the consideration of rights, which are nothing more than legal or equitable relations. To prove a right,

[*a*] 3 Blacks, Com. 2.

then the *relation* in which it is related must be distinctly shown. And here we must premise that in speaking of relations we allude more particularly to such as arise *ex contractu*, and are the foundation of action of that nature, as being more analogous to cases in equity, and quite sufficient for purposes of illustration. Relations, again, let in three separate considerations: first, the parties with their several disabilities and liabilities in law; secondly, the subject matter, or contract, with circumstances under which it was made; and lastly, the legal and equitable incidents or rights, the withholding of any of which is the cause of complaint. Who, then, for a moment reflects upon the vast and diffusive field of controversy which this includes, can be surprised at the difficulty attending upon the preliminary arrangement of the points in litigation, or the number of minute regulations that have from time to time been found necessary to be adopted in order "to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty."

Hence, we see that the *statement* of the injury is composed of these three points: the setting forth the relation between the parties; the right accruing by such relation, and that such right is withheld. This entirely agrees with the ancient view taken of a declaration at common law, which was said to consist of three parts—the demonstrative, the declarative, and the perclose or conclusion. Here the *demonstrative* part, which states the names of parties, and the *nature* of the action corresponds with the setting forth of the right, because at common law certain actions were given for certain injuries; the *declarative* part which explains the *cause* of action is equivalent to the showing the relation between the parties, and the *perclose* is the complaint of injury sustained. The first and principal point, therefore, with the plaintiff, is to show his right,

and however complicated and diffuse the statement in a declaration at common law, or a bill in equity, may appear, it is nevertheless reducible to two propositions declarative of such right. The *first* proposition states the rule of law, that a certain right flows from a certain relation; the *second*, that the parties stand in such relation.

1. The *first* is proved—1st, by act of parliament, on which turns the question of construction; 2d, by precedent, on which turns the meaning and extent of the rule gathered from the precedent; 3d, by analogy, where a still more general rule is to be collected, from a variety of analogous cases, or from the universal principles of equity itself.

2. The *second* proposition is founded on the facts of the case, as stated in the declaration at common law, and the bill in equity. But these statements may be untrue, or inadequate. Their truth which is a question of fact, is decided by the verdict of a jury, at common law; and in equity, by written depositions and the defendant's admissions upon oath. But, secondly, the facts, though proved to be true may be inadequate to sustain the assumed relation. As if, for instance, a man, who claimed some duty arising from the relation of copartnership, was unable to prove a contract for the participation of *loss* as well as profit (for without such essential ingredient, it would not be a copartnership concern,) [*a*] he would thereby fail to establish the relation on which his claim was founded, and this is frequently the ground of non-suit at law, and of dismissing the bill in equity. This point of adequacy, is purely a question of law, and is proved by showing that the case made out has all the essential qualities of the assumed relation; or in other words, that the facts proved,

[*a*] Hesketh v. Blanchard, 4 East., 144.

bring the case within the application of the rule of law, laid down in the first proposition. The conclusion here is as much demonstration as any theorem in pure quantities.

9. Next, as to the *application* for *redress:* although every man who has suffered wrong is *prima facie* entitled to redress in a court of justice, yet as the law has established for the convenience and dispatch of business, several distinct and independent judicatures, with exclusive jurisdiction, the plaintiff must take care to bring his action or commence his suit in such court as has authority to take cognizance of the wrong complained of; otherwise, besides the general inconvenience that would result from an opposite course, great injustice might be done to the defendant if he were obliged to contest the right in an incompetent court, for want of adequate means of defence.

Secondly, there are certain disabilities, some of which are only temporary, imposed by law, which restrict those who are subject to them from suing in a court of justice; and, on the other hand, there are certain privileges attached to individuals in particular capacities, which exempt them from liability.

Thirdly, as the courts have by a series of decisions, laid down a system of proceedings which experience has proved to be the best calculated to attain the ends of justice, the application for redress must follow the established forms, that the defendant may at once know what and how to answer. The complaint must likewise be so framed as that the whole question, and between all the parties, may be brought before the court; since, otherwise, the defendant would be harrassed by uselessly contesting a suit in which complete and ample justice could not be finally administered. And, lastly, we may add under this head that no man is permitted to sue another while a former suit for the same cause of action is pending, either

in the same or any other court of competent authority. "*Nemo debet bis vexari pro eadem causa.*"

10. We now come to the pleadings on the part of the *defendant*, or the answer which he gives to the complaint made against him; and here an obvious distinction presents itself, corresponding with the division we have made of the complaint into the *statement of the injury* and the *application for redress.* The defendant either directly answers the *statement of the injury* by denying it altogether or, or by confessing and avoiding it; or, secondly, if there be any objections to the *application for redress*, founded upon the reasons specified in the preceding section, he states such a ground why he should not be further called to account, at least until the disability be removed or informality rectified. The former are called *pleas in bar*, and go to the merits of the cause. The latter are termed *pleas in abatement*, their sole effect being to set aside the complaint, and are sometimes distinguished by the appellation of *dilatory pleas*, because their operation, for the most part, is only temporary.

11. As, therefore, pleas in abatement being merely objections to entering into the "*litis contestatio*," must precede the "*litis contestatio*," itself, we shall commence our observations with them; and, in point of fact, a defendant, after putting in a plea in bar, cannot plead in abatement, for, by submitting to answer the substance of the complaint, he waives all preliminary exceptions which might have been taken to the mode of application. The several species of pleas in abatement are conformable to the subdivision we have noticed in the application for redress.

1. First, therefore, if the suit be instituted in a court which has not competent authority, the defendant may state that circumstance as a reason why he should not

answer to the cause of complaint; and this kind of dilatory plea is called *a plea to the jurisdiction.*

2. Secondly, the defendant may allege in abatement of the suit, either, first, a legal disability on the part of the plaintiff, disentitling him from seeking the assistance of a court of justice, or some privilege of the defendant, which saves him from responsibility. Of these, some are only temporary, and are the proper subject of abatement; others, again, are permanent and take away all right of action *at any time.* These latter, therefore, are of an amphibious character, and may be pleaded in bar as well as in abatement; for it is manifest that these latter may be considered as an answer to the very cause of action, by annulling the relation between the parties. This second species of pleas in abatement are termed *pleas to the persons;* and under this head may be classed such pleas as state that the plaintiff is a fictitious person or dead.

3. Thirdly, if there be any defect in the mode or form of proceeding adopted by the plaintiff, arising from mistake or want of certainty in his statement of the cause of action, in consequence of which the real merits of the question cannot conveniently be inquired into, or, when inquired into, cannot lead to any satisfactory result, the defendant may take advantage of it by pleading the same in abatement of the complaint. The plea of want of proper parties is a plea of this nature, as also the plea of the pendency of another action for the same cause. Pleas of this last kind are strictly *dilatory* pleas, and have this quality annexed: that where the deficiency is in a point which comes more properly within the knowledge of the defendant, he must give the plaintiff a better form, *i. e.*, at the same time that he states the error he must show how it may be corrected, as, for example, when he pleads a misnomer he must give the real name, for justice must

not be eluded by any frivolous evasion. These pleas are called *pleas in abatement*, because they go particularly to quash the form of proceedings. The same objections, if they appear on the face of the pleading, may also be taken by *special demurrer*, which is the denial of the sufficiency of the pleading, in the particular matter *specified;* for this is a mere point of law, and does not involve any dispute as to fact.

12. Next, as to pleas in bar, or answer as to the merits of the complaint, the substance of every complaint being, as we have already seen, the subtraction of some *duty or right* (these being co-relative terms) derived from an existing *relation*, the only conclusive answer must be, either of the four following

Modes of Defence.

1. First, confessing the relation, to deny *the right;* and this is the general issue in law, and is called a demurrer; an issue being, as was before stated, formed of an affirmative and negative. [*a*]

2. Secondly, confessing that the right demanded would follow from the relation assumed, to deny generally the *existence of the relation*, which is the general issue in fact, or to deny some particular allegation, upon which the whole relation rests.

3. Thirdly, confessing the right and relation, to deny the *subtraction.*

[*a*] It may appear startling, from its novelty, to class demurrers under the head of pleas in bar; but taking the definition of pleas in bar to be such answers as go to the gist of the action, demurrers are clearly a species, being the pleading which tends an issue *in law* as the general issue does *in fact;* and the general is confessedly a plea in bar. In reality, however, it matters little how the parts are distributed, provided the arrangement be intelligible; and that has been the principal aim of the present treatise.

4. And fourthly, confessing the subtraction, to give *some valid reason to excuse* the non-performance of a duty. The two latter are called *special* pleas in bar.

13. Again: *the reason assigned in excuse* may be twofold, in reference to the two propositions concerning the relation and the right. *First*, it may be *some new matter* to *invalidate* the *prima facie relation* set out in the complaint; or *secondly*, it may be *some new matter* by means of which, supposing the *relation* to exist, yet the *right* derived from it is gone; and here it is obvious that the reason alleged must be of new matter; for if the same statement appeared on the face of the complaint, the defendant might at once deny the right; which, as observed above, would be a demurrer, or general issue in law. It has been before remarked that relations may be considered with respect to the *parties*, the *subject matter*, and the *incidents*.

1. First, then, to *invalidate the relation*, the new matter may show, *first*, that the *parties* were incapacitated from contracting the relation, or are incapable to continue it. *Secondly*, that the *subject matter* was insufficient or illegal, or had undergone some alteration. *Thirdly*, that the *right*, being incidental, had not accrued.

2. Second, the new matter may show that the *right*, though once existing, is barred by the act of the *party;* by the act of *law;* or, lastly, by the act of *God*, or unavoidable calamity.

The student, upon examination, will find that every possible species of defence is included under the above heads, and may be referred to some one of the foregoing classes—a proof of the correctness of the principles from which they are deduced.

14. Upon an attentive investigation of the *four modes*

of rebutting the complaint just enumerated, it will be seen that the fourth is in a great measure resolvable into the second; for it is manifest that whatever matter is adduced to demonstrate that the relation is invalidated or its incidents altered, will tend to prove that it is not the same as stated in the complaint, and therefore may be *denied generally;* and this, at first view, would appear to be the shortest course. In effect, many things which might be pleaded specially in excuse, are allowed to be given in evidence under the general issue, in avoidance of the claim. [*a*] But there are three grand objects achieved by special pleas: first, the law and the fact are kept distinct; second, the issue is narrowed, by means of which the points to be proved in evidence are considerably diminished, and the parties saved expense; and third, the court and opposite party are apprised of the nature of the defence. Wherever the attainment of these three ends, therefore, is not materially obstructed, the court has given great latitude in allowing the general issue to be pleaded.

15. From what has been said above, it is clear that to constitute a sufficient answer to any material allegation in a pleading, the adverse party must either deny the allegation altogether, or *confess* the fact, and *avoid* the inference, viz.: by setting up some new matter *consistent* with such allegation, but which, if true, is an answer to it. [*b*] If, however, he set forth matter *inconsistent* with the allegation, by way of avoidance, this will not be sufficient, without a direct denial of the allegation. And this for two reasons; first, because as the *inconsistent* matter is in effect a different statement, both statements may relate to distinct subjects and so be both true; [*c*] and, second,

[*a*] 1 Chitty on Pleading, 468.

[*b*] 1 Saunders, 22, n. 2.

[*c*] Bennett v. Filkins, 1 Saund., 23.

such denial avoids prolixity, by tendering an issue at once, and gives the party an apportunity to prove his allegations.

16. A denial of this kind, prefaced by matter of avoidance, is called a *traverse*, and begins with the technical words "*absque hoc.*" The preceding statement is termed the *inducement*, [*a*] and such formal traverse is only necessary when it is requisite to show that the point traversed is material; [*b*] otherwise a simple denial, according to the second mode of defence, will be sufficient. [*c*] As the inducement, therefore, shows the materiality of the traverse if the inducement be bad, the traverse will be insufficient. The inducement, however, cannot be met by a denial, because it is enough for the opposite party to prove his allegation true (which the traverse enables him to do), and then the inducement being of inconsistent matter, if relating to the same subject, must be false; or relating to a different subject, does not operate as an avoidance. This is the meaning of the rule laid down in the books, that "a traverse cannot be taken after a traverse." [*d*]

17. The immediate use and design of pleading is the formation for an issue, which Lord Coke defines to be "a single, certain, and material point, issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative." [*e*] As soon as this object is effected, therefore, in such manner as to answer the whole of the precedent pleading, the matter is brought to a close; and the party who first arrives at that point is said to tender an issue; and concludes by praying

[*a*] 1 Saund. 22, n. 2. I Chitty, 592, n. (g) and 699.
[*b*] Com. Dig. Pleader, G. 20.
[*c*] 1 Saund., 103, b.
[*d*] 1 Chitty on Pleading, 612 Com. Dig. Pleader, G. 17.
[*e*] Co. Lit., 126, a (*q*)

the judgement of the court, if it be a question of law; or if it be a matter of fact, he concludes to the country, *i. e.*, he demands a trial by jury; for if it be a disputed record; he appeals to the record itself, and the adverse party joins issue by doing the like. On the other hand, when a pleading introduces new matter by way of avoidance or excuse, it only concludes with a verification, because such new matter may be contested as to its validity in law or its truth in fact, or the other side may adduce new reasons to invalidate it in turn. In this latter case, the pleadings must advance one step further.

18. Having taken this view, we shall now proceed to the plaintiff's reply to the defendant's plea, called the *Replication.* The replication being an answer to the plea, we shall consider it with reference to the *four modes* of defence already enumerated. It is manifest that the first two constitute issues, there being an affirmation on one side, met by a denial on the other. The replication in these cases, therefore, only joins issue.

19. The third mode of defence, namely, the denial of subtraction is always put affirmatively, by averring a performance; because this is is a proposition which admits of dispute both in law and in fact, and, therefore, the opposite side should have an opportunity of answering it, which is done by assigning a particular breach. This last mentioned replication bears a strong analogy to that which is called a "*novel assignment*," [*a*] viz: where the complaint not having been set out with sufficient precision, it becomes necessary from the evasiveness of the plea, to re-sign the cause of the action with fresh particulars.

20. It is, however, the excusing non-performance (being the fourth mode of defence) which opens the widest

[*a*] 2 Chitty on Pleading, 617, 1 Saund., 299, 6, Com. Dig. Pleader, 3 M. 34.

range for replication. The statement of excuse may, like the statement of the right, be reduced to two propositions, and of a similar nature. The first proposition is—

That certain incidents superadded to the admitted relation, operate as a legal discharge to the otherwise resulting liability.

The second—*That such incidents affect the acknowledged relation.*

Therefore, *That the defendant is discharged from liability.*

The *first* proposition here is a question of law, and may be met by demurrer; the *second* is a question of fact, and may be denied or confessed, and avoided by a new showing; or traversed, in a manner precisely similar to that which we have described at large, when treating of pleas in bar.

To the replication the defendant must again *rejoin*, by taking issue or tendering issue, or adding new matter of avoidance; and so on, until the parties arrive at the true and simple point of controversy.

21. This will suffice to convince the student that the rules of pleading are, in reality, founded in common sense, and are by no means so abstruse as he might be inclined to suppose them. At the same time they offer the greatest possible scope for exercising the intellectual faculties, and might, with great advantage, be studied for the mere improvement of the reasoning powers. Indeed, pleading affords the most beautiful illustration of the nature and utility of the art of logic—an art which has also been greatly and undeservedly decried, but from which

the most important advantages may be derived, both in morals and science. (*a*)

Section II.

The Analogy of the Rules of Pleading to Pure Dialectics.

22. In order to show the close connection which exists beween the forms of pleading and the rules of logic, we shall endeavor to put the foregoing pleadings into dialectic form, which will also serve to elucidate the observations we have already made.

The declaration may be resolved into a syllogism, of which the *major premise* states the rule of law, and the *minor* shows the application of the case to the rule. This syllogism, however, is usually an enthymeme, of which the *major premise* is suppressed. To take a familiar example, suppose debt on bond, the declaration states:

Min. *That the defendant acknowledges himself, by a certain writing obligatory, bound to pay a certain sum to the plaintiff.*

Therefore, *he ought to pay it.*

Here the *suppressed premise*, which for greater convenience we shall make an hypothetic, is:

Maj. *If a man acknowledges himself, by a writing, obligatory bound to pay a certain sum, he ought to pay it.*

(*a*) Lord Coke, in his Commentary on Sect. 381 of Littleton, says, "By this argument, logically drawn a *divisione*, it appeareth how necessary it is that our student should (as Littleton did) come from one of the universities to the study of the common law, where he may learn the liberal arts, and especially logic; for that teacheth a man, not only by just argument to conclude the matter in question, but to discern between truth and falsehood, etc., whereby it appeareth how necessary it is for our student." Co. Litt. 235, b.

This is the general rule of law, and is *prima facie* true.

23. Now let us examine each proposition separately: if the minor be false, the defendant at once pleads the general issue of "*non est factam*," which is equivalent to "*negatur minor*," and puts the plaintiff on the proof. If the minor be true, then the error must lie in the suppressed premiss, or the conclusion is badly drawn. But the hypothetic major may be bad in two ways: first, the consequent may not follow from the antecedent at all, or, in other words, there may be no such general rule of law; and to this the defendant may demur, which is equivalent to "*negatur major;*" but, secondly, as the antecedent of the hypothetic is indefinite, it may be taken either as universal or particular, *i. e.*, it may be considered as an universal rule, or one admitting of exceptions if it be taken in the argument as universal, then it may be bad; or, in other words, there may be exception to the general rule of law. And, on the other hand, if in such case it be taken as particular, then the conclusion is improperly drawn, for it is "*argumentum a particulari ad universale*," because, the conclusion being in the singular, the subalternans, from which it is deduced, must be universal. In other words, the defendant may show that the case falls within the exceptions, and not within the rule; and this he must do by special plea, which is equivalent to a "*non sequitur*," and must be proved by a collateral argument, for it is not enough to show that there are exceptions to the general rule, but the defendant must prove his case to be one of the exceptions. And, in general, where the conclusion is contingent it will be taken to be good until the contrary is proved. Another reason why the defendant is, in this latter instance, bound to prove his case, is because no man shall be obliged to prove a negative, which the

plaintiff would be compelled to do if it lay upon him to show that the case did *not* fall within the exceptions.

Let us suppose, then, in the example given, that the defendant pleads satisfaction "*solvit ad diem.*" We shall now examine his collateral syllogism.

Here the suppressed premiss is:

Maj. *If the condition of the bond has beeen performed, then the defendant is not liable.*

Min. *The condition has been performed, for the money was paid at the day.*

Therefore, *the defendant is not liable for the penalty.*

24. The student will observe that the minor of this syllogism is not a simple proposition, but that the whole argument is in fact a "*sorites*," though expressed for the sake of brevity in the above form. Here "*negatur major*" is a demurrer to the exception, or that there is no such exception to the general rule of law laid down by the plaintiff. But the minor is resolved into two parts, namely, whether the money has been paid in the manner stated, or at all; and, secondly, whether such payment is a performance of the condition. The first is put in issue by a *negatur minor*, and the defendant must prove it at the trial; the second point results from the major of the second syllogism, into which the *sorites* is resolved, and is a demurrer in law by a "*negatur major secunda.*"

25. We might pursue this investigation much higher, but we have purposely selected the simplest example for illustration; and this, it is apprehended, is sufficient to let the student see that the principles of special pleading and those of pure dialectics are perfectly similar, [*a*] It is

[*a*] "The structure of a record raised on these foundations is not less solid than the demonstration of a proposition in Euclid; and pleading formed on these maxims, is not only matter of *science*, but perhaps affords some of the best specimens of strict genuine logic." *Vide* Wynne's Eunomus, Dial. 2d.

obvious that the illustrations we have adduced refer only to special pleas in bar. The same logical method is, however, equally applicable to all other pleas. In effect, the declaration does not confine itself to the naked proof of right, but proceeds to show, by a statement of demand and refusal, that the right is withheld, and therefore the plaintiff calls upon the court for its assistance, or, in other words, the sanction of the law. By this concluding part of the declaration, the competency of the jurisdiction, the non-disability of the plaintiff, and the correctness of the form of proceeding, are all inferred; and if the defendant can show a deficiency in any of these particulars he may plead the same in abatement. And these propositions, like the former, may be all put in the syllogistic form, and their correctness tried by the same test.

Section III.

Of Pleading in Equity, and its Analogy to Common Law.

26. We shall now proceed to show the application of the principles we have laid down, to cases in equity, and although from the difference in the forms of proceeding in chancery it may not appear at first sight, yet upon a closer inspection we shall find that there is a strict analogy between the pleadings in equity and those at common law.

27. The original writ, sued out at common law, requires the defendant to repair the injury complained of, or to appear in court and show cause to the contrary. The declaration afterwards is but an exposition or amplification of the writ. If the defendant contests the suit, he comes in and pleads, in the manner we have described in the former part of this chapter. Proceedings in *equity* are commenced by a petition to the court, to issue the king's writ of *subpœna*, to compel the defendant to appear and

"answer concerning those things which shall be objected to by him; and further, to do and receive what the said court shall have considered in that behalf:" which is the language of the writ. The petition must, therefore, state the cause of complaint, as a ground for issuing the *subpœna*. Originally when the defendant appeared on the *subpœna*, articles in writing were exhibited to him, containing such charges as he was required to answer upon oath; but it was found more convenient to insert such charges in the body of the petition itself, which was thence denominated a *bill* in chancery. Hence the primary object of a bill is to obtain a discovery upon oath from the defendant, and then to have such relief grounded upon the defendant's admissions, or the complainant's proofs, as the court shall think proper. The bill, therefore, being framed with a view to extract a discovery in the first instance, is generally of considerable amplitude, stating a variety of circumstances by way of inducement, and usually anticipating and controverting the defence of the adverse party. In this respect it differs from the declaration at common law, which is a pure pleading, confined to the single and simple point of charge or statement of injury; and from this difference, it will be seen, some of the apparent anomalies in pleading in equity arise.

28. As the bill in setting out a cause of complaint must state an injury sustained, or likely to be sustained, it will contain the two propositions to prove the right formerly noticed, and will, in substance, admit of the same modes of defence as at common law; whatever dissimilarity exists, is caused by the difference of form. The prayer of the bill is, in the first instance, that the defendant shall be compelled to answer upon oath the several allegations contained in the bill; and thus it performs the office of an *examination* as well as of *complaint*. Hence arises a species

of pleading in equity different from anything we have hitherto seen, namely, the *answer* to the bill; which in analogy to the bill, has the double character of a pleading and a proof, being a *plea* so far as it denies the allegations of the bill, perfectly analogous to the *general issue* at law; and a *proof*, so far as it contains admissions of any part of the complainant's case. Here, too, many facts which might have been available as a plea are allowed to be stated by way of answer, similar to the rule which permits such facts to be given in evidence under the general issue at common law. And the reason seems to be, that as the chief end of a plea in equity is to decide a preliminary valid objection, without putting the parties to the expense and trouble of arriving at the same point, by the circuitous mode of following up the suit, wherever that object will not be effected by a plea, the party is at liberty to resort to which ever mode of defence he thinks most suitable, for as the reason of the rule ceases, "*cessat et ipsa lex.*" The invariable rule of the law, that every defence which cannot be specially pleaded, may be given in evidence under the general issue; and a similar rule holds in equity; for wherever the party has a defence, which is not the proper subject of a plea, such defence may be stated in the answer. [*a*] Thus we find the answer either, 1st, traverses and denies the allegations of the bill; or, 2nd, it admits them to be true; or, 3d, it confesses and avoids such points as need not be specially pleaded to, and these are in fact, the several parts of an answer, as laid down in the books of practice.

29. Now, as a decree of the court of equity is pronounced on a view, both of the fact and the law of the case, the answer, such as we have described it, might be deemed in all cases a sufficient defence, since it includes the *three*

[*a*] Mitf. 249. 1 Atk. 54. 2 P. Wms. 145.

last modes; and the question of law is determined at the hearing. But we must recollect that one of the principal objects of special pleading is to save the parties the expense and trouble of proving, by evidence, facts which might eventually turn out to be immaterial, or inadequate to sustain the right demanded.

30. From the nature of equity, it is obvious that the *right demanded* cannot be any definite essential quality, flowing from the relation, but only growing out of it incidentally; and which, therefore, must be determined "*secundum æquum et bonum.*" This is the proper business of the court at the hearing; and when the rights of all the parties are ascertained, thereupon is grounded such measure of relief as the reason and justice of the case may require. The party complainant, therefore, after stating the hardship under which he labors, from the nature of the relation existing between him and the defendant, prays the court to grant him such specific relief as he conceives himself entitled to demand. The relief prayed includes, of course, the restoration of the equitable right, supposed to be withheld; and ancillary to relief, is discovery from the defendant; or the discovery may be the principal point, and the only right demanded. Hence the propositions of a bill may be universally laid down to be—1st: *That from the relation stated accrues the right to discovery, and such relief as is prayed for.* 2d: *That the relation stated is that which actually exists.*

31. It is evident that this first proposition assumes the sufficiency of the form of the application, as well as the existence of the right; from which it has been doubted whether equity has any pleas in *abatement*, as contradis-

tinguished from pleas in *bar;* but this is a mere question of words, and not worth the inquiry. [*a*]

These two propositions admit of any defence which either, 1st, denies the *right* either to discovery or relief, or both; or, 2d, denies the *relation;* or, 3d, *invalidates* the relation, or *bars* the right. Most of these may be done by way of answer; but as it may be a principal object with the defendant not to answer at all, and as it will preclude unnecessary litigation to state a valid bar *in limine*, the first mode of defence must, in general, be taken advantage of by demurrer; the third, by plea. To these there is only a formal replication, for the purpose of tendering and joining issue; the necessity for special replications being obviated by the permission which the parties have to add to, and amend their pleadings.

32. From the principles above stated, it is sufficiently clear that the two modes of defence just mentioned are similar to the analogous ones at common law, and are here perfectly applicable; for in general terms, a *demurrer* is confined to the single point of law, but a *plea* opens the two questions of law and of fact, to either of which the opposite party may except. The demurrer, in the first mode of defence in equity, is taken on the complainant's own statement, by his bill; and consequently the facts cannot be disputed. In the third mode, the defendant puts forward a new statement of his own, and this must be by plea, that the complainant may have an opportunity to reply, and so put him to the proof of the new facts.

33. Hence is the grand distinction which is drawn between demurrers and pleas in the books, that the one is an

[*a*] Merewether *v.* Melish, 13 Ves. 437. And *vide* Beames' Pleas, 57, 58, 59. The difference between pleas in abatement and those in bar in equity, rests on precisely the same grounds as at common law.

objection, apparent from matter contained in the bill; the other, from matter "*dehors*" the bill. [*a*] But this latter is rather an accident than the essential difference, as the matter of a plea need not necessarily be *dehors* the bill. Accordingly we find that that species of plea, called a "*negative plea*," [*b*] does not advance any new fact which the bill had omitted, but is simply confined to the denial of a point stated in the bill, on which the whole right of action depends. Nor is this peculiar to equity; the plea of "*ne unques executor*" [*c*] "*ne unques accouple*," and such like, which are pleas in bar at common law, coming under the *second mode* of defence; and many of the pleas in abatement are strictly of the same nature as the negative plea in equity, and do not advance foreign matter. In like manner that species of plea which sets up a defence anticipated by the bill, and therein sought to be controverted, does not bring forward matter *dehors* the bill; and yet the objection cannot be taken advantage of by demurrer, but is, with strict propriety, the subject of a plea, *because it involves a question of fact as well as of law.* Such is the plea of release to a bill, which seeks to set such release aside on the ground of fraud, or want of consideration; or the plea to a bill to set aside a decree on the ground of fraud, and the like. Here the whole question turns on the validity of the bar sought to be impeached; and therefore the plea must go on to deny, by averment, the ground of impeachment; which is, in such case, the real point at

[*a*] Beames on Pleas, 2 Mitf. *Passim.*

[*b*] Mitf. 187, 188.

[*c*] The plea of "*ne unques executor*," is classed by Lord Redesdale, among pleas in abatement; and is treated as such by Mr. Beames, when speaking of *negative pleas.* But it is manifestly a plea in bar, of the *second mode;* namely, the denial of a particular fact on which the relation rests. See also 1 Saund. 274, a. (n. 3.)

issue. But this point is a point of fact, and consequently cannot be controverted by demurrer, which is an issue in law only.

34. But it is necessary that the fraud, or other matter, be denied by *answer* likewise. To seek for the reason of this peculiarity from the analogy of law, we must go somewhat deeper into the inquiry. In the first place, we must recollect that an issue is produced by a direct averment on the one side and a traverse on the other, and that party which first traverses or denies a specific averment, is said to *tender* an issue on that point. Now, at law no issue is tendered by the special plea, but as it always relies upon new facts, it concludes with a verification. And even in the case of a *special* negative plea there is no issue tendered by such plea, because it is not the denial of a distinct averment in the declaration, but only of a point assumed, and which must be formally averred before the traverse can tender an issue; and the negative plea, as it alleges no new fact, does not even require the usual verification. [*a*] In equity, since the disuse of special replications and rejoinders, there are but two of the pleadings which tender an issue—the answer, on the part of the defendant, and the replication, on that of the complainant. When the defendant desires to take *issue in law* he files a demurrer, and the complainant sets it down to be argued, which is a joinder in demurrer; on the other hand, he tenders an issue on the facts by his answer, so far as it traverses or denies them; and the complainant joins issue by the first part of his general replication, which states that "he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto;" and in the latter part, which maintains that "the said answer of the said defendant is uncertain, untrue, and insufficient to

[*a*] Co. Litt. 303, a.

be replied unto by this repliant," he tenders an issue on his part to such portions of the answer as confess and avoid the bill, or to the new facts of the plea; and to this the defendant *pro forma* rejoins. As, therefore, in conformity to the rule of law, the plea in equity does not tender an issue, [*a*] in the case of negative averments being contained in the plea, the same points must also be denied by way of answer, for othewise no issue could be joined on such negative averments. The complainant could not tender an issue upon them by his replication, for that would be but the negation of a negation, which, in fact, only amounts to an affirmative; and we have seen that an issue "consists upon an affirmative and an negative," therefore the defendant must produce the issue in the only way which remains to him—that is, by answer. This difficulty is obviated at common law by a special replication, which may tender an issue affirmatively to the negative averment.

35. And here we must mark the distinction between a *negative plea*, which is frequently supported by affirmative averments, and *negative averments*, which are used in support of an affirmative plea. And this distinction will furnish us with another reason for the general rule laid down, viz: "that if there is any charge in the bill which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, as fraud, or notice of title, that charge must be denied by way of answer as well as by averment in the plea." [*b*] It will be seen at once that such denials are negative averments in support of an affirmative plea. Now we have before noticed that when the complainant intends to dispute the facts of the plea he replies, and thereby puts the defendant to the

[*a*] 2 Bro. C. C. 144.

[*b*] Mitf. 241. Roche v. Morgell, 2 Sch. & Lef. 728.

proof of his allegations, so that in this instance the defendant would be forced to prove a negative, which is contrary to reason and the rule of law. This absurdity is obviated by the defendant's denying the fraud or notice in his answer, which at once tenders the issue and puts the complainant on the proof. But besides the denial by way of answer, there must likewise be positive averments in the plea; and this for two reasons: first, because as the plea admits the facts of the bill, without such averment, it would acknowledge the fraud or other ground of impeachment to the bar; and, secondly, by such acknowledgment the plea would be imperfect, as a fraudulent release, for instance, would be no release, and therefore not a good bar.

36. The mode of pleading has been objected to on the ground of duplicity—a mistake which has arisen from want of sufficient attention to the distinction between averments in support of a plea and the pleading a double bar, which alone constitutes duplicity. [*a*]

Thus, it is humbly conceived, we have shown that this kind of plea differs not in principle from other pleas—a disquisition into which we have been led both because it serves to elucidate the nature of pleas in general and to point out the correctness of Lord Eldon's observation, "that the best rule is analogy to law;" [*b*] but, principally, because Mr. Beames in his learned Treatise on Pleas styles this an "*incongruous plea*," and thinks that it is not properly a plea, but something in the nature of one. His opinion upon this subject seems to have been formed from supposing that the essential difference between a demurrer and a plea is that the latter always relies on matter "*dehors*" the bill; whereas, the true distinction is that the demurrer is an *an issue in law, on the complain-*

[*a*] 1 Burrows, 320.

[*b*] 9 Ves. 54.

ant's own showing; the plea is an objection raised by a *new showing* of the defendant. But the defendant's new showing may be of *old* matter stated in the bill (out of which matter a contradictory case may be made by traverse), although most usually it is altogether of *new matter.* And the reason for such new showing, whether old or new matter, being the proper subject of a plea, is that it lets in the *fact* as well as the *law.*

37. With the view that is here taken of this subject, the old definition of a plea in equity, laid down in the Cursus Cancelariæ, [*a*] and adopted by Lord Redesdale, strictly accords, and tends to fortify aud prove the correctness of the foregoing reason. A plea is there defined to be, "a special answer to a bill, or some part thereof, showing and relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred." [*b*] And, first, it is an answer because it avers and maintains one or more *facts* wherein it differs from a demurrer, which rests upon *law* only; and in some instances it denies allegations in the bill by negative averments.

But, secondly, it is a *special* answer, "differing in this from an answer in the common form, as it demands the judgment of the court in the first instance, whether the matter urged by it does not debar the complainant from his title to that answer which the bill requires." [*c*]

Thirdly: "It relies upon one or more things (not *new* things), as a cause why the suit should be either dismissed, delayed or barred." The first part of this member of the definition points out the integral division of a plea into the matter of it and the averments: "on one or more things" (*i. e.* facts or averments which may be manifold)

[*a*] Curs. Ca. 180.

[*b*] Mitf. 178.

[*c*] Roche v. Morgell, Sch. & Lef. 721.

—"as a cause" (*i. e.* the matter or bar) which must be single. [*a*] The latter part briefly gives the division of a plea into its several kinds.

38. This will give the student some idea of the extreme accuracy of most old legal definitions, which cannot be too attentively studied, and it was the more advantageous to pursue this subject so far, because he might be induced to conclude, from the loose manner in which it has been ordinarily treated, that the system of pleading in equity was not founded on any fixed principles, but left to fluctuate amid variable decisions and arbitrary rules.

[*a*] 1 Burr. 320. Mitford, 238, and the cases there cited.

CHAPTER II.

OF THE ORIGINAL BILL IN EQUITY.

SECTION I.

Of the General Form and Structure of Ordinary Bills.

39. A bill in equity, as we have remarked in the preceding chapter, has a two-fold object in view, first, the statement of complaint, similar to the declaration at common law; and secondly, the examination of the defendant upon oath. So far as it is a mere pleading, the bill must set out the nature of the relation between the parties, and the particular incidents which create the hardship which is the cause of complaint; and one of these incidents is the want of adequate relief at common law. This is the main body of the bill. Again, so far as the bill acts the part of an *examination*, it must state all such matters of inducement, and such collateral circumstances as may tend to extract a discovery, or which may raise a presumption of the truth of the principal statement, even if denied by the defendant. Should there be matter of avoidance, of which the defendant might avail himself, the bill, as an *examination*, should also contain charges to rebut the defence. It has already been observed that the bill is a petition to the court for a *subpœna*, or such other writ as the exigency of the case may require; and, accordingly, it concludes with a prayer in the usual form of petition, and stating the ends for which this writ it prayed; which are, first, that the defendant may answer the several distinct allegations of the bill, which are for that purpose put in an

interrogative form; and, second, that the court may interpose with relief.

40. This is the sum and substance of every bill which can be filed; and how long and intricate soever it may be drawn, it nevertheless contains but the four following parts:

1st. The circumstantial *statement of the relation*, including the inducement or introductory part.

2d. The incidents which produce the grievance complained of, including the *requests* made to the defendant, and his *refusal.*

3d. The statement of such collateral circumstances, if necessary, by way of *charge*, as may compel the defendant to acknowledge the grievance, or which may anticipate and controvert his defence.

4th. And lastly, by *reason* of the foregoing complaint, and for the want of adequate remedy at common law, it concludes with a petition for the *subpœna, to the end* that the defendant may answer the premises, and the court decree relief.

41. These four parts are each marked by certain technical language, with which they commence. The *first* part begins thus: "Humbly complaining, showeth unto your Lordship, your orator, A. B. of ——, that, etc.," and then proceeds at once to the statement. Here we must stop to observe that this commencement of the bill is framed to express its office, both as a *petition* and *complaint.* The words are: "humbly *complaining*, showeth;" and it styles the complainant not your petitioner, but your *orator*, to mark the distinction between a bill and a mere petition, and to designate the higher character which he sustains. The word "orator" is used in allusion to the formal conclusion of all petitions, "and your petitioner

will ever *pray*," [*a*] a custom which took its origin from the piety of our ancestors, and the authority of ecclesiastics in these primitive days, when the seals were always entrusted to churchmen, who were likewise the keepers of the king's conscience. [*b*] Another point to be observed in the formal commencement of the bill is, the grammatical inversion; a more remarkable instance of which, however, occurs in the last part of the bill, which we shall notice presently.

42. The *second* part commences, "And your orator hath frequently and in a friendly manner applied to and requested" [the defendant to do such acts according to the nature of the bill, as equity and good conscience required of him.] "And your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been; but now so it is, &c." [*i. e.* the defendant, *confederating with others* to oppress and defraud the complainant, refuses to do what is just.] As this part is nearly the same in all bills, it has become a common form. If the circumstances creating the hardship be only such as the court can rectify or control, and not depending on the acts of the defendant, as where trustees desire to act under the direction of the court, and the like, then the above common forms are omitted, and the difficulty labored under is here stated according to the nature of the case.

43. The *third* part is generally introduced by a statement that the defendant makes various pretences to justify his refusal, the contrary of which the complainant *charges* to be true; and then proceeds to make such other charges as either corroborate his own statement or contro-

[*a*] In Ireland, the form used is, "your suppliant and *daily* orator," *i. e.* "who remembers you daily in his prayers."

[*b*] 3 Black. Com. 48–54. Madox Hist. Exch. 42.

vert the defence likely to be adopted by the adversary. "And to countenance such, his unjust conduct, the said defendant sometimes pretends that" [there is some good matter of excuse to discharge him from liability] "whereas your orator charges the contrary to be true, and that" [there are such other circumstances in the case as invalidate the excuse, or corroborate the statement]; "and other times he pretends" [other pretences], "whereas your orator charges the contrary to be true, and" [other charges.] And the whole concludes with the averment, "all which actings, pretences and refusals of the said *confederates*" [alluding to the charge of confederacy on the second part] "are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises."

44. The *fourth* part is, the petition to the court for the *subpœna;* and begins by formally setting out the *reasons* for applying to the court, viz: "In consideration whereof" (*i. e.* "the wrong and injury" complained of,) and forasmuch as your orator is without remedy at common law, and cannot have adequate relief but in a court of equity; May it please your Lordship to grant his Majesty's most gracious writ of *subpœna*, etc., commanding the defendant to appear; *to the end* that he may distinctly answer upon oath whether each particular fact and charge in the bill is not as therein stated, or how otherwise; and that he may be decreed by the court to perform such acts as the court in its wisdom shall think proper, and the justice of the case may require. "And your orator shall ever pray," etc. The whole of the part, beginning with the words, "in consideration whereof," to the conclusion of the bill, is but a single sentence. There is, however, a considerable inversion in its form, the clause commencing "to the end," being put before the prayer for the *subpœna*

"may it please," etc. The want of sufficient attention to this point, coupled with the circumstance of the extreme length of the sentence, the whole statement and charge of the bill being here repeated in the form of interrogation, and the prayer for particular relief being also included, has occasioned great perplexity in the mind of many a pupil, and in not a few instances, has prevented him from ever arriving at the knowledge of the true bearing and connection of the several members of this complicated sentence. Nor is the pupil much assisted in this difficulty by the usual division of a bill into *nine* parts, than which nothing can be more illogical and incorrect. According to this arrangement, to be met with in all the books, the several parts of a bill are: first, the direction or address; second, the parties; third, the plaintiff's case; fourth, the charge of confederacy; fifth, the pretence and charge; sixth, that part which gives jurisdiction to the court; seventh, the interrogating part; eighth, the prayer; ninth, the usual prayer for a *subpœna* or other process. The four last are included in the single sentence to which we have just called the student's attention, and which are thus presented to his mind as so many distinct and unconnected parts; and his embarrasment is increased by finding that in the precedents to be found in the books these several parts are marked as distinct periods.

In order to illustrate the forgoing observations, we shall insert here the skeleton of a bill:

To the Rt. Honorable the Earl of Eldon,
Lord High Chancellor of Great Britain:

(1.) Humbly complaining, showeth unto your Lordship, your orator, A B, of , gent. that [at a particular time mentioned, certain events took place which led to the relation now existing between your orator and C D, the defendant, hereinafter named.] And your orator

further showeth unto your Lordship that [your orator and the said defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant; whence arise certain duties to be performed by the said defendant, C D.] (II) And your orator hath accordingly, both by himself and his agents, applied to and requested the said C D to [perform the said duties; and your orator well hoped that such, his just and reasonable requests, would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your Lordship, the said C D, combining and confederating with divers persons at present unknown to your orator (but whose names, when discovered, your orator prays he may be at liberty to insert in this, his bill, with apt and proper words to charge them as parties defendants hereto), and contriving how to injure and oppress your orator in the premises, absolutely refuses to comply with your orator's aforesaid reasonable requests. (III.) And to countenance such, his unjust conduct, he sometimes pretends [some matter of excuse to discharge him from liability;] whereas, your orator charges the contrary to be true, and that [there are other circumstances which invalidate the excuse of the said defendant and corroborate your orator's statement.] All which actings, pretences and refusals of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. (IV.) In consideration whereof, and for as much as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable, to the end that the said C D and his confederates, when discovered, may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information and belief,

full, true, perfect and distinct answers make to all and singular the matters aforesaid; and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively distinctly interrogated; and more especially that the said C D may, in manner aforesaid, answer and set forth whether [at the time hereinbefore in that behalf mentioned, or at some, and what other time, certain events did not take place, which led to the relation now existing between your orator and the said defendant, or how otherwise; and whether such relation does not in fact exist; and whether your orator and the said defendant are not parties to such relation, under circumstances to which particular equitable, or some and what incidents are concomitant, or how otherwise; and whether such duties as are hereinfore set forth to be performed by the said defendant did not arise therefrom, or how otherwise]; and whether your orator hath not, by himself or his agents, or how otherwise, made such applications and requests as are hereinbefore in that behalf mentioned, or some such or the like; or any and what other applications and requests, in respect of the several matters aforesaid; and whether the said defendant hath not refused to comply therewith, and why; and whether [such circumstances as are hereinbefore charged, for the purpose of invalidating the excuse of the said defendant, and corroborating your orator's statement, are not true, or how otherwise]; and that the said defendant may be compelled, by and under the decree and direction of this honorable court, [to perform such duties as are incident to the relation hereinbefore stated to exist between him and your orator;] and that your orator may have such farther and other relief in the premises as to your Lordship shall seem

meet, and the nature and justice of the case may require. May it please, etc.

[*Counsel's name.*]

Pray Spa.

v.

C. D.

The above is the general form of every kind of bill, as prepared in the draftman's office; and with this outline before him the pupil will be able to shape his course without any difficulty, in all cases, and to judge what parts are essential and what may be omitted, according to the nature of the subject. We shall presently advert to this point more at large.

45. The pupil will observe that in the precedent of the draft, the conclusion being a common and invariable form of prayer for the *subpœnâ*, is marked by an "*&c.*," with a marginal direction to the solicitor, who is to have it engrossed at full length, as to the names of the parties whom he is to pray process; for none are defendants to the suit, although mentioned in the body of the bill, unless process of *subpœna* be issued against them. [*a*] The conclusion of the bill, as engrossed, is as follows: "May it please your Lordship to grant unto your orator his Majesty's most gracious writ of *subpœna*, to be directed to the said C D, and to the confederates when discovered, thereby commanding them, and every of them, at a certain day, and *under a pain* to be therein limited, personally to be and appear before your Lordship, in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; *and further to stand to, perform, and abide such further order, direction and decree therein as to your Lordship shall seem meet;* [*b*] and your orator shall ever pray," etc. If the

[*a*] 2 Dick. 707.

[*b*] If the bill be for discovery merely, the words in italics are omitted. 3 Atk. 439.

bill seeks for an *injunction*, or a "*ne exeat regno*," such writ is also prayed for in the conclusion, in addition to the writ of *subpœna*, for the form of which the student may consult the books of precedents, the above being sufficient for our purpose. In a *certiorari* bill, the only object being to remove the proceedings from the court below, the prayer for a *subpœna* is unnecessary, as the parties must follow in the suit. [*a*]

46. Where the attorney general is a defendant, instead of a *subpœna* the bill prays, "that his Majesty's said Attorney General, being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to and abide," etc.; [*b*] and in the case of a peer, a letter missive is prayed, "to be directed to the said [peer], desiring him to appear to and answer your orator's said bill; or in default thereof, his Majesty's most gracious writ of *subpœna*," etc.

Section II.

Of the first Part of a Bill; and herein of the Doctrine of Relations.

46 a. Having given this general view of the nature and form of a bill, we shall now draw the student's attention to its several parts, and add a few particular observations on each. In the appendix of common forms, will be found the different modes of address used in the several courts of equity, and also the formal words of commencement, according to the various capacities of the parties instituting the suit.

[*a*] Mitf. 40.

[*b*] The Attorney General may refuse to answer, and no process of contempt can go against him. 1 Dick. 730. Davine v. Attorney General. Exchequer, 1813.

46 b. The additions and places of abode of the complainants should be specially stated, both to prevent suits from being commenced in the names of fictitious persons, and also that the defendants may know where to resort for redress, in case the proceedings should be deemed vexatious, the practice of taking security for that purpose having been long since disused, except where the complainant *resides* out of the jurisdiction, when security for costs, to the amount of forty pounds, will be required, on the defendant's motion. In the exchequer, in order to give the court jurisdiction, the complainant states himself to be a debtor and accountant to his Majesty, which is similar to the practice at common law, and this is an averment not allowed to be traversed, and therefore mere form. A bill filed by a Peer always commences without affixing the epithet humbly; but simply—"complaining, showeth unto your Lordship." The form for infants, married women, and lunatics, will be seen in the Appendix.

47. When the attorney general commences a suit, either on half of the crown or those under its protection, whether with or without a *relator* not personally interested, he proceeds by way of *information*, which differs in no respect from the form of a bill, except that it does not use the language either of complaint or petition; but merely, "informing, showeth unto your Lordship, Sir A. B. knight, his Majesty's attorney general, on behalf," etc. If the *relator* be also a complainant, then the proceeding will be both information and bill; for the form of which, as also of informations in general, see the Appendix.

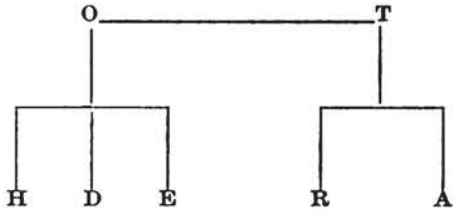
48. The two first parts, according to our division, are essential to every kind of bill whatever; as the first states the circumstances of the case, or the relative situation of the parties, and the second sets out the injury sustained, or the grievance likely to ensue, not remediable at com-

mon law, which is the ground of application for the interference of a court of equity. So far the bill acts the part of a pleading, similar to the declaration at common law, and according with this view of it, is the definition given in the *Cursus Cancellariæ;* where it is said, "a bill in equity is in nature of a declaration at common law, wherein the complainant is to set forth the circumstances of his case for some fraud, force, or injury done to him, praying relief of the court, for that he has no remedy by the common law; and also process of *subpœna* against the defendant, to compel him to answer the charge of the bill. [*a*] The observations we have made, therefore, in the foregoing chapter relative to the mode of statement of injury are entirely applicable to this part of a bill. We there showed that the plaintiff, in complaining of a wrong done to him, does nothing more than set forth a right of which he has been deprived; that rights are incident to relations, and that therefore to prove a right, the *relation* in which it is founded must be thoroughly understood. Relations, again, we have seen, let in three separate considerations: 1st, the *parties*, with their several disabilities and liabilities in law; 2d, the subject matter or *contract*, with the circumstances under which it was made, and herein also of the nature of the property in litigation; and *lastly*, the legal and equitable incidents or *rights*, the withholding of any of which is the cause of complaint. We shall subjoin such additional instructions with regard to the doctrine of relations as may be generally useful to the pupil.

49. Relations may be divided into *primary or original—secondary or derivative*—and *collateral.* The first are those which subsist between the original parties; the second are such as are derived therefrom, either by the transmission of interest or the transfer of title or liability.

[*a*] Curs. Can. 36.

Thus there is a primary relation between the mortgagor and mortgagee; but if the mortgagor assigns his equity of redemption, there then arises a new or secondary relation between the mortgagee and the assignee of the equity. A collateral relation is that which exist between two or more derivative parties.



Thus in the figure above, let O and T stand for the parties to the original relation; let T be tenant for life, and R a remainderman; let A be an assignee, or alienee of T's interest; let H represent the heir at law to O; D be his devise, and E executor. Here there will be a secondary relation between O and A, in respect of *the privity of contract* between T and A. There will be also a secondary relation between O and R, in respect of the *privity of estate* between T and R. Between T and H there will be a secondary relation, in respect of the *privity of blood* between O and H. So between T and D, in respect of the *privity of interest* between O and D; and in like manner between T and E, on account of the *privity of representation* between O and E. Again, H, D, and E on one side, and A and R on the other, stand in collateral relations to each other. Other derivative relations might be enumerated; but this will suffice at present for the purpose of illustration. The right understanding of these particulars is in the first place essential to the determination of the necessary parties to the suit, and the importance of this doctrine will be still further apparent when we come to treat of Supplemental Bills and Bill of Revivor.

50. The *original* relation may arise, either, 1st, out of a specific contract, the incidents of which must depend upon the terms of agreement, as in those cases where a *specific performance* is sought to be enforced; or, 2d, the relation may be such as though arising from contract between the parties, is nevertheless recognized and ascertained by the law, which attaches to it certain essential incidents and ingredients—such as the relation of partnership, of mortgagor and mortgagee, and the like; or, 3d, it may be produced by the act of a third person, as in the relation of executor and legatee; or, 4th, it may arise by the operation of law, as, for example, the relation between tenant in dower and heir at law.

In the *first* instance, as the nature of the relation is to be collected from the words of the contract, if the agreement be in writing, it must in general be set out *verbatim* in the bill; if not in writing, then such collateral circumstances must be stated as raise a strong presumption in favor of its existence. On this point of the specific performance of parol agreements, various rules have been laid down in equity, with which the student should make himself acquainted, in order to frame his bill in cases of this nature. In the statement of specific contracts, the agreement must also be shown to be of such a kind as not to militate with general policy, [*a*] and that the stipulations contained in it are such as a court of equity ought in conscience to enforce. [*b*] The circumstances under which the agreement was made, form therefore, in most instances, a material part of the statement; and every fact should be set out, by way of inducement, tending to show that the consideration was valid and the terms fair and

[*a*] 9 Ves. 608. 1 Vern. 5.
[*b*] 2 Anst. 543.

equitable; for it is a maxim, "that he that would have equity should do equity."

In the *second* case above noticed, where the relation is one recognized by law, all the legal requisites to form such relation and the liabilities resulting from it, should be well understood, that the draftsman may be able to bring the case in the bill within the meaning of the law, and show such a breach as constitutes an injury cognizable in equity. As this kind of relation is founded in like manner as the former, on the contract of the parties, it will be subject to the same rules with regard to the equity of consideration and origin.

51. The same observations will apply to the 3d and 4th classes above enumerated, with this additional remark —that all the circumstances that led to the existing relation, must be succinctly alleged by way of preamble, both for the advantage of clearness of statement, and also in order to deduce the complainant's *title.*

This last is essential to every bill, and in general, it is to be remarked, there are four things indispensably requisite to be shown in the stating part, namely, 1st, the complainant's interest [*a*] in the thing demanded; 2d, his title (*b*) to sue; 3d, the defendant's interest; [*c*] and 4th, his liability; [*d*] for though there cannot be a title or a liability without an interest, there may be an interest without either. Thus, an executor, before he has proved the will, has an interest in the testator's chattels, but not such as to give him a title to sue; [*e*] so also an assignee has an interest in the thing assigned, although not liable to be

[*a*] 2 Atk. 210.
[*b*] 1 Vern. 105. 9 P.Wms. 371.
[*c*] 2 Eq. Ca. Ab. 78, 2 Vern. 380.
[*d*] 1 Vern. 180. 1 Ves. 56.
[*e*] 1 P.Wms. 172, 176.

sued for breach of covenant, unless such covenant runs with the land. [*a*] We do not here speak of the title or liability with reference to those defects which are the proper subject of *abatement;* but the title and liability, as derived from the very relation itself, and which therefore must appear on the face of it, if the relation be adequately stated; which title Lord Coke defines to be "*justa causa possidendi quod nostrum est.*" And he says: "*dicitur titulus a tuendo;*" because by it a man holds and *defends* his right. [*b*] It is necessary, however, to observe, that the title thus deduced, must not appear by the bill to be affected by any personal disability; and the defendant must be liable in the court of equity where the suit is instituted.

52. In deducing the title in the *third* class of original relations, it will be seen that such a preamble is necessary as will show that the person creating the relation had the power to do so, whether by *law* or by express *power* in a deed. In the first case the capacity in law is all that need be stated—as, for example, "that the testator was, at the time of making his will, and at his death, *seized* of or entitled to *freehold estate*, and *possessed* of personal property; and being of sound and disposing mind, made and published his will, with the usual formalities." With regard to the execution of a *power* created by deed, it will in general be requisite to set out the power in *hæc verba*, since a question may turn on its extent or validity; and if the latter be likely to be contested, the preamble should go back to the origin of the instrument containing the power. Indeed, the student will observe that the preamble must, in a great measure, depend upon his discretion, always making it consistent with clearness of ex-

[*a*] 1 Ves. 56.
[*b*] Co. Litt. 345, b.

planation, and such as may assist the complainant's title, by discovery from the defendant, if any ambiguity in the title render such detail necessary; but upon the face of the statement, at least a *prima facie* title must appear. In like manner, the draftsman must use his discretion as to whether the whole or any part of the instrument creating the relation be set out *totidem verbis;* having this general rule to guide him, that it is usually unnecessary, and therefore improper, to state more than the substance, unless where the duty claimed depends upon the very words of the instrument.

53. With respect to relations arising by operation of law, we need only observe that the progress of the operation should be traced from the prior relation to its subsequent effect, and the circumstances must be shown to be such as that the legal results necessarily ensue.

From the foregoing remarks the student must feel conscious how necessary it is to have a clear and just conception of the nature of the relation which is to be the subject of his statement, with all its legal and equitable incidents, before he sits down to draw the bill; for, as the nature of the injury must be derived from the incidents of the relation, so the form of the statement must depend upon the nature of the injury; if it be the deprivation of a right issuing out of the express contract of the parties, the terms of the contract will be essential; if, on the other hand, the right demanded is one given by law, the statement, to be adequate, must bring the case within the relation affected by the legal or equitable incidents.

Section III.

Of the Second Part, or Statement of Injury.

54. The point next to be considered is, what circum-

stance in the case it is which produces the injury, or causes the hardship against which the complainant seeks relief; and this must arise from the state of the relation between the parties, either where a duty flowing from it is withheld, which, though binding in conscience, yet the ordinary courts have not the power to enforce; or where the relative situation of the parties is such, whether from fraud or accident, or any other cause, as that a manifest wrong, or even probable injustice or inconvenience would ensue, but for the interference and assistance of a court of equity in compelling a discovery and supplying the adequate remedy.

55. This statement of grievance forms the second part of the bill, according to our division, corresponding to the breach in the declaration at common law, and should be made with brevity and succinctness. When the injury sought to be redressed is occasioned by the subtraction of a duty on the part of the defendant, this part of the bill merely contains a statement of *request and refusal*, viz: that various applications were made to the defendant, requesting him to do justice to the complainant and restore to him the right demanded, or perform the duty withheld, which nevertheless he has refused to do. The refusal is most commonly ushered in by the formal charge of confederacy, which, though usually inserted, is altogether unnecessary, [*a*] as new parties may be added at any period of the suit, without any such charge in the bill; and, therefore, in amicable suits, the refusal is stated without charging combination, and this form is invariably omitted where the defendant is a peer of the realm. [*b*]

56. In those cases, on the other hand, where the

[*a*] 1 Anstr. 81.

[*b*] Mitf. 33.

grievance arises out of the peculiar situation of the parties, the complainant having explained by his statement their relative position, goes on in this part of his bill briefly to show the nature of the difficulty resulting from it, or the hardship likely to ensue unless a court of equity interposes to his relief. "To the end, therefore," etc. Here, then, the student will observe, as no refusal is stated, of course the introductory charge of confederacy has no place; and, in like manner, as the necessity for the interference of a court of equity is embodied in the very statement of grievance, the formal clause of equity, as it is called, commencing: "And for as much as your orator is without remedy in the premises," is also omitted. In the statement of the injury for which redress is sought, it is obvious that the draftsman must be previously acquainted with the extent of the jurisdiction of the court; and to this point the student should turn his particular attention, in order that he may be able to set forth such a grievance in his bill as a court of equity will take cognizance of; for the mere averment that there is no remedy but in equity will not avail, unless it appear also on the face of the statement that the case is such that the court of chancery can compel a discovery or decree relief.

Section IV.

Of the Third Part, or Pretences and Charges.

57. We next come to the pretences and charges, the nature and utility of which have been already pointed out. As the two former parts belong to a bill, *as a pleading*, in common with the declaration at law, so this *third* part has a peculiar reference to its character as an *examination*. One of the principal advantages attendant upon the mode of proceeding in chancery, is that the complainant is entitled to have an answer upon oath from the defendant, as

to all the facts stated in the bill; but as it is a maxim in our law that no man shall be bound to criminate himself, care must be taken that no allegation be made which would subject the defendant, if admitted by him, to penalty or forfeiture, [*a*] unless, indeed, the forfeiture be one thereby accruing to the complainant himself, and that he specifically waives his right to it, [*b*] for the sake of the discovery. So far, then, as the defendant admits the facts alleged in the bill, it precludes the necessity of having them proved in evidence; as, on the other hand, if there be an unequivocal denial on the part of the defendant, two witnesses, at least, are required to establish the fact against his oath. [*c*] One of the chief objects of the draftsman's care, therefore, should be to charge in his bill all such material circumstances of the case as may tend to draw forth from the defendant an admission of the principal matters, and so avoid the necessity of proving them by depositions.

58. This, then, is the peculiar province of the charging part of the bill; for if the same were attempted to be done in the statement, it would interrupt its course and render that confused, the chief quality of which should be clearness and intelligibility. But this, though the principal, is not the only end of the charging part, for as the relief sought frequently consists of a variety of particulars, the charges are sometimes made to support a part of the prayer. Thus, the circumstances which warrant the application for an injunction are generally stated in the charging part. Again, if it be anticipated that the defendant has any matter of avoidance to set up against the statement of complaint, whatever will operate to rebut

[*a*] 1 Bro. C. C. 98. 1 Atk. 529. 2 Atk. 392. 2 Ves. 109.
[*b*] 1 Vern. 109–129. 1 Chan. Rep. 144.
[*c*] 2 Chan. Ca. 8. 1 Vern. 161. 3 Atk. 649, 270.

that avoidance should be stated by way of charge, founded upon the supposed reasons of the defendant for *refusing* to accede to the complainant's reasonable requests; [*a*] and in this respect the charging part supersedes the use of a special replication, and, as far as regards discovery, is somewhat similar to a cross examination.

59. Hence we may collect, that the difference between the stating and charging parts of the bill, is, that the first is confined to simply unfolding the nature of the relation clearly and concisely, containing such matters of inducement as are requisite for explanation and for deducing the title; the latter is used for the purpose of adding all such further facts and allegations which cannot be conveniently inserted in the statement, and which yet are material, either to extract *admissions* from the defendant, or to obtain *collateral relief;* or, lastly, to *anticipate* the defence. In fact, it being a question of arrangement only, much must be left to the sagacity and discretion of the draftsman in determining which part of the bill he shall choose for making any particular statement, since the pretences and charges are made a separate part of the bill, more for the sake of the "*lucidus ordo*" than from any real distinction existing, other than that we have noticed above. [*b*] In many cases, therefore, this part may be altogether passed over; and the foregoing observations will serve to instruct the pupil when charges should be introduced and when they may be omitted.

[*a*] Mitf. 34–5.

[*b*] Lord Kenyon, in the bills he drew when at the bar, never put in the *charging* part, which does little more than unfold and enlarge the statement. Madd. Prac. 169; and Patridge v. Haycraft, 11 Ves. 574, there cited.

Section V.

Of the Fourth, or Interrogating Part, and Prayer.

60. Of the conclusion (which, as we have elsewhere remarked, is but a single sentence), the groundwork is the prayer for a *subpœna*, adding a statement of the *purposes* for which the writ is required. *These* are in ordinary bills: first, that the defendant may be compelled to attend, in order to *answer* distinctly the several points of the bill; and, second, that upon a view of the case the court may interpose its authority to prevent or redress immediate wrong; or it may *decide* upon the ultimate claims of the parties, and enforce its decree by process of execution.

61. By the words of the bill, the defendant is required to give "full, true, perfect and distinct answers, upon oath, to all and singular the matters stated and charged in the bill, as if he were distinctly interrogated to each;" and this he must do, whether there be interrogatories or not. At first view, therefore, the repetition of the whole bill by way of interrogation would appear a very useless prolixity. But experience has proved the utility of this practice beyond cavil; for the contrary method would not fail to produce still greater expense and delay to the parties, by occasioning frequent and numerous exceptions and amendments. The statement, must of necessity be direct and positive; and if the defendant thought it his interest to do so, he might content himself with answering it according to the letter. But in most instances such a mode of answering would be perfectly evasive, and leave the substance of the charge quite untouched. [*a*] Thus, for instance, if the defendant were charged with having received a specific sum of money at

[*a*] Mitf. 36.

a particular time, although he may have actually received the money, yet he might with strict truth deny his having received the *precise* sum, or at the *time*, or in the *manner* specified. The possibility of evasion is, however, obviated, by putting the statement into the form of an interrogatory, with all the concomitant alternatives: as, "whether the defendant did not receive that particular sum, or some, and what other sum of money, at the particular time mentioned, or at some and what other time, and in the manner specified, or how otherwise."

62. The great object of the interrogating part of the bill is, therefore, to preclude evasiveness in the answer; and the whole attention of the draftsman must be turned to this single point of putting the question in every variety of form, to elicit a full and definite reply, and to prevent the defendant's having any loophole to escape upon a *negative pregnant*. In fact, this part of the bill is altogether subservient to the office which the bill performs, of an examination, and should therefore omit nothing essential to the proof and elucidation of the statement; but as the substance of the bill is, in fact, the thing to be answered, and the interrogatories are only permitted for the sake of convenience, no question can be put which is not immediately dependent on, or relevant to, a particular statement or charge in the bill. [*a*]

63. With the foregoing reservation, however, whatever may be important to the complainant as matter of discovery to support his case, without his being compelled to resort to extraneous evidence, may and ought to be interrogated to, since one of the principal ends of a bill taken as an examination, is to supersede the necessity of proof. Thus in a bill for an account, the nature, value, and amount of the property charged to have come into the

[*a*] Mitf. 35–6. 4 Bro. C. C. 458. 6 Ves. 62–3. 11 Ves. 273.

defendant's hands may be inquired into, and how every part has been disposed of; and if any remains in the defendant's hands, how it is employed; and every other circumstance which may be of service in taking the account required. [*a*]

64. This is, however, only subsidiary to the decree, and therefore the bill goes on to state, as the *second purpose* for which the writ is prayed, that the defendant may be compelled to account under the decree of the court, in nearly the same words. We have thought it right to make this remark here, because it is apt to appear strange to the pupil that in one sentence the defendant is called upon to account with the complainant, and in the next, almost the same terms are used, that an account may be taken under the direction of the court. But the foregoing observations will have explained that there are two purposes or *ends* for which the writ of *subpœna* is required: first, for discovery; and second for the interference of the court, expressed by its order or decree; and that each of these are distinct.

65. We now come to the latter *purpose*, the statement of which is usually, though improperly, the "*prayer for relief.*" On examining the structure of a bill, the student will see that the only prayer contained in it is that for the *subpœna*, and that the clause of which we are now treating is inserted in order to show to the court how far, and in what respect, its assistance is required. This is essential, in order to point out to the court and opposite party the definite object for which the bill is filed, that the former may know distinctly what it is called upon to decide, and the latter what to defend.

66. At common law, the settled forms of action ren-

[*a*] 10 Ves. 290. 11 Ves. 301.

der this part unnecessary in the declaration, as every case has its express remedy provided; but it is otherwise in equity, where the mode and degree of relief cannot, from the nature of the thing, be bounded or prescribed by any determinate rules, but must be adjusted to the circumstances of every individual case, "*secundum æquum et bonum.*" In the former instance, the premises allowed, the law draws the inevitable conclusion; in the latter, the inference is deduced from reason and conscience. It is therefore proper that the complainant in his bill shall not leave this inference to be vaguely collected from a diffuse and sometimes indeterminate statement; but that the party who is aggrieved should himself set forth the nature of the redress which he seeks; and it is sometimes material, even as a medium of construction, for explaining equivocal charges in the body of the bill. [*a*]

67. The relief sought, again, subdivides itself into two kinds: first, the collateral and auxiliary assistance of the court for the redress of immediate and prevention of threatening injury, pending a course of litigation, or the avoiding a probable future grievance—such as an injunctian, a "*ne exeat regno*," a commission to examine witnesses who are abroad, in aid of a trial at law, and the examination of witnesses "*in perpetuam rei memoriam.*" The second species of relief is that which is properly so called, and is founded upon the *decree* of the court, pronounced upon hearing and deciding on the ultimate claims of the respective parties.

68. A bill may be framed for all or any of these purposes conjointly, as for an answer and injunction, or an answer, injunction and decree; only it is to be observed that such original bills as call for the decree of the court

[*a*] 18 Ves. 80.

are alone termed *bills for relief*. In many instances a complainant is entitled to a discovery, and even to the collateral aid of the court by injunction, or an order for commission, etc., where the court could not *decree* relief; and in such case care must be taken not to frame the bill as a *bill for relief*, for otherwise it would be demurrable. [*a*] Hence the student must be acquainted with the nature and extent of the authority of a court of equity, as well as with the subjects of its jurisdiction; that from the one he may learn what injuries the court can redress, from the other, the manner of effecting it. Upon this, and the nature of the injury sustained, or the grievance complained of, must depend the form of the remedy to be applied. If it be an injury arising from the subtraction of a duty, the direct and substantial relief will be a decree for the restoration of the right (wherever that can be effected), accompanied by such ancillary directions as will tend to effectuate that object. If the assistance of the court be required to redress a grievance, or remove a difficulty flowing out of the relative situation of the parties, then such relief must be sought as accords with the practice of the court, ascertained by a series of decisions in similar or analogous cases.

69. After the statement of the particular relief sought, there is always added a general suggestion that the complainant "may have such further or other relief in the premises as the nature and circumstances of the case may require;" and the court, acting upon this suggestion, will vary the relief according to its discretion, so as to meet the justice of the case; [*b*] *provided*, such relief

[*a*] 2 Bro, C. C. 319. 6 Ves. 62. 11 Ves. 509. 2 Ves. & Beames, 328.

[*b*] 2 Ves. Jun. 401. 5 Ves. 495.

be not *incompatible* with that sought by the bill; [*a*] and the reason of this last rule is, that as the relief required must grow out of the statement of the injury sustained, of the nature of which, therefore, it will be a fair construction, it would be absurd as well as unjust towards the defendant to make a decree in favor of the complainant inconsistent with his own case. But there is an exception to this rule in the case of an information by the attorney general, suing on behalf of a charity, [*b*] or where a bill is filed by an infant; [*c*] in the former instance, because the interest of the charity ought not to suffer from the neglect or default of a public officer; in the latter, because an infant, having no discretion of his own, the court is bound to protect his rights, without any regard to mistake or error in point of form. The draftsman should therefore use the utmost caution in this part of the bill; and if he doubts the complainant's title to the relief he wishes to pray, the bill may be framed with a double aspect, that if the court determines against him in one view of the case, it may yet afford him assistance in another. [*d*]

[*a*] 2 Atk. 141. 1 Ves. Jun. 426. 3 Ves. 416. 12 Ves. 48. 13 Ves. 114.

[*b*] 1 Atk. 355. 2 Ves. 426. 11 Ves. 247, 367.

[*c*] 1 Atk. 6.

[*d*] Mitf. 31. 2 Atk. 325. 6 Ves. 53.

CHAPTER III.

OF SECONDARY BILLS.

70. Having thus gone through the several parts of an ordinary bill, it only remains to notice some peculiarities in the structure of such bills as are not original, but which are the consequence of, or have some reference to, a former bill; and the peculiarities we shall point out in each, will at the same time be illustrative of the general doctrine.

71. In the progress of a suit, circumstances may arise which will cause such a change in the state of the relation between the parties as to render it necessary to add new incidents to the former relation, or to state an entirely new relation, which will, however, have a *reference* to the former, inasmuch as it grows out of the former subject of litigation. The same may likewise occur after the termination of a suit, and before the execution of the decree. In any of these cases a new bill must be filed, which, as it of course *refers* to the former bill, and the subsequent proceedings thereon, is therefore distinguished from the original bill, and termed "*not original.*" So far as such bill merely adds new incidents to a still subsisting relation, it is *supplemental*; where it states a new relation between new parties, it is either *a revivor, or in the nature of revivor, or supplement.*

72. We have already seen that the use of a supplemental bill is either, 1st, to supply the place of amendment at that state of the proceedings when amendment

will not be permitted, or, 2d, to *add* such circumstances which have occurred subsequent to the filing of the original bill, as may either have caused a change in the terms of the relation subsisting between the *original* parties, and consequently in the rights and duties flowing from it; or an alteration in the parties, by means of which new parties to the suit must be brought before the court. From this circumstance of the alteration of the *parties* to the relation, the principal difficulty arises as to when a suit becomes *abated*, and when merely *defective*, and consequently in what cases a supplemental bill will suffice. We shall here, therefore, endeavor to apply the principles we before laid down concerning relations, as an attempt at a solution of the present difficulty.

Section I.

Of Abatement, and the Distinction between Suits abated, and those become merely defective.

73. All persons who have such an interest in the matters in litigation, as that their rights might be affected by the decree, should strictly be parties to the suit. [*a*] This is the general rule adopted by a court of equity, which, as it does not confine its decree to the mere decision of the question at issue between the principal parties, but determines all points of controversy which may arise out of the principal question, and gives direction thereupon, which may affect persons remotely or consequentially concerned in interest, will not make such decree, unless the persons so concerned are brought before the court, to assert or defend their particular rights. [*b*]

[*a*] 2 Eq. Ca. Abr. 176. 2 Atk. 296, 515. 7 Ves. 563. 1 Meriv. 262. 16 Ves. 325.

[*b*] 3 P. Wms. 333. Mit. 134.

74. This rule, however, is not so strict but that it may in some cases, be dispensed with—as where, from the multitude of the parties, it would be inconvenient or impracticable—"the court preferring to go as far as possible towards justice, rather than to deny it altogether." [*a*] So, where the interest of the party is very remote, [*b*] or his rights depend upon the establishment of prior claims, [*c*] or where there is already before the court a person competent to protect them, and in general it may be put negatively, that none are required to be parties who are not bound by the decree, [*d*] as, on the other hand, none are bound by the decree who are not parties to the suit. [*e*]

75. Thus, then, all persons whose *rights* are necessarily involved in the litigation before the court, are necessary parties. But their *rights* must flow from some *relation* existing between them and the principal parties to the suit. Relations, we have seen, are either, first, *original;* or, second, *derivative;* or, third, *collateral.* [*f*] It is clear that all those who are parties to the original relation must also be parties to the suit commenced by any of them touching such relation, or the incidents belonging to it, unless such parties as may be passed over from remoteness of interest—as a remainder-man, after a vested estate of inheritance. [*g*] So all *derivative* parties, so far as their newly acquired rights may be affected by the question between the original parties, or their acquisition of new rights may affect the original rights. So, likewise,

[*a*] 16 Ves. 329: per Ld. Eldon, C.
[*b*] 2 Eq. Ca. Abr. 166. Mitf. 139.
[*c*] Mitf. 142. 2 Vern. 527. Amb. 564. 16 Ves. 327.
[*d*] 3 P. Wms. 310, in note.
[*e*] 1 Ball. & Beatty, 447.
[*f*] *Vide ante*, p. 198.
[*g*] Mitf. 141.

if a derivative party commence a suit against any of the original parties, it may be necessary to bring his *collaterals* before the court, if their collateral rights may be endangered or called in question by the suit—as where the devisee is compelled to make the heir-at-law a party when he claims to have the will established. [*a*] It is upon collateral rights that cross-bills are generally filed.

76. We have thus far ascertained, at least in general terms, what parties ought to be named in the original bill; and if any such should be omitted, they may be added at any period afterwards, by way of amendment. [*b*] But where any of the parties to the original relation come into existence after the bill is filed—as on the birth of a tenant in tail, [*c*] or where the *derivative* relation, which makes the addition of a new party necessary, is created subsequent to the commencement of the suit; or if the *collateral* relation accrues by an event subsequent, there must be a *supplemental* bill to bring such new parties before the court. [*d*] This is, however, only in case the new parties are required to be *added* merely to the original suit, and who should have been named as parties in the original bill, or might have been made parties by amendment afterwards, had such parties been in existence, or had the derivative or collateral relation occurred before the bill was filed; and this is the true test for ascertaining when new parties may be *added* by supplement merely.

77. Abatement is either *of the suit*, or *as to a party*. A suit is said to abate when, in consequence of some event, there is no longer any person before the court, by

[*a*] 2 Ves. 431.
[*b*] *Vide ante*, p. 65–6.
[*c*] Mitf. 49.
[*d*] *Ante*, p. 137.

or against whom the proceedings can be carried forward. Abatement as to a party is, where the interest and title, or liability of the party, having ceased, it is no longer necessary to have such party before the court. When, in consequence of some derivative relation, a new party is required to be *substituted* in the room of one of the original parties, and not *added* only, it is clear, that the substitution works an abatement, as far as regards the original party. Now, derivative relations are produced, either, first, by the death of a party; second, by a voluntary transfer of interest; third, by the act of law; or, lastly, by succession.

78. As to the *first*, it is obvious that where derivative rights have devolved upon a new party by the *death* of an original party, there is necessarily an abatement as to the *party*, and the substitution of the new party will be a revivor as to him; but unless the deceased had been a *sole* complainant or defendant, even though he be a *principal* party, the *suit* has not abated by the death, because there are still before the court parties, by or against whom the proceedings may be carried forward. Nevertheless, if in such case the interest of the deceased party is transmitted to his representatives, so that it is necessary to have such representatives before the court, the suit becomes to that extent *defective*, and can only be continued by a revivor as to the representatives of the deceased party. [*a*]

79. A derivative relation, by the voluntary act of the party, can only be created by an assignment of interest in the matters in litigation; if it be an assignment of part only of his interest, the new party, in respect of his new rights, ought to be *added* to the suit, by way of supplement; and here it is clear there is no abatement. If

[*a*] Boddy v. Kent, 1 Meriv. 564.

the assignment be of the party's whole *interest*, as it is no longer necessary to have such party before the court, there will be an abatement as to the party whenever the assignee is substituted, but not until then, for, in effect, if the alienation of the property *pendente lite* be not disclosed, the suit will proceed without the addition or substitution of the derivative parties, who will, notwithstanding, be bound by the decree, since they thus tacitly submit to purchase the property, under all its circumstances of hazard, and subject to the event of the suit. [*a*] If, therefore, their newly acquired rights are materially affected by the decree, their only remedy will be an original bill, something in the nature of a cross bill. [*b*] On the other hand, if their newly acquired rights so far affect the original rights as that the decree cannot be put in force without making them parties, on this fact being discovered, they must be added by supplemental bill, to carry the decree in to execution. [*c*]

80. Thus, though when a party assigns his whole interest *pendente lite*, and the assignee is made party to the suit in his room, there is an abatement *as to the party* assignor; yet in no case, even where the party assigning his whole interest is sole complainant, does such assignment cause *ipso facto* an *abatement of the suit;* for an abatement of the suit only happens where there is no longer any person before the court, by or against whom the proceedings can be carried forward. But we have just seen that the suit may be proceeded with, notwithstanding the assignment of the party's *entire* interest. Indeed, the principle

[*a*] "*Pendente lite nihil innovetur.*" Co. Litt. 344, b. and *vide* 2 Atk. 174. Ambl. 676. 11 Ves. 195. 2 Ves. & Beames, 204, *et seq.*

[*b*] Mitf. 58. 2 Atk. 174. 3 Atk. 57.

[*c*] Mitf. 57.

is carried to such an extent that it seems a man may bring two bills at his own expense, making use of the name of his assignor in one; nor can the court say he shall be stopped in that one. [*a*]

81. If, indeed, the suit be proceeded with, notwithstanding the assignment, and such assignment be known, the want of interest may be used in the defence as a plea in bar; and, therefore, if the assignment be on the part of a *sole complainant*, the suit in his name will necessarily be rendered ineffectual, not because there is no longer before the court a person competent to conduct it, but because the *cause of action* is transferred to another. This, though it in effect puts an end to the suit, is not however, an *abatement*, and if three terms elapse without any further proceeding, the bill may be dismissed. The assignee of the complainant may, in the meantime, however, commence a *new suit* in respect of his acquired interest, which will have a reference, so far, to the original proceedings, as that he may crave the benefit of them. The bill necessary to be filed by the assignee of a sole complainant, therefore, will be an *original bill, in the nature of a supplemental bill.* [*b*]

82. If the assignment be on the part of a *sole defendant*, though there is an abatement *as to the party*, there is no abatement *of the suit*, and consequently the complainant may file a bill, stating the change of interest which has occurred, and substituting the assignee as the new defendant; but such bill being only in continuation of the former, will be *supplemental* merely, though in the nature of a bill of revivor, so far as regards the abatement as to the party.

[*a*] Ambl. 546.
[*b*] Mitf. 51.

83. This difference between a sole complainant and a sole defendant is father accounted for on this principle, that the defendant shall not be allowed to take advantage of his own act to bar the complainant's right during the pendency of a suit, but the suit will continue against the assignee of the interest, who takes it with all the liabilities attached. [*a*] The distinction between the marriage of a feme plaintiff and a feme defendant, as it effects the suit, rests upon similar grounds. If a *feme plaintiff* marries *pendente lite*, although her interest in the subject of litigation be not gone, yet she voluntarily deprives herself of all *title* to sue alone, in consequence of which the suit becomes abated, and the husband, *jure uxoris*, together with the wife in respect of the *interest* remaining in her (being but one person in contemplation of law), must be *substituted* for the feme sole complainant, by revivor. [*b*] On the other hand, a feme sole defendant cannot by her own voluntary act discharge herself from liability; [*c*] but such liability is annexed to the person of her husband, who should therefore be named in all subsequent proceedings; [*d*] and such is manifestly no abatement of the suit.

84. In general terms, it may be stated, that no circumstance causes an abatement *of a suit*, which would not be valid as a plea in abatement, although such circumstance may produce an abatement *as to a party*, and although the suit may thereby be *barred*. It is a want of attention to this distinction between a suit being *abated* and a suit being *barred*, which has caused all the un-

[*a*] Ambl. 676. 2 Ves. & Beames, 200.
[*b*] 1 Vern. 318. 1 Ves. 182.
[*c*] Beames' Pleas, 283. Gilb. For. Rom. 174, 175.
[*d*] *Ibid.*

certainty and contradiction as to the effect of bankruptcy, or insolvency, pending a suit. [*a*]

85. The property of a bankrupt, or insolvent, is, by law, transferred to assignees, chosen in a particular way, who hold such property *in trust* for the benefit of the creditors, and ultimately for the bankrupt or insolvent. [*b*] This transfer of property produces the third class of derivative relations above enumerated, namely, *by act of law.* Now, bankruptcy, or insolvency, can only be taken advantage of by *plea in bar*, [*c*] and consequently they cause no *abatement* of the suit. [*d*] Nor do they even, strictly speaking, produce an abatement *as to the party*, for as the assignees are in the character of trustees, they hold the property committed to them, not in their own right, but in the right of the bankrupt or insolvent, and are the representatives of whatever interest remains in him. That some interest continues in him is clear, for after payment of his debts he will be entitled to the surplus of property, if any; [*e*] and in some instances the bankrupt is permitted to follow up the suit in his own name, [*f*] though in such case he must bring the assignees before the court. [*g*] In all cases, therefore, even where the bankrupt or insolvent is the *sole complainant*, his assignees may come before the court and have the benefit of the former pro-

[*a*] *Vide* Beames' El. of Pleas, 286, *et seq.*, and the cases there cited.

[*b*] 6 Ves. 485. 15 Ves. 8.

[*c*] Mr. Beames classes bankruptcy and insolvency among pleas to the person; in which he professes to follow Lord Redesdale. (El. Pleas, 120.) But Lord Redesdale expressly makes it a plea in bar, under the head of *want of interest.* Mitf. 189; and see the next chapter.

[*d*] Cooper, Tr. 75.

[*e*] 15 Ves. 8.

[*f*] Mitf. 52. 1 Atk. 263.

[*g*] 18 Ves. 424.

ceedings, by supplemental bill; [*a*] for as they come in merely in a representative character, it is rather a change of *persons* than of *parties* to the suit, which remains exactly in the same condition as before. For the same reason, if any parties, suing or sued *en auter droit*, are changed or removed, their successors *in the same right* continue the litigation by supplement only. [*b*]

86. The last species of derivative relations mentioned above is that which accrues by *succession*, or where a new party comes in to the same interest, but by a different title—as in the case of succession to a benefice. This must happen either by the death or removal of the former party. On the principles already established, it is clear that in case of death the suit is abated; in case of removal, the suit is barred; and in all cases there is an abatement as to the party when the successor is *substituted*. Here, therefore, the parties must commence the proceedings *de novo*, and the original proceedings will be of no further avail than that, on being referred to, they may be a groundwork for the court to adopt similar proceedings in the new suit. [*c*] Such original bill is therefore said to be in the nature of a supplemental bill.

Section II.

Of the Form and Structure of Supplemental Bills.

87. The subject of every kind of bill, is the statement of some grievance or hardship, arising out of the relative position of the parties, and the grounds on which it calls upon the court for relief. Now, in a supplemental bill, the grievance complained of is, that there exists

[*a*] Coop. Tr. 76; and see 1 Ves. & Beames, 500. See 1 Atk. 263. 4 Ves. 387.

[*b*] 1 Atk. 88. 3 Atk. 218.

[*c*] Mitf. 57; and see 9 Ves. 37 to 67.

some defect in the suit already before the court, by means of which complete justice cannot be attained; but which, nevertheless, cannot, from the nature of it, or from the state of the proceedings, be remedied in the ordinary way of amendment.

88. We have seen that the bill should, in all cases, commence by stating the relation between the parties; and next deduce therefrom cause of complaint. In a supplemental bill, the cause of complaint grows out of the position of the parties to the original suit, and therefore the statement of the *relation* in a supplemental bill, will be a statement of the original bill, and of the proceedings thereon; the statement of *grievance* will be of the new matter which causes the defect in the original suit. This is always introduced by the words: "and your orator further showeth, by way of supplement, to your Lordship." The bill then proceeds to pray for a *subpœna, to the end* that the defendant may answer the new supplemental matter thus put in issue, and that the court may grant further relief, grounded on the supplemental statement; or if the defect in the suit arises from a change of parties, a *subpœna* is prayed against the new parties, to the end that they may answer the premises, and that the complainant may have the benefit of the former proceedings as against them, and the same relief as he would be entitled to against the original parties.

89. Here, it is obvious, the *third part* of the bill, according to our division, that which contains the pretences and charges, need in no case be inserted, unless where the supplemental matter seeks for further discovery; and the formal clause of equity, which suggests the jurisdiction of the court, is of course unnecessary, since the supplemental bill is only in continuation of the proceedings already before the court. Indeed, it has been shown, in a

former page, that these parts are not essential, even to the original bill; and thus a supplemental bill is, in all respects, analogous in its structure to an ordinary bill, and corroborates the principles we have before laid down concerning bills in general.

Section III.

Of the Form and Structure of Bills of Revivor, and of Bills in the Nature of Bills of Revivor.

90. In those cases where a bill of revivor may be filed, the hardship complained of is, that by the abatement of the suit, the complainant would be compelled to renew the same proceedings against persons who stand in precisely the same relation as the parties to the original suit, and against whom, therefore, he has the same claims, unless the court shall apply a remedy, by allowing the original proceedings to be *revived*, for or against the new parties. To make out such relation, therefore, the bill of revivor must state the original bill, and the proceedings upon it; and further, that the new parties hold exactly the same place in the original relation as the persons through whom they derive, and therefore are invested with similar rights and duties.

91. This is always the case where the new parties come in after abatement, *by the act of law*—such as the the heir at law, who comes in as the representative of the deceased, in regard to his real estate; the executor or administrator, who represents him as far as regards the personality; and the husband, *jure uxoris*, who must join with the *feme* plaintiff to sustain the suit. In all these cases, therefore, the relation will be sufficiently made out to give a title to revivor, by merely stating that the new party is the heir at law, or executor, or administrator, or

the husband of the *feme* plaintiff, and there is no question put in issue but as to the person of the party. This is the case of a bill of revivor, properly so called, which thereupon proceeds to state, " that the complainant is, as he is advised, entitled to have the said suit revived against the defendant, and restored to the same plight and conditiou as previously to, and at the time of the abatement and therefore prays a *subpœna* against the defendant to appear and show cause, if he can, why the suit and proceedings should not stand and be revived against him, *to the end* that the suit may be revived."

92. When the new party comes in after abatement, not by the act of law, but *by the act of the party*—as in the case of a devisee, who comes in under the will of the testator—to make out such a relation as will entitle to revive, it will be necessary to go one step farther, and to show not only the state of the former proceedings, and that the new party is the devisee, but also that *the act of the party*, by which the rights and duties have devolved upon him, is valid; and here, it is manifest, a considerable question is put in issue, until which is disposed of, either by admission or by proof, the title to revive is not fully established. This, therefore, is no longer a bill of revivor merely, but an *original bill in the nature of a bill of revivor*. This kind of bill, then, after showing the abatement and the transmission of interest to the new party, proceeds to state that, notwithstanding such abatement, the complainant is, as he is advised, entitled to have the same relief against the defendant as might have been decreed between the parties in the original suit; and then expressly *charges* the validity of the instrument by which the interest of the new party has been transmitted.

93. Here we are furnished with an exemplification of what we have laid down in a former part of this chap-

ter, concerning the nature and use of the *charging part* of a bill. Thus, the relation is here sufficiently made out, by merely showing the abatement and devise, so as to give a *prima facie* title, which is the proper function of the stating part of the bill; and the *charge* is introduced to anticipate and controvert the defence which may be set up, viz: that although such a devise was made, yet that it was not valid and effectual in law (as, for instance, that the testator was not empowered to dispose of his real estate by will); which brings the point at once to issue between the parties; and such, we have seen, is the peculiar province of the charging part.

94. The bill next goes on to pray for a *subpœna*, in the common form, *to the end* that the defendant may answer the premises, and that the same benefit may be had of the old suit as if it had not abated, or that the defendant may show good cause to the contrary.

95. *A supplemental bill in the nature of a bill of revivor*, is similar in principle to this last, except that, not being the consequence of an abatement of the suit, it partakes somewhat of the qualities of a supplemental and not an original bill.

Section IV.

Of the Form and Structure of the Original Bill in the Nature of a Supplemental Bill.

96. In the bills we have just described, the mere statement of a valid transmission of interest to the new party is sufficient to establish such a relation as will give a title to the benefit of the former proceedings, because the new parties to such bills are derivative parties, by privity of *blood*, or *representation*, or *contract;* and in such cases the derivative interest carries along with it the

original title and liability. But where the new parties are derivative by privity of *estate* only—as in the case of a successor to a benefice, or of a remainder-man to a tenant in tail, the acquisition of interest is not accompanied with either the old title or the old liability; but a *new* title, and a *new* liability will spring from the possession of the *estate*, which *may, perchance*, be similar to the former, as arising out of the same matter of litigation.

97. In such case, therefore, there must be a new suit altogether, and if in the new suit the injury complained of, and the redress sought, be similar to the former bill, in general the complainant will have the benefit of the former proceedings, so far as to have the new suit considered as supplemental to the original suit. To obtain this end, however, it will not be enough to show that there has been a transmission of interest, but it will be necessary to state such a new relation as will prove that the *new* title, or the *new* liability, is similar to the old, and that the complainant is in consequence entitled to similar relief; or, in other words, that the new suit is the same in substance as the original one, and therefore may be made supplemental to it. This bears a strong analogy to the practice of consolidating suits, which is done on special motion for a reference to the master, to see if two suits are for the same purpose. [*a*]

98. The *Original Bill in the nature of a Supplemental Bill*, states, therefore, the original bill at full length, with the proceedings upon it; the manner in which the succession of interest has accrued; next, the circumstances which make the relation similar; and, finally, it prays for a *subpœna* against the defendant, *to the end* that he may answer the premises, and that the

[*a*] 16 Ves. 344.

complainant may have similar relief against him to that which was prayed in the original bill.

Section V.

Form and Structure of Bills in the Nature of Original Bills.

99. We shall now briefly notice the structure of the remaining bills of such nature, that though they are strictly not original bills, yet the injury they complain of proceeds out of a former suit. These are cross-bills—bills of review—bills to set aside a decree obtained by fraud—bills to suspend a decree, and bills to carry a decree into execution.

100. A *cross-bill* is a species of defence used for the purpose of obtaining a discovery necessary to the defence, [*a*] or when it would be too late to use the same defence by way of plea; [*b*] or, lastly, to obtain some relief founded on the collateral claims of the party defendant to the original suit. [*c*]

101. In the *first* of these cases, the former suit causes the relation on which is founded the right to discovery; and, consequently, that suit and the proceedings upon it must be stated in the cross-bill. The discovery, when obtained, if material, must be added to the original answer by way of supplement; for the answer to the cross-bill cannot be read as a defence at the hearing of the original cause. [*d*]

102. In the *second* instance, the cross-bill is in the nature of a *ple puis darrein continuance*—as, for example,

[*a*] Mitf. 64. 3 Atk. 812. Mos. 382.
[*b*] Mitf. 64. 3 Ch. Rep. 19.
[*c*] 2 Cox, 78.
[*d*] 2 Ves. & Beames, 16.

where some occurrence has happened after the cause is at issue, which would have been a good ground of plea in bar—such as a release from the plaintiff. Here the statement of *relation* is of the former bill and proceedings, and the new occurrence which creates the bar; the *injury* is, that the suit is notwithstanding proceeded with, and that the complainant, in the cross-bill, cannot use the defence as a plea in bar; and he therefore prays a *subpœna, to the end* that the premises may be answered and that the new defence may be declared a sufficient bar to any further proceedings; and that, therefore, the original bill may be forthwith dismissed with costs. This kind of cross bill is necessary, in order to put the new defence in issue, without which the court could have no judicial cognizance of it at the hearing. [*a*]

103. A cross-bill, filed for the *last* purpose above mentioned, viz: for collateral relief, differs in no respect from the common form of an original bill, but must state the collateral relation—the injury sought to be redressed, in which part is generally included the reference to the former bill; pretences and charges, when necessary, being for the most part, pretences of some of the allegations in the original bill, and charges to the contrary; and, lastly, the prayer for *subpœna, to the end* that the defendant may answer the premises, and the court may decree such relief as the nature of the case may require. As a cross-bill is considered merely as a species of defence, [*b*] and concerns matters already in litigation before the court, it will not be necessary, at least as against the complainant to the original suit, to show any ground of equity to support the jurisdiction of the court. [*c*]

[*a*] 3 Ch. Rep. 19.
[*b*] 3 Atk. 812. Mos. 382.
[*c*] Hardr. 160.

104. *A bill of review* is either on error apparent, or on discovery of new matter. When it is brought for *error apparent*, after reciting the former proceedings, and the substance of the decree pronounced in which the error appears, it proceeds to state that "the said decree has since been duly signed and enrolled, and which said decree the complainant humbly insists is erroneous, and ought to be reviewed, reversed and set aside, for many apparent errors and imperfections, inasmuch as it ap pears," etc. Then, after showing the errors relied on, a *subpœna* is prayed, *to the end* that the statement may be answered, and that the decree may be reviewed, reversed and set aside, and no further proceedings taken thereon.

105. When the bill of review is brought on the *discovery of new matter*, after stating the enrollment of the decree, the bill proceeds: "and your orator showeth unto your Lordship, by leave of this honorable court, first had and obtained for that purpose, by way of supplement, that since the signing of the said decree, your orator has discovered, as the fact is," etc., stating the new matter relied on as a ground for reviewing and reversing the decree. "And your orator is advised and humbly insists, under the circumstances aforesaid, that the said decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed." It next prays a *subpœna*, *to the end* that the defendant may answer, and that the decree may be set aside; and that further directions be added, if required, on the supplemental matter, and for such general relief as the circumstances of the case may require.

106. *A bill to impeach a decree on the ground of fraud*, is in many respects similar to the last mentioned, only the circumstances explanatory of the fraud charged must be stated by way of inducement to the relation arising

out of the proceedings, and the decree alleged to be fraudulantly obtained. The complainant must then set out the circumstances of fraud under which the decree was obtained, and that having lately discovered the same, he applied to the defendant for redress, and not to insist on the decree. The *injury* complained of is, the defendant's refusal to comply with this request; to which is always added a pretence to the validity of the decree (which anticipates the defence), and a charge to controvert it; together with whatever other charges may corroborate the statement of fraud. The *subpœna* is prayed *to the end* that the defendant may put in his answer, and that the decree may be set aside and declared fraudulant and void; and for such other relief as the case may require.

107. The remaining two species of bills above enumerated, viz: bills to *suspend*, and bills to *carry a decree into execution*, are merely in the nature of a petition in the cause; only that the cause being concluded by the pronouncing of the final decree, the parties must again be brought before the court by an original bill.

In the former, the complainant must show the special circumstances on which he grounds his title to have the decree suspended; and then state that he is, as he is advised, entitled to have the decree, or part of it, suspended as against him, upon such equitable terms as he thereby offers, and so pray accordingly.

In the latter, the complainant must set out a sufficient reason why the decree has not been carried into execution, and also the circumstances which impede the execution of it at the time of filing the bill; and state that though "he is desirous of having the said decree forthwith carried into execution, yet, that from the circumstances aforesaid, he is advised that the same cannot be done without the assistance of the court;" which he prays

accordingly, " and that the defendant may be ordered to do and concur in all necessary acts for that purpose."

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108. We have thus endeavored to explain in general terms the form and structure of a bill in chancery, so that the student may be at no loss to apply the general principles to the particular case which comes before him; and we have also pointed out the peculiarities in the frame of secondary bills, which, however, form no exception to the general rules, but are rather particular instances illustrative of the universal theory. As informations differ in no respect from ordinary bills, but in their form, we have not thought it necessary to give them a separate consideration. It only remains for us at present to add such orders in chancery as relate to the mere drawing of the bill.

109. In Lord Bacon's Ordinances, published in open court in the year 1618, the 55th and 56th sections are as follows: " 55. If any bill, answer, replication, or rejoinder, shall be found of an immoderate length, both the party, and the counsel under whose hand it passed, shall be fined." " 56. If there be contained in any bill, answer, or other pleadings or interrogatory, any matter libellous or slanderous against any one that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's courts, such bills, answers, pleadings, or interrogatories, shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court; and the counselors at law who have set their hands, shall likewise receive reproof or punishment, if cause be."

110. These regulations were further enlarged by Lord Coventry in the orders published by him, A. D. 1635, and subsequently adopted by Lord Clarendon, in 1661. In the collection of rules and orders that go under his name, under the title "Bills," it is ordered, "That no counsellor do put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused by himself in the paper draft, before it be engrossed (which they shall do well for their own discharge to sign also after perusal), and counsel are to take care that the same be not stuffed with repetition of deeds, writings, or records *in hæc verba;* but the effect and substance of so much of them only as it is pertinent and material to be set down; and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other impertinencies, 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 criminous or scandalous, under the penalty of good costs to be laid on such counsel, to be paid to the party grieved, before such counsel be heard in court." "If there be matter scandalous in a bill, a master of chancery is to expunge it, and to tax costs for the party scandalized; but if on such reference the master reports the bill not scandalous, the party procuring such reference shall pay costs to the plaintiff for such his reference."

CHAPTER IV.

PLEAS AND DEMURRERS.

111. We now come to those pleadings which are used on the defence, and which either submit to answer and contest the suit, or which show some reason why the defendant is not called upon to answer; as that the court has not *jurisdiction;* or that the suit has *abated*, or is *defective*, or *barred.* When the defendant submits to contest the suit, he puts in an *answer;* he shows cause against answering by either *demurrer* or *plea.* As the plea in bar likewise contests the suit, so far as it insists that the cause of action either never existed, or is gone; so, in many cases, where the defendant does not require to protect himself from discovery, or that he must answer as to other particulars, he may insist upon the bar by answer, as effectually as by plea. [*a*] As pleas and demurrers are used as objections to the being compelled to answer, we shall commence our observations with them, and afterwards treat of the form and general requisites of answers.

SECTION I.

Of the General Nature of the Defence by Plea or Demurrer.

112. In a preceding chapter we have pointed out the distinction between pleas and demurrers in equity, and their analogy to the same species of defence at common law; and it there appears that the essential difference be-

[*a*] Mitf. 249. 1 Atk. 54. 2 P. Wms. 145.

tween a plea and a demurrer is, that the latter is merely an *issue in law* on the complainant's own showing; the former always puts *matter of fact*, as well as of *law*, in issue. Hence, wherever the objection to answer is founded on a matter of fact not admitted by the bill, and which, therefore, may be disputed, advantage of such objection must be taken by *plea*, in order that the complainant may have an opportunity to reply, and so take issue upon it. If the objection is apparent on the face of the adverse pleading, and therefore no question of fact can arise, the defendant may *demur*. With the restriction just mentioned; the objections taken, both by plea and demurrer, are the same; so that in this point of view, the ensuing observations will apply equally to both.

113. The student will recollect that we formerly laid down the propositions of a bill to be: 1st, That from the relation stated accrues the right to *discovery*, and such *relief* as is prayed for; 2d, That the relation stated is that which actually exists, and that these propositions admit of any defence which either, *first*, denies the right either to discovery, or relief, or both; or *second*, denies the relation; or *third*, invalidates the relation, or bars the right.

114. First, as to the denial of the *right*. This is analogous to the first mode of defence at law, mentioned in the chapter before alluded to, which, admitting the facts of the case, denies the inference or the rule of law sought to be established, which, as we have seen, constitute a demurrer. In like manner, this defence in equity, while it takes the statement in the bill as true, yet insists that the facts, even as stated by the complainant himself, do not give him a right to discovery or to relief.

115. In equity there are many cases where, though the court will not assume a jurisdiction to give relief, yet the complainant will be entitled to a discovery in aid of

the jurisdiction of other courts. [*a*] In such cases, however, the bill must be a bill of discovery only; and if it should seek any relief beyond the mere collateral relief of an injunction, or a commission to examine witnesses, [*b*] and the like, it may be demurred to. [*c*] In other instances the court will not interfere even for the purpose of discovery; and if the bill should state a case not entitling the complainant to discovery, it may be demurred to as a bill of discovery merely. [*d*] But discovery being, as before stated, incidental to relief where the complainant has a right to the assistance of the court, no demurrer will hold to the discovery, [*e*] unless, indeed, it be to a point which might subject the defendant to penalties or forfeiture, which is a good ground of demurrer: or if he does not think proper to defend himself from the discovery, by demurrer or plea, according to the circumstances of the case, he may by answer insist that he is not obliged to make the discovery. [*f*]

116. Second: The defence in equity, which denies the *relation* assumed, or, in other words, denies the truth of the facts stated in the bill, is analogous to the plea of the general issue stated at common law, and is taken advantage of by way of answer, which puts the complainant on the necessity of proving the allegations denied, if material to support his case. In like manner, the same defence, and with a similar analogy to common law, may be

[*a*] Mitf. 42, 149. 2 Ves. 398.

[*b*] 1 Bro. C. C. 471. 2 Ves. Jun. 514.

[*c*] Mitf. 149, and the cases there cited. See also, 6 Ves. 62, 11 Ves. 509. 2 Ves. & Beames, 328.

[*d*] Mitf. 150.

[*e*] *Ibid*, and see Forest's Rep. in Exchequer, 129. 6 Ves. 37-8. 1 Swanst. 294.

[*f*] Mitf. 163, 249. 3 Bro. C. C. 40. 3 P. Wms. 238. 10 Ves. 450.

made by denying some particular fact on which the whole relation, and consequently the right, is founded. This last is used by plea, the negative averments of which must be supported by answer also, for the reasons assigned in a previous chapter.

117. Third: The defence which *invalidates* the relation, or *bars* the right, is similar in all respects to a special plea in bar, at common law. *To invalidate the relation*, therefore, some new matter must be stated, which may show that the *parties* were incapacitated from contracting the relation, or are incapable to continue it; or that the *subject matter* was insufficient or illegal, or had undergone some alteration; or that the *right*, being incidental, had not accrued—as where a condition precedent had not been performed. Again, new matter may be stated to show that the *right*, though once existing, is *barred* by the *act of the party*, by the *act of law;* or, lastly, by the *act of God*, or unavoidable calamity. In all these cases, as new matter must be put in issue, the defence must be by plea.

118. It is to be observed, that according to the first proposition of the bill stated above, the *right* of which we here speak and which the defence either denies or invalidates, is *the right to discovery and relief*, which may be termed the *general right*, to contra-distinguish it from the *particular rights* flowing from the relation sought to be established, and which are included in the relief required. It is clear that the right to discovery and relief involves the consideration of the mode of *applying for redress*, since, if this latter be defective, the court will not interfere, at least, until the defect be remedied. All those objections, therefore, which we have noticed before [*a*] as the subject of pleas in abatement, and to the jurisdiction, are equally applicable as modes of defence in equity,

[*a*] Cap. 1, Sec. 1.

whether by demurrer or plea. In point of fact, there is this distinction to be taken between those modes of defence as used at common law, and as used in equity: that in the former case, general demurrers and pleas in bar are considered as effective answers to contest the suit; in equity, as has been already stated, pleas and demurers of all kinds are more in the nature of exceptions to answering or contesting the suit, either because the court has not *jurisdiction*, or the suit has *abated*, or is *defective*, or *barred*. And this difference arises from the double character as formerly noticed, which is sustained by the answer in equity—it being a pleading so far as it denies, and a proof so far as it admits, the allegations of the bill.

119. There is a close affinity between the method of the Roman law and that adopted by the *common law* of England. Our trial by jury is, in reality, nothing more than *giving judges*, under the Roman law, after the preliminary pleadings have been decided by the court; and, in many cases, the law is so interwoven with the fact, that the jury are, of necessity, the judges of both; and in one case more particularly, that of libel, by express act of parliament. In like manner, in *equity*, the masters in chancery, who were anciently the counsel and assistants to our clerical chancellors, were some of them given as judges; and this is the foundation of the judicial authority of the master of the rolls, who is the head of the masters in chancery, and, as such, entrusted with the keeping of the rolls of the court, whence he derives his name. [*a*] So, also, at the present day, all matters of account and such like are at once referred to a master, to be decided by him. Anciently, when the cause was remitted, to the master of the rolls, he used to examine the witnesses him-

[*a*] *Vide* Sir Jos. Jekyll's Treaties on the Judicial Authority of the Master of the Rolls.

self; but in course of time that duty devolved upon officers deputed by him, and thence called examiners [*a*] (for which reason he has the nomination to that appointment to this day); and hence this proceeding in chancery is still a remnant of the practice of *giving judges* to inquire into matters of fact, although the court retains to itself the ultimate decision of the cause upon the proofs and arguments at the hearing.

Section II.

Of the subject matter of Pleas and Demurrers, both to the Discovery and Relief.

120. Having thus made it appear that in equity, at least, demurrers and pleas are used for the purpose of showing that the suit ought not to be further contested, it remains now to see what objections will be deemed available to that end. It has been already shown that whatever objection holds against the relief sought by a bill, is equally valid against the discovery prayed by the same bill, the latter being incidental to the former. But as bills are sometimes filed for discovery only, there are some objections which extend to mere discovery. We shall, therefore, take each in its turn; and first of the objections to relief.

I. It is material to observe here, that as pleas in equity may be either in abatement or in bar, since the *right* to discovery and relief may be met by objections that go in abatement as well as in bar, so demurrers also, which *deny that right*, may be sustained on either of those grounds. It is different, however, as to answer, because the want of *relation* is an objection in bar, and consequently, the answer, the use of which is to deny, or inval-

[*a*] Ibid.

idate the *relation*, is in *bar* only, [*a*] and cannot insist upon an objection in abatement.

121. The annexed synopsis will exhibit, at one view, all the modes of defence to the relief, which may be used in equity; any of which may be taken advantage of, as preliminary objections, by plea or demurrer, to the defendant's answering or contesting the suit, with the exception of that mode which denies the relation; which, being in reality the very *litis contestatio* itself, must be done by answer, unless where the same thing can be effected by means of the *negative plea*. It was formerly, indeed, matter of doubt how far the negative plea ought to be allowed in equity [*b*] since it was thought that the answer was the most fitting mode of contesting the character in which the complainant sued, and on which his supposed claim was founded. But it has since been determined, and justly, that the negative plea is good; for otherwise, any person assuming a fictitious character might force a discovery from a defendant, to which, in his real capacity, he would have no right. [*c*] For it is an invariable rule that when a defendant does not plead or demur, but submits to answer, he must answer fully. [*d*]

122. II. We next come to those objections which hold even to discovery, without any relief being prayed; and first, we may lay it down as a general rule, that, whatever objections are valid to avoid a discovery, are a *fortiori* good as against relief; or negatively, that where there

[*a*] "An answer is that which the defendant pleadeth, or saith *in bar*, to avoid the plaintiff's bill or action, either by confessing, and avoiding, or traversing and denying, the material parts thereof." West's Symb. 104. Hinde, 196.

[*b*] Beames' Pleas, 123, *et seq.* and Mitf. 187, 188.

[*c*] Ibid.

[*d*] Mazzaredo *v.* Maitland, 3 Madd. Rep. 70. And see 11 Ves. 395, and 16 Ves. 382.

is no objection to relief, there can be none to discovery, unless where such discovery might subject the party to a penalty or forfeiture. But the converse of this proposition does not hold; for there may be no objection to the discovery and yet an objection to the relief; or, in other words, that which is an objection to a bill for relief, may yet be no objection to a bill of discovery. For as a bill for a mere discovery seeks no decree, so want of equity or want of proper parties would be no objection. [*a*] But as the discovery in a *bill for relief* is only subsidiary to the relief, if there be a valid objection to the latter, the discovery, though otherwise proper, must fall with it. [*b*] Care must be taken, therefore, that the bill do not pray relief when the complainant has a right only to discovery. [*c*] And it appears that even where the answer to a bill of discovery might furnish ground for supposing that relief was in equity, not in law, yet that the bill cannot be amended by adding a prayer for relief, but that it would be better to direct the complainant to pay the costs and bring a new bill; and if in that cause any use is to be made of the discovery given by the first answer, to let it be read as an answer to a bill of discovery, as evidence, not as part of the defence, or admission, upon which the bill proceeds. [*d*]

123. A bill of mere discovery is always brought in support of defence of a *civil* suit, either in the court itself or in some other court. In this respect, therefore, the

[*a*] Mitf. 163.

[*b*] Mitf. 149. Beames' Pleas, 250, and the cases there cited. See also 3 Meriv. 175. 1 Ves. & Beames, 539.

[*c*] But a mere prayer for *general* relief, or for the *collateral* relief of an injunction, commission, and the like, will not render a bill of discovery demurrable. 2 Ves. jun. 514.

[*d*] See the observations of Lord Eldon, in Butterworth *v.* Bailey, 15 Ves. 358.

court of equity assumes a jurisdiction to compel discovery, even where it has not authority to extend relief. Consequently, the want of equity will be no good ground to avoid an answer. But if a mere discovery be sought, where the court has not even jurisdiction to that extent—as if the discovery be sought in aid of a court of criminal jurisprudence, [*a*] or of a court which has itself authority to compel the discovery, [*b*] the defendant may plead or demur *to the jurisdiction*.

124. All pleas *to the person* extend to the discovery, as well as to relief; for they are objections to show that the complainant cannot institute a suit in any court. But, on the other hand, no plea in abatement, on the ground of the *mode of proceeding being defective*, can be used as an objection to a bill of discovery; because such a bill seeks no *decree* from the court. Multifariousness ought, perhaps, to be made an exception, [*c*] that the defendant may not be uselessly harrassed.

125. Next, as to the objections *in bar*. As the discovery is only for the purpose of obtaining relief, either in the same or in another court of justice, any objection which shows that the complainant can have no right to relief, either *in the same or any other court*, will bar his right to discovery. All the objections *in bar* for relief, therefore, in equity, will be equally valid against discovery in aid of relief *there*. [*d*] Yet there is one seeming exception to this rule, namely, as to the objection which *denies that the defendant has such an interest as can make him liable;* for persons, not otherwise interested,

[*a*] 2 Ves. 398.

[*b*] 1 Atk. 288. 1 Ves. 205. 2 Ves. 451.

[*c*] Mitf. 163.

[*d*] 2 Ves. 71. 3 Meriv. 175. 1 Ves. & Beames, 539. And see Lord Alvanley's observations, in 3 Ves. 347.

are frequently made parties for the mere purpose of discovery; such as the officers of the corporation (which, as it answers under seal, cannot be indicted for perjury) or attorneys, auctioneers, agents and arbitrators, when charged with being parties to a fraud. But further, if the complainant has no right of action *in any other court*, he can have no title to discovery in *this;* and the want of such right may be pleaded in bar, or objected by demurrer. [*a*] And even though the complainant should have such right, yet if the defendant has an equal claim to protection—as where he is a *purchaser for valuable consideration, without notice*, the court will not interpose, even to compel a *discovery*. This last plea, therefore, is equally a bar to discovery, in aid of the jurisdiction of other courts, as it is to relief, and consequently to discovery, in this. [*b*]

126. There are yet some objections peculiar to discovery, as regarded in the light of an examination. Thus, a defendant may refuse to answer any question that would subject him to a penalty or forfeiture, [*c*] unless such forfeiture be waived by the person competent to do so, [*d*] or that would cause a breach of the confidence reposed in him, as counsel, attorney, or arbitrator. [*e*] And this arises from the peculiar nature of a bill, which is both a pleading and an examination. The objections on such grounds may be taken to the bill, in its character of a pleading, by plea or demurrer; but as it is also on examination, the defendant may, without demurring or plead-

[*a*] Mitf. 152. 3 Bro. C. C. 154. 3 Ves. jun. 494. 13 Ves. 240.

[*b*] 2 Cha. Ca. 72. 1 Vern. 27. 1 Ventr. 198. 2 Ves. jun. 454.

[*c*] 1 Bro. C. C. 98. 1 Atk. 529. 2 Ves. 389. 2 Atk. 392.

[*d*] 1 Vern. 109, 129, 306. 1 Chan. Rep. 144. 2 Atk. 393.

[*e*] Cha. Ca. 277. Finch. Rep. 82.

ing, decline answering to the objectionable parts. [a] And this is the only exception to the general rule that when a defendant submits to answer, and neither pleads nor demurs, he must answer fully. [b] For reasons grounded on similar principles, if the discovery sought be *immaterial* to the relief required, either in the same or another court, the bill, which seeks such discovery, may be demurred to; or matter may be pleaded to show that the discovery, when obtained, would be immaterial. [c]

SECTION III.

Of the Defence to Bills not Original.

127. The objections which are peculiar to the bills not original, are chiefly in the nature of objections to the form of proceeding—as where a devisee files a bill of revivor, [d] when, as we have before seen, his proper course would be by original bill, in the nature of a bill of revivor: or where a complainant states, by way of supplemental bill, facts which might have been added by amendment; [e] or amends his original bill by adding new facts which had occurred since the institution of the suit, and which therefore are the subject of supplemental matter only. [f]

128. So, in like manner, if a person not a party or privy to the original suit brings a bill of review, the defendant may demur; or if such bill be brought against a

[a] Mitf. 163, 249. 3 Bro. C. C. 40. 2 P. Wms. 238. 10 Ves. 450.

[b] 3 Madd. Rep. 70.

[c] Mitf. 155, 156. 1 Bro. C. C. 96. 2 Atk. 387, 394. 2 Ves. jun. 396.

[d] 1 Cha. Ca. 174.

[e] 3 Atk. 817. 2 Mad. Rep. 240.

[f] 1 Atk. 291.

defendant not a party to the original bill. [*a*] But any matter which shows that the right, though existing at the time when the original bill was filed, had been subsequently barred—as by release, fine, and non-claim, [*b*] statute of limitations, [*c*] or decree enrolled twenty years —][*d*] may be pleaded against the secondary bill. Whereever new matter is introduced, either by supplement or in a bill of review, such new matter is liable to any objection which might be made to it, if stated in the original bill. [*e*]

129. The proper defence to a bill of revivor is by plea or demurrer, because if the party makes the same objection by answer, it cannot be determined till the hearing. Nevertheless, if at the hearing it does not appear that the complainant had a title to revive, although the defendant did not take advantage of the objection in any manner, he shall gain nothing by his bill. [*f*]

130. The regular defence to a bill of review for *error apparent*, is to plead the decree in bar to the new suit, and demur to opening the enrolment, [*g*] on the ground that the errors assigned are not such as to entitle the com plainant to have the decree *reviewed*, much less *reversed*. The first question therefore, is, whether the enrolment should be opened, and the decree *reviewed*, and this is argued apon the demurrer, when nothing can be read but what appears upon the face of the decree; if the demurrer

[*a*] Gilb. For. Rom. 186. 1 Chan. Ca. 123.

[*b*] 2 Vern. 190.

[*c*] 1 P. Wms. 742.

[*d*] 5 Brown. P. C. 466. 6 Brown. P. C. 395. 1 Vern. 287. 1 Ves. & Beames. 536.

[*e*] Mitf. 236.

[*f*] 3 P. Wms. 348.

[*g*] 1 Vern. 392. 2 Atk. 534.

be overruled, then arises the second question, whether the decree ought to be *reversed;* and the complainant is at liberty to read bill and answer, or any other evidence, as at a rehearing, the cause being equally open. [*a*]

131. The plea of the decree is proper in this case, and because it is the very foundation of the defence which is provable by the record; and although it appears on the face of the bill, yet it is there sought to be impeached on the ground of error apparent, which error being a question of *law* only, is rightly denied by demurrer; as likewise in a similar manner, when a bill is brought to set aside a decree on the ground of fraud, the decree itself is pleaded in bar, and the fraud, which is a question of *fact*, is denied by answer, in support of the plea, as well as by negative averments in the plea.

132. Where a bill of review is brought on *discovery of new matter*, a case can scarcely occur where it will be necessary to plead or demur, as the leave of the court must be had before the bill is filed. The fact of the discovery, however, may be contradicted by plea, or traversed by answer; and, in general, the new matter is liable to any objection which would have been good ground of defence to it in the original bill. [*b*].

133. A demurrer for want of equity will not hold to a cross bill, for the defendant being drawn into court by the complainant in the original bill, he may avail himself of the assistance of the court, without being obliged to show a ground of equity to support its jurisdiction. [*c*] For the same reason, such bills are not liable to any objections to the person, except the informality of the bill

[*a*] 1 Atk. 290.
[*b*] Mitf. 236.
[*c*] Hard. 160. 3 Atk. 812.

being exhibited in the name of a person who is incapable of instituting a suit alone. [*a*]

SECTION IV.

Of the General Form and Structure of Pleas and Demurrers.

134. Our next consideration will be, as to the form and general requisites of pleas and demurrers. The defendant being called upon by the *subpœna* to answer the interrogatories in the bill, must do so or show good cause to the contrary; the office of pleas and demurrers is to state such cause. Hence the substance of all pleas and demurrers is, in effect, nothing more than the statement, with certainty and precision, of some of those objections which are to be found in the synopsis of the modes of defence, "wherefore the defendant demands the judgment of the court, whether he shall be compelled to answer and contest the suit; and prays to be dismissed, with his reasonable costs."

135. Thus the demurrer contends that the case made by the bill (*admitting it for the sake of argument to be correct*), [*b*] is yet not such as to entitle the complainant to an answer, [*c*] either *because* the case, as stated, does not contain some essential ingredient necessary to establish the right, or *because* some fact is therein stated which operates as an avoidance to the right. [*d*] Again, the plea admits, *for the sake of argument*, that the facts stated in the bill are true, [*e*] and that the legal inference drawn is correct; but it *avers* that there are other circumstances connected with the case which dis-

[*a*] Hinde. 190.
[*b*] 2 Ves. Jun. 95.
[*c*] 3 Meriv. 503.
[*d*] 3 Ves. 255.
[*e*] 2 Atk. 51,

place the equity, [a] or which, in other words, by changing the nature of the relation between the parties, avoid the right established by the bill. The negative plea differs only in this, that instead of averring new facts, it denies some one essential position of the bill, admitting, *for the sake of argument*, that all the rest of the facts relied upon are true.

136. From this view it is apparent that the essential part of a plea or demurrer is the assignment of the reasons on which the defendant relies for not answering; and this is the substance and *body* of the pleading, which consists of the enumeration of the causes of *demurrer*, or the averment of the facts which constitute the *plea*. There are, besides, a formal commencement and conclusion, each of which performs distinct functions, and therefore the pleading may, with sufficient convenience, be devided into three parts: first, the commencement; second, the body; and, third, the conclusion. We shall here subjoin the skeleton form of a demurrer, and of a plea, and then add some remarks upon each part in its order.

137. The Demurrer of C. D., Defendant, to the Bill of Complaint of A. B., Complainant.

[A] This defendant, by protestation, not confessing or acknowledging 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, doth demur thereto; [B] and for cause of demurrer showeth, that [the said complainant hath not by his own showing made out a case which establishes his right, title, or interest; or that he hath admitted and acknowledged, by his said bill, certain facts which, by the known rules of the law, avoid his right to an answer.] [C] Wherefore, and for divers other defects and causes of demurrer appearing

[a] 1 Bro. C. C. 417. 1 Atk. 54. 3 Atk. 341. 15 Ves. 376.

in the said complainant's said bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and prays to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

The Plea of C. D., Defendant, to the Bill of Complaint of A. B., Complainant.

[A] This defendant, by protestation, not confessing or acknowledging 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, doth plead to the said bill; [B] and for plea saith, that [there are certain incidents affecting the relation between the parties, omitted (*or sought to be invalidated*) in the said bill, but which, when stated (*or discharged from impeachment*), show that this defendant ought not be compelled to answer the said bill]; and this defendant avers [all necessary circumstances to avoid ambiguity and exclude unfavorable construction]. [C] All which matters and things this defendant doth aver to be true; and therefore he doth plead the same to the said bill as aforesaid, and humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

Section V.

Of the Commencement.

138. [1] As to the commencement: We see that both pleas and demurrers begin with a protestation against confessing the facts, as stated in the bill, to be true. This

is a form frequently used at common law, when the party pleading wishes to avoid the inference that he admits anything which he has not an opportunity of putting in issue in that cause; and Lord Coke therefore defines it to be "the exclusion of a conclusion." [*a*] The use of the protestation of the commencement of the plea and demurrer in equity is to save the defendant from being concluded by his implied admission of the truth of the facts stated in the bill, and is a kind of declaration *in limine* that such facts are only admitted *for the sake of the argument;* for if subsequently his plea or demurrer should be overruled on argument, he is then to make a new defence, and may by answer deny or explain away the statement, which the plea or demurrer had by implication allowed. [*b*]

139. A *protestando* to the same effect is not necessary at common law, because there the plea in bar or demurrer, being an effective *litis contestatio*, is conclusive either way; and the plea in abatement (on which, being overruled, the judgment is *respondent auster*) [*c*] does not bring into question the merits of the case, and, consequently, neither admits nor denies the facts stated in the declaration. But, as we have already seen, in equity, pleas and demurrers are more in the nature of objections to answer, and proceed upon the ground that, *even granting that the complainant's statement be true*, still there is some reason, either *apparent* or stated, in the plea, why he has not the right to dicovery, or to the relief as prayed.

140. If the demurrer or plea be allowed, therefore, it is in effect the decision of the court, that the complainant has no right to discovery or relief, and consequently the bill is dismissed. [*d*] In case, however, it be

[*a*] Co. Litt. 124, b.
[*b*] Mitf. 14.
[*c*] 2 Saund. 211. a. n. [3]
[*d*] 3 P. Wms. 95. Mitf. 175.

not a dismissal on the merits, such dismissal will not preclude the complainant from bringing a new bill, when the disability is removed, or informality rectified; [*a*] and if this latter can be effected by amendment, the court might make a special order to that effect, without dismissing the bill. [*b*] On the other hand, with respect to a plea, though the opinion of the court on argument should be favorable to the defendant, this does not terminate the proceedings; for, though the reasoning in law may be correct, the facts on which the rule of law is founded, may be untrue; to put which in issue, the complainant may reply, even after the plea has been allowed; [*c*] and if at the hearing it shall appear that the defendant has not proved his case, the plea is of no avail, and the defendant must answer interrogatories to supply the place of that discovery to which the complainant, but for the plea, would have been entitled by answer. [*d*]

141. From the complex nature of a bill in equity, it is obvious that the same defence may not be applicable to every part, but that it may be expedient to demur, or plead to one part of the bill, and answer to the rest; or to demur, plead, and answer to different parts; and sometimes it may be necessary to have separate demurrers or separate pleas to distinct portions of the bill. Whenever, therefore, the demurrer or plea does not extend to the whole bill, it should clearly express what part of the bill it is intended to cover, and what it is the party refuses to answer, [*e*] otherwise the court would be put to great difficulty, and be obliged to refer to the bill and answer, to ascertain how far the pleading was meant to go; as, on

[*a*] Ibid.
[*b*] Mitf. 13, n, (p) 175.
[*c*] Mitf. 244. Beames' Pleas. 317.
[*d*] 2 Ves. 247.
[*e*] 2 Ves. 108, 450.

the other hand, in case of a reference of the answer to a master, upon exceptions, he would be at a loss to determine, precisely, whether the answer was sufficient or not. [*a*] And it would not be enough, in such case, to say that the defendant answers to such and such facts, and pleads or demurs to all the rest of the bill; for a pleading of this sort would be overruled for being too general. [*b*] It is in the commencement of the plea or demurrer, immediately after the protestation, that the statement is introduced of what part of the bill is sought to be covered by the pleading. The commencement in such case runs thus: This defendant, by protestation, etc., doth demur (*or plead*) to so much and such part of the said bill as prays, etc., (*or seeks a discovery from the defendant, whether, etc.*")

142. Great care, however, must be taken not to make the *demurrer* extend to any part of the bill to which it will not be a good defence; for *a demurrer cannot be good in part, and bad in part;* [*c*] that is, if there be any part of the bill sought to be covered by the demurrer, to which the demurrer does not extend, the whole demurrer must be overruled; [*d*] because the court will not be at the trouble of examining to which part of the bill the demurrer is applicable; yet the defendant is not thereby barred of his defence, because he may afterwards, with the leave of the court, file a new demurrer of less extent. [*e*] But if a defendant has demurred to part only of a bill, and answered other parts, it is no objection to the allowance of the demurrer that it is equally applicable to the whole of the bill. [*f*] So, where there are separate demurrers to

[*a*] 2 Sch. & Lefr. 207.
[*b*] Ibid. and *vide* 3 Atk. 70. Mos. 40. 1 Ves. & Beames' 514.
[*c*] 1 Atk. 451. 2 Atk. 388. 5 Ves. 173.
[*d*] 17 Ves. 280. 1 Swanst. 304.
[*e*] Mitf. 14. 11 Ves. 68.
[*f*] 1 Cox, 416.

distinct parts of the bill, one demurrer may be overruled upon argument and another allowed. [*a*]

143. But with respect to pleas, the rule is different; for *a plea may be good in part and bad in part;* [*b*] or, in other words, if the plea cover too much, it will nevertheless be allowed to the *extent* to which it is applicable, [*c*] and the reason that the rule with regard to demurrers does not extend to pleas, is that the latter, being *special answers* to the bill, as we have seen by the definition formerly quoted, it may conveniently enough be ascertained to what part of the bill the plea is an answer, and whether any other part requires a further defence. Indeed, the usual course in such case is to allow the plea to stand for an answer, with liberty to except. [*d*]

Section VI.

Of the Body, and herein of Averments and Intendments.

144. II. The body of the pleading consists of the assignment of the various causes of demurrer, or the statement of those facts which constitute the plea. A demurrer is the negation of the rule of law laid down in the first proposition of the bill, namely, that the right to discovery and relief results from the relation assumed; or rather, since the causes of demurrer must be assigned, it is a negative proposition that *from the Complainant's own showing*, he has not the right to discovery and relief, either *because* the relation stated by him is not adequate, or *because* there are some of the objections to answering which are classified in the *Synopsis*, apparent on the face of the bill. Thus, an issue in law is joined, not in the

[*a*] Mitf. 174. 3 P. Wms. 158. 1 Atk. 544.
[*b*] 4 Bro. C. C. 254. 8 Ves. 403. 11 Ves. 70.
[*c*] Mitf. 240. 2 Atk. 284.
[*d*] 6 Ves. 580.

first instance on the complainant's right, but on the validity of the causes assigned; and if any of these causes be allowed on argument, the right is necessarily gone.

145. The statement of the causes of demurrer, therefore, will be nothing more than a reference to the bill, and an enumeration of the objections appearing on the face of it, on which the defendant means to rely. Hence arise two questions: whether the objection, as stated, really exists; and whether such objection is valid. The first is, generally, a question of the adequateness of the relation stated by the bill; the latter is a question on the rule of law; and the defendant should, in assigning the causes of demurrer, clearly point out the nature of the objection which he takes, and how it appears on the adverse pleading.

146. It is a general rule, that a *speaking demurrer* is bad; *i. e.*, when it contains argument in the body of it; if, for instance, the demurrer say, "in or about the year 1770, *which is upwards of twenty years before the bill filed.*" [*a*] A demurrer, also, to anything but what appears on the face of the bill, is considered a *speaking demurrer*. [*b*]

147. The defendant may show as many causes of demurrer as there are objections apparent in the bill. [*c*] in which respect a demurrer differs from a plea, which must not (at least without the leave of the court) be *double;* [*d*] and the reason of this difference is, that one of the principal advantages of a plea being to save the parties the expense of going into an examination at large,

[*a*] 2 Ves. jun. 83.

[*b*] 2 Ves. 245.

[*c*] 3 Mad. Rep. 8.

[*d*] 2 Eq. Abr. 176. 1 Atk. 54. 1 Bro. C. C. 404, and 2 Ves. & Beames, 153, 155.

that end would be frustrated by permitting the defendant to put in issue a variety of facts constituting distinct bars, any of which would have been sufficient; but demurrers put no facts in issue, and may therefore take every available exception which can be used on the argument; and even causes of demurrer may be stated *ore tenus*, although not set out in the pleading; [*a*] but nevertheless, only to the extent of the demurrer on the record. [*b*] For example: if the demurrer be to the discovery, the defendant cannot *ore tenus* demur to the examination of witnesses *de bene esse:* and much less shall he be allowed to demur at the bar, when he has only pleaded, and there is no demurrer in court. [*c*]

148. As a demurrer collects the negative rule of law from the complainant's own statement, so the plea, on the other hand, deduces the same conclusion from a new statement by the defendant. The *body of the plea*, therefore, will consist of a statement of the facts from which the conclusion in objection to answering is drawn, [*d*] and the defendant, in effect, makes out a collateral case, founded on some one of the modes of defence stated in the *Synopsis.*

149. The *collateral case* made by plea, may, like the statement of a bill, be resolved into two propositions, of which one states the rule of law, viz.: 1st, *That certain incidents affecting the relation, avoid the complainant's right to discovery or relief;* the other avers the facts. 2d, *That such incidents are attached to the relation in question.* Hence arise two questions: the first a question of law, as to the validity of the objection relied on; the other a question of fact, as to the truth of those allega-

[*a*] 1 Vern. 78. 3 P. Wms. 370.
[*b*] 17 Ves. 213.
[*c*] 1 Vern. 78.
[*d*] 3 Atk. 558.

tions which constitute the objection. Upon either or both of these the complainant may take issue; and we have seen that if the plea on argument be determined against him, he may reply to the question of fact, and put the defendant on the proof; but if he replies in the first instance, without setting down the plea for argument, he thereby admits the validity of the rule of law, which is always the prior question; and he will not afterwards be admitted to dispute it, since he was contented to rest his case on the truth or falsehood of the facts alleged by the plea. [*a*]

150. The statement of the facts then must be direct and positive, and such as will amount to a complete equitable bar or other objection to answering. [*b*] It must also be clear and precise, and contain such subsidiary *averments* as are necessary to avoid all ambiguity of meaning; for the rule of construction is always unfavorable to the pleader. Hence, *averments* have been divided into *general* and *particular*. [*c*] The first are those which state generally the collateral case; the latter are such as are used in explanation of the *general averments* to exclude *intendments* [*d*] (as they are technically called), which in all cases are taken most strongly against the pleader. The meaning of an *intendment* is, that allowing an averment to be true, but that at the same time a case may be supposed consistent with it, which would render the averment inoperative as a full defence, such case shall be presumed, unless specifically excluded by particular averment—as where a proposition in the disjunctive is not denied in both its parts; or a proposition in the conjunctive, affirmed in both its parts.

[*a*] 3 P. Wms. 95.
[*b*] Mitf. 240. 2 Ves. 245. 3 Atk. 586.
[*c*] Co. Litt. 362 b.
[*d*] Mitf. 240.

151. The *general averments* must contain a detailed statement, in their natural order, of all those circumstances, which, taken together, amount to a valid equitable defence; [*a*] and if any of the links in the chain of facts be wanting, it will be intended against the defendant. It must be a statement of particular *facts*, and not of general deductions from facts; [*b*] thus, it is not enough to say, that a thing was *duly* or *lawfully* done or executed, without setting out the particular manner; for that is a question for the court to determine, and not for the defendant to assume. This is meant, however, with regard to such averments only as go to the very substance and gist of the bar. To take a peculiar example: the bankruptcy of the plaintiff subsequent to the cause of action, is a good plea in bar, both in law and in equity. [*c*] It is not, however, his being declared a bankrupt under the commission, which constitutes the bar, but his having *bona fide* committed an act of bankruptcy, and the proceedings thereon, including the transfer of his property to the assignees. For the substance of the bar, in this case, is the want of interest in the plaintiff, such interest being vested in the assignees; but if any of the previous steps be irregular, the assignment is void. It is not sufficient, therefore, to state that the plaintiff was *duly* found and declared a bankrupt under the commission; but his being a trader under the act, his act of bankruptcy and the several proceedings thereon *seriatim*, must be set out at full length; for although the commissioners may have declared him a bankrupt *non constat*, but that their decision may be reversed, and that is for the court and jury to determine. [*d*] So also, in pleading a release, the con-

[*a*] 1 Ves. 243. 1 Bro. C. C. 578.

[*b*] 4 Bro. C. C. 321. 13 Ves. 29. 2 Sch. & Lefr. 305–6.

[*c*] 9 Ves. 77. 1 Anstr. 101.

[*d*] *Vide* what is said by Lord Eldon, in Carleton *v.* Leighton, 3 Meriv. 667.

sideration must be set out, [*a*] or otherwise it will be intended to have been made without a sufficient consideration; for the statement in the bill being taken for true, the demand is acknowledged to be just; and then a release would not be a good bar, unless the consideration were equivalent; [*b*] but that is for the court to decide.

152. If any one of the *general averments* admits of an intendment unfavorable to the defendant, such intendment must be excluded by a *particular* averment. Thus in outlawry or excommunication, which are pleaded *sub pede sigilli*, [*c*] it must be averred that they are still in force, and also that the person named in the record produced to the court under seal, and the complainant, are one and the same person. This is similar to the usual averment of "*quæ est eadem*," in trespass at common law. In like manner, where the plea has been anticipated and impeached by a charge in the bill, the charge must be negatived by a particular averment [*d*] to avoid the general intendment that the allegations of the bill are true, and consequently the matter of the plea invalidated. [*e*]

153. But, as we have explained in a former chapter, a plea of this nature must be *supported* by an answer, so far as to deny the matter of impeachment charged in the bill, [*f*] both for the technical reasons which have been formerly detailed, and for another reason which we shall mention here, namely: that notwithstanding the plea, the complainant is entitled to discovery, so far as relates to

[*a*] Hard. 168. 2 Ves. 107. Gilb. For. Rom. 57.

[*b*] See Lord Redesdale judgment in Roche *v.* Morgell, 2 Sch. & Lefr. 728.

[*c*] Beames' Ord. Chan. 27.

[*d*] Mitf. 241, 196, *et seq.*

[*e*] Mitf. 241. Gilb. For. Rom. 58. 2 Atk. 124.

[*f*] Mitf. 192, and the cases cited in the note.

the charge, with all its circumstantial interrogations; [*a*] and it is in its character of a proof, and not as a pleading, that the answer is used in this case. This is the meaning of the position most correctly laid down by Lord Redesdale, when, in combating the notion that there is something incongruous in this mode of pleading, he says, that "the answer is no part of the defence." [*b*] The plea alone is the defence; the answer is but the discovery to which the complainant is entitled, and which the plea cannot cover, because the validity of the plea depends in a great measure on the discovery, to which alone the complainant can except; and the negative averment in the plea "does not require positive assertion." [*c*] Answers are thus used sometimes *in support* of a plea; but in other respects, if a defendant were to answer to parts of the bill, covered by plea or demurrer—these pleadings being in fact, only objections to answering—would be thereby waived. [*d*]

154. From the strictness of the rules regarding pleas, it is apparent that in order to make the plea a full defence, all the averments must be stated positively; [*e*] although in some instances—as in case of negative averments, and of averment of facts not within the immediate knowledge of the defendant, he will be permitted to aver according to the best of his knowledge and belief. [*f*] A variety of facts may be averred, provided they all tend to the same conclusion, and amount to a *single* objection; [*g*] for, if more than one objection were taken, the plea

[*a*] Gilb. For. Rom. 58. Mitf. 200. 6 Ves. 592.
[*b*] *Vide* Mitf. 189, note [*h*] and *vide* Beames' Pleas, 34.
[*c*] Mitf. 240.
[*d*] Gilb. For. Rom. 58. 2 Atk. 155. 1 Anstr. 14. 1 Vern. 90.
[*e*] 3 Atk. 586.
[*f*] Mitf. 240.
[*g*] 1 P. Wms. 723. 15 Ves. 79.

would be bad for duplicity. [*a*] By the common law, a double plea, or one which assigned more than one cause in bar of a suit, was bad; [*b*] but now, by stat. 4th Ann. c. 16, two several bars may be pleaded by the leave of the court in any court of record. The court of equity not being a court of record, it was considered that a double plea in this court would be fatal; but it has lately been decided that with the leave of the court, the defendant may plead double; [*c*] and justly, since it would be contrary to all analogy, that the same latitude should not be allowed in equity as at common law; and the previous sanction of the court sufficiently guards against abuse.

Section VII.

Of the Conclusion.

155. III. The conclusion of a plea or demurrer is, substantially an appeal to the court, whether the defendant, for the reason assigned in the body of the pleading, ought to be compelled to put in an answer and contest the suit, or make that discovery which the complainant seeks by his bill; and it ends with a prayer that the party may be dismissed from attendance, with his reasonable costs. The purport and design of pleas and demurrers of all descriptions in equity being to avoid an answer, [*d*] the same conclusion is alike applicable to every species. In general, however, in pleas in bar, the defendant states that he avers the matter contained in his plea, and pleads the same

[*a*] 2 Eq. Ca. Abr. 176. 1 Atk. 54. 1 Bro. C. C. 404. 2 Ves. & Beames', 153.

[*b*] Co. Litt. 304, a.

[*c*] Gibson *v.* Whitehead, 30th July, 1819, before V. C. Leach, cited in Madd. Chan. Prac. 299.

[*d*] Gilb. For. Rom. 58.

in bar; [*a*] but this, though usual, is not necessary, nor will the want of it vitiate the plea. [*b*]

156. At common law, every plea has its apt and proper conclusion, [*c*] by which the nature of the plea is to be judged; and therefore an improper conclusion would be fatal, there being an essential difference as to the judgment to be pronounced on each. [*d*] The slightest informality will invalidate the plea in abatement; [*e*] because the courts discountenance these pleas, which do not go to the merits; and it is but reasonable that he that objects upon mere form, shall be judged by the same rule; besides, the judgment in such case is only interlocutory, *quod respondeat ouster.* [*f*] In equity, the decision of the court with respect to all kinds of pleas and demurrers is the same, viz.: the bill is dismissed, or the defendant is put to *answer over*, and contest the suit. In this regard, all pleas, even such as are in bar in equity, are analagous to pleas in abatement at common law, which do not contest the suit. In equity, the answer is the only pleading which effectively contests the suit; and all pleas, whether dilatory or peremptory, are only objections to answering. Hence has arisen the doubt, whether there be any pleas in abatement in equity, as contra-distinguished from pleas in bar; [*g*] and certainly it would be more correct to divide pleas in equity into declinatory, dilatory and peremptory, in analogy to the civil law, from which the proceedings in this court are derived. The judgment, in all pleas in

[*a*] Beames' Pleas, 49.

[*b*] This point was raised in the case of Merewether *v.* Mellish, 13 Ves. 435; but it was not even noticed by the court.

[*c*] Co. Litt. 303 b.

[*d*] 1 Saund. 103, a. n. [1].

[*e*] 3 Term. Rep. 185. 8 Term. Rep. 515.

[*f*] 2 Saund. 211, a. n. [3].

[*g*] *Vide* Beames' Pleas, 57, *et seq.*

equity, being the same, the conclusion need not be different; and, as we have seen, they bear an anology to pleas in abatement at common law; so the conclusion is similar to that of pleas to the person at common law, where the defendant demands the judgment of the court *si respondere debet.* [*a*] Thus, too, and with the same anology, pleas of matter *in pais*, like pleas in abatement at common law, [*b*] must be put in upon oath.

157. It has been questioned whether a plea in equity, which did not conclude by averring the facts to be true, [*c*] similar to the "*hoc paratus est verificare*," at common law, would be good; but since the stat. 4 Ann. c. 16, not even at common law can this objection [*d*] be taken advantage of, but by special demurrer, and it would not, it is concluded, be available in equity.

158. When the plea or demurrer extends to part only of the bill, the conclusion must be conformable thereto; and as in that case there must be an answer to the rest of the bill, not covered by the plea or demurrer, such answer is preceded by a protestation against a waiver of the plea. So, likewise, when the answer is in support of the plea, it is expressed to be made for that purpose, and preceded by a similar protestation. This is, however, *exabundanti cautela*, because an answer is only a waiver to the plea, "when it puts in issue anything which the plea would cover from being put in issue." [*e*] Where an answer is added to a plea or demurrer, the prayer to be dismissed with costs is inserted at the end of the answer. In cases of this nature the conclusion runs thus:

[*a*] 2 Saund. 210, note. Tidd, 576.
[*b*] 2 Str. 705, 738.
[*c*] Randolph *v.* Randolph, Hardr. 160.
[*d*] 1 East, 369.
[*e*] Gilb. For. Rom. 58. Mitf. 195, n. [*e*].

"This defendant both plead (*or demur*) to so much of the said bill as is hereinbefore mentioned, and humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to so much of the said bill as is hereinbefore pleaded (*or demurred*) to. And this defendant, not waiving his said plea (*or demurrer*), but relying thereon for answer to the residue of the said bill, saith," etc. If the answer be in support of the plea, "this defendant not waiving his said plea, but relying thereon, and for better supporting the same, for answer to so much of the said bill as aforesaid, saith," etc. The nature and form of answers will be the subject of our consideration in the ensuing chapter.

CHAPTER V.

ANSWERS.

159. If the defendant cannot protect himself from discovery, by either plea or demurrer, he must give a distinct and full answer to each particular allegation and charge in the bill. The bill calls on the defendant "to make full, true, perfect and distinct answers to all and singular the matters therein contained; and that as fully and particularly as if they were repeated by way of interrogation;". and it then proceeds to interrogate to each point circumstantially. The defendant must therefore answer every part of the substance of the statement and charges, even though it should be omitted in the interrogation; and further, as the use of the interrogating part in the bill is to extract a full confession and prevent evasion or ambiguity, every particular question must be answered precisely in all its bearings and circumstances, provided it be founded upon some express allegation in the body of the bill. [*a*] So far as the answer is an admission of the facts charged by the complainant, it stands in place of proof in the cause; and hence the great object which the complainant has in view, is to obtain such an answer as will either *supply* proof, where the facts rest within the knowledge of the defendant, and are binding in conscience only, or such as will *aid* proof, viz.: where, although he shall be able to prove the facts by the testimony of others, yet the defendant's admission will save him the trouble and expense of examining witnesses to those points which are acknowl-

[*a*] 1 Bro. C. C. 503. 6 Ves. 37-8.

edged by the answer. [*a*] Looked upon in this point of view, therefore, the answer must fully and fairly meet every inquiry in the bill, for if there be any possibility of evasion, the complainant will accept. For this reason, the primary consideration with the draftsman is to make the answer *sufficient*, and most of the observations we shall have to make on the subject of answers will relate to this point.

160. In earlier times, the forms of proceeding in this court do not appear to have been near so strict as they are at the present day, although perhaps they were abundantly sufficient for all purposes at that period when the authority of the court of chancery was yet in its infancy; and this looseness of form was certainly more conformable to the notion of equity then entertained, being considered as a relaxation of the rule of law. Thus the answer seems to have been little more than a general and informal statement of the adverse case, in reply to the bill, accompanied with a traverse of all such points as the defendant thought it material to deny, in order to put the complainant upon the proof, and concluding with a general traverse of whatever was not admitted to be true. This general traverse at the end of the answer, though now unnecessary, as every point must be answered separately, is still continued in practice. [*b*] In like manner the defendant was permitted to answer and plead, or demur, at the same time, and to the same parts of the bill; because the answer, being such as we have described it above, was not considered so much in the light of a discovery, which the defendant by his plea or demurrer would avoid, as of a pleading to be used only on the defence. Hence it was usual to commence the answer with a general reservation

[*a*] 2 Atk. 241. 2 Ves. 492.

[*b*] 2 P. Wms. 87.

of the right to except to the complainant's bill; and although, since the practice of the court has been matured, the answer would be a waiver of a plea or demurrer, [*a*] and consequently no objection can be taken after answer to the bill, [*b*] still the old form of commencement is adhered to. The commencement is now, therefore, a mere technical form, of no further utility than as it serves to characterize the pleading. In the case of an infant, whose rights and interests are under the peculiar protection of the court, this form of reserving the benefit of exceptions, as well as the usual denial of combination, at the close of the answer, are omitted. [*c*]

161. The defendant, by his oath, is bound to answer according to the best and utmost of his knowledge, remembrance, information and belief. That which he is acquainted with of his own knowledge admits of a direct answer, either in the affirmative or negative, unless it be a matter of recollection, in which respect the answer must be qualified according to the extent of the remembrance. Such circumstances as are known to the defendant from information and hearsay only, are the proper subjects of belief, and on which he in general has formed some opinion, either of assent or dissent. It is not enough, therefore, to answer the question by saying he has been informed, or heard of any particular fact, but he must state whether or not he believes it to be true. [*d*] Again, there may be other facts alleged in the bill, to which the defendant is a total stranger, and of the truth of which he

[*a*] Mitf. 258, 3 Anst. 715. 2 Atk. 155.

[*b*] But if, after an answer, the complainant amends his bill, the defendant may, notwithstanding his former answer, put in a plea to the amended bill. *Vide* Ritchie *v.* Aylwin, 15 Ves. 79.

[*c*] Mitf. 254.

[*d*] Hinde, 197.

cannot form any opinion. Thus, the answer will be either a direct admission or denial, or an assent or dissent, or a declaration that the defendant cannot, as to his belief or otherwise, form any opinion of the truth or falsehood of the facts alleged.

162. But there may be statements or charges in the bill, which though true in part, are yet substantially incorrect, and which, therefore, it may be necessary to add to, qualify, or explain. To questions of this nature the defendant cannot give a direct answer in the first instance; but he must state the case according to the fact, and conclude by denying that the particular statement or charge is true, "further or otherwise," than as he has explained it. This is the meaning of a *traverse* in an answer, so frequently to be met with in the books as contra-distinguished from a direct denial; and although it is now marked by the technical words *absque hoc*, it is, to all intents and purposes, a *traverse*, being preceded by an inducement of matter inconsistent with the statement of the complainant, but which, without the denial in the conclusion, would not tender an issue; and this, we have seen, is the definition of a traverse, as explained in a former chapter. [*a*]

163. It is an observation worthy of the student's attention, that in order to make an answer sufficient, and thereby avoid exceptions, the words of the interrogation ought, as nearly as possible, to be followed, but so as that the charge may not be answered literally, but in substance. Thus it should be said, "this defendant admits, or denies it to be true;" or, "has been informed and believes it to be true, that," etc., following the words of the bill in the interrogating part. So, likewise, when the defendant disclaims all knowledge, he should say, "and

[*a*] *Vide ante*, c. 1.

this defendant doth not know, and cannot, as to his belief or otherwise, save as he is informed thereof by the said bill, answer or set forth whether," etc., repeating the interrogatory. The traverse is in this form: "this defendant, further answering, saith that," etc. (stating his case), "and this defendant further, or otherwise than as aforesaid, denies it to be true that," etc. (the words of the interrogatory). If the defendant be interrogated to a point of law merely, and not of fact, instead of answering he submits the question to the decision of the court: "and this defendant submits it to this honorable court, whether," etc. We have already seen that many circumstances which would have been available as a defence by way of plea, may be insisted upon by answer—as where the defendant does not require to protect himself from discovery [*a*] or where it might be doubtful whether the same defence would hold as a plea; [*b*] or where, from the variety of matters to be put in issue, a plea would not achieve the object of shortening the suit and saving expense. [*c*] In this respect the answer confesses and avoids the particular allegation of the bill, similarly to what we have described when treating of pleas: "and this defendant admits it to be true that, etc., but then he saith that," etc. (stating the matter in objection); and it is a common but unnecessary practice to conclude with insisting upon having the same benefit of the objection so stated, as if the same were pleaded in bar to the relief, or *demurred* to as to the *discovery*, where it would cause a penalty or forfeiture, or a breach of confidence in a counsel, attorney, or arbitrator. These are the only cases, as we have stated in the preceding chapter, in which the defendant can insist by answer against making a dis-

[*a*] Mitf. 249.
[*b*] 2 P. Wms. 145.
[*c*] 1 Atk. 54.

covery; in all other cases where the defendant submits to answer, although he might have good ground for pleading or demurring, *he must answer fully*. [*a*]

164. It was formerly thought that if a defendant denied by his answer the foundation of the bill, as where he denied the complainant's title, or where such title had not been previously established at law, he might decline making any discovery as to those inquiries in the bill which rested on the assumption of the matter denied, [*b*] as of good title for instance, unless such discovery were material as affecting the controverted point. This has been long a *multum vexata quæstio*, and one which Lord Eldon termed a "distracted point"; [*c*] for the cases abound with contradictions and nice and subtle distinctions upon the subject. [*d*] But the question is now put completely at rest, it having been recently decided "that a defendant cannot by answer object to answering, though by plea he may;" [*e*] and Sir John Leach, expressing his opinion on this point, said, "I think that this is so useful a rule, I shall always adhere to it." The allowing a contrary rule to prevail, would be to confound all just distinctions, and to do away all the advantages that result from adhering to systematic forms.

165. The old practice seems to have obtained from having allowed too great a latitude of construction to a different rule, namely: that where there is a series of questions depending upon a supposition of the fact upon which they are built being admitted, if that fact be denied, it would undoubtedly be superfluous to go on and

[*a*] 3 Madd. Rep. 70.
[*b*] Mitf. 251-2-3.
[*c*] Shaw *v.* Ching, 11 Ves. 306.
[*d*] 2 Madd. Chan. Prac. 338-9.
[*e*] Mazzaredo *v.* Maitland, 3 Madd. Rep. 70.

give a particular negative to each query deduced from such presumed fact. But this rule relates to a single allegation and its consequents, and not to a point, which, if insisted on by a negative plea, would be a good objection to the discovery of independent matter; and the reason of this rule is, that the answer may not be rendered needlessly prolix by the insertion of that which is sufficiently denied by the previous answer.

166. For the similar purpose of avoiding prolixity, deeds or other writings should not ordinarily be set out *in hæc verba*, even though called for by the bills. [*a*] It is sufficient if they are referred to, and left with the clerk in court, for the complainant to take copies, if he thinks proper; or the court will order them to be produced on the examination of witnesses. [*b*] In all other respects, however, the answer to each inquiry must be full and precise; and although general accounts and inventories and such like, may be set out in schedules annexed to the answer, and which the defendant prays may be taken as part thereof, yet any particular question relating to such account, etc., must be answered specifically, and it will not be enough to refer generally to the schedule in answer to such particular query. [*c*] Most of the rules relating to the precision of answers are to be found in the following extract from Lord Clarendon's orders: [*d*] "An answer to a matter charged as a defendant's own fact, 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

[*a*] Hinde, 198. Beames' Ord. Chan. 69, 166.
[*b*] Hinde, 198.
[*c*] 1 Bro. C. C. 503.
[*d*] Beames' Ord. Chan. 179.

deny it (as the cause requires) directly and not by way of negative pregnant. [a] As, if he be charged with a receipt of a sum of money, he must deny or traverse that he hath not received that 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 must answer the point of substance positively and certainly."

167. An answer must not, no more than a plea or demurrer, be argumentative; [b] but should rely on matter of fact only. There is one more observation which the student will do well to recollect, namely: that when any admission which might operate against the defendant is followed by an avoidance or explanation, this should be one continuous sentence: for though the answer, when replied to, cannot be read at the hearing in support of the defendant's case, yet if part of any sentence be read by the complainant, the defendant will be entitled to have the whole of that sentence read; and, in like manner, when a sentence has a direct reference to a previous part of the answer, the defendant has a right to read the part referred to.

168. In order to give the student a general idea of the form of an answer, we shall here insert an answer to the skeleton bill given in a former chapter; and, as far as it may be done, with its several variations:

[a] A *negative pregnant* is a negative, implying also an affirmative; as if the man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo et forma declarata*, which implieth, nevertheless, that in some sort he did it." Cowell. Beames' Ord. Chan. 179, n. 56.

[b] 11 Ves. 303.

"The Answer of C. D. Defendant, to the Bill of Complaint of A. B. Complainant.

"This defendant saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says he believes it to be true, that at the time in the said bill in that behalf mentioned, such events did take place as led to the relation now existing between the said complainant, A. B., and this defendant; and he admits it to be true, that such relation does in fact exist. And this defendant, further answering, saith, he admits it to be true, that the said complainant and this defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant; but then, he saith, such equitable incidents depend upon the performance of a condition precedent; and that such condition has never been performed by the said complainant, although this defendant hath always been ready and willing, and hereby offers to perform his part of the contract, whenever the said complainant shall have complied with terms thereof on his part. And this defendant, further answering, saith, that had the said complainant performed the said condition precedent, such duties as are in the said bill in that behalf set forth to be performed by this defendant, would have arisen from the said relation; but further or otherwise than as aforesaid, this defendant denies it to be true, that such duties as are in the said bill set forth to be performed by this defendant, did arise from the said relation. And this defendant denies it to be true, that the said complainant hath, by himself or his agents, or in any other manner, made such or the like applications and requests as are in

the said bill in that behalf mentioned, or any applications and requests in respect of the matters in the said bill mentioned. And this defendant doth not know, nor can he as to his belief or otherwise, save as he is informed thereof by the said bill, set forth whether the circumstances in the said bill charged are true, or how otherwise. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged; *without this*, that there is any other matter, cause, or thing, in the said bill of complaint contained (material or necessary for the defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied), is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

169. It can be scarcely necessary to observe that the above general form is given merely for the example; and that answers cannot pursue any precise method or arrangement, but must follow the circumstances of the case, and the allegations of the bill. For further answers, and the answers to amended bills, which are always considered as a continuation and part of the former answer, we refer the student to the Appendix. We have endeavored to mould the above form so as to give instances of — 1, an assent; 2, admission; 3, confession and avoidance; 4, traverse; 5, denial; and 6, disclaimer of knowledge. The example of denial affords us also an apt illustration of the rule that it is useless to deny a fact, the negation of which is necessarily involved in the answer to a former question. Thus, as the defendant denies that any requests were

made to him, it would be utter trifling to say that he did not refuse to comply with them, or why.

170. The conclusion, which is a common form, and now quite unnecessary, supplies us with an example of the formal traverse, with an *absque hoc*. This is a general traverse of every allegation in the bill which the answer did not specifically meet but formerly it was the custom to insert, immediately preceding the general traverse, a particular traverse of those parts of the bill which the defendant meant to deny; the whole foregoing part of the answer being nothing but inducement, or a statement of the defendant's case, inconsistent with that made by the bill. [*a*]

171. As an infant is not bound by the answer put in for him by his guardian, and as the Attorney General cannot be compelled to answer at all, [*b*] such answers cannot be excepted to; [*c*] and they are therefore, seldom full. For the form of those answers, as well as for *disclaimers*, which are a species of answer filed by persons made defendants, who claim no interest or concern in the suit, we must refer the student to the Appendix.

[*a*] The student will find in the Appendix the precedent of a bill, and an answer to it in the old form, taken from the Curcus Cancellariæ, p. 125, *et seq*.

[*b*] Dick. 730.

[*c*] Madd. Cha. Prac. 336, and the cases cited in the note. Mitf. 254.

CHAPTER VI.

THE REPLICATION.

172. When the answer, according to the practice which formerly prevailed, was only a statement of the defendant's case in reply to the bill, and not, as at the present day, a full discovery of all the matters charged, it usually became necessary for the complainant to make a special replication to such statement in the answer, which was followed by a special rejoinder, rebutter, and so on, until a distinct issue was joined, as at common law. But, as the practice now stands, the answer being a full discovery to every point, the complainant may find sufficient admissions in the answer, upon which to ground a decree; whereupon he proceeds to a hearing upon bill and answer only. If the admissions be accompanied by a statement in avoidance, the complainant will be allowed, instead of replying specially to the new matter, to amend his bill and extract fresh discovery. The amended bill, therefore, and further answer supply the place of special pleadings, which are now obsolete and the reason why this practice has obtained in equity, though not at common law, is that the great object of *special* pleading at common law is to keep the law and the fact distinct, they being to be tried by seperate tribunals; but in equity the whole question comes before the court for its decision, both on the pleadings and the proofs.

173. When the defendant, by his answer, denies the material facts of the bill, an issue is then *tendered* upon them, and the complainant must *join* issue and prove the facts thus disputed by the testimony of two witnesses at

least, against the positive oath of the defendant. [*a*] Such issue is joined by a general replication, that the complainant *aver and prove his bill to be true, certain and sufficient;* which is an issue, both as to the law and the facts, according to the constitution of the court. When the answer advances a new statement on behalf of the defendant, the complainant should *tender* an issue to the new facts and oblige the defendant to prove them, as otherwise they will be taken to be true. This also is done by the general replication, stating *that the answer of the defendant is uncertain, untrue and insufficient*, which *tenders* an issue, both of law and fact, on which the defendant *joins* issue by a formal rejoinder—a pleading which is supposed to be filed, but is never actually drawn—the practice being to serve the defendant with the *subpœna ad rejungendum* (unless he submits to rejoin *gratis*), which is equivalent to a notice of replication, and issue is then joined between the parties. [*b*] Hence we find that the replication in equity only serves as a mere form for producing an issue, and as such it need not be signed by counsel. [*c*] The form of it is as follows:

The Replicatton of A. B., complainant,
to the Answer of C. D., defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith, that he will aver and prove his said bill to be true, certain and sufficient, in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; *without this*, that any other matter or thing whatsoever in

[*a*] 2 Chan. Ca. 8. 1 Vern. 161. 3 Atk. 270. 649.
[*b*] *Vide ante*, p. 80. Mos. 123, 296.
[*c*] Hinde, 285.

the said answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is, and will be, ready to aver, due proof, as this honorable court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

The general replication concludes the pleadings in equity.

174. Having now pointed out the several grounds of defence to a suit in equity we will for the convenience of the student give a skeleton synopsis of those defences.

SYNOPSIS OF SEVERAL GROUNDS OF DEFENCE.

I. OBJECTIONS TO THE JURISDICTION:—

1st. Want of equity.
2d. Jurisdiction in some other court of equity.

II. OBJECTION IN ABATEMENT:—

1st. Personal disability.
1. Outlawry.
2. Excommunication.
3. Attainder.
4. Alien enemy.
5. Infancy.
6. Coverture.
7. Lunacy, or idiotcy.

2d. Mode of preceding defective.
1. Another suit depending.
2. Want of proper parties.
3. Multifariousness.
4. Splitting of suits.
5. Want of proper affidavit annexed, etc.

III. OBJECTIONS IN BAR:—

1st. To deny the relation assumed by the bill.
1. By answer.
2. By negative plea.
1. Which denies the character attributed to either complainant or defendant by the bill.
2. Which denies that the defendant has such an interest as can make him liable.

2d. To invalidate the relation.
1. Parties incapable to contract.
Alien purchasers, etc.
2. Contract illegal, insufficient, or altered.
1. Illegality, or insufficiency of the consideration.
2. Statute of Frauds.
3. Want of title in plaintiff *ab initio*,
4. Want of present interest,
5. Bankruptcy or insolvency.
6. Forfeiture.
3. The right being contingent, did not accrue.
The non-performance of a condition precedent.

3d. That no right ever existed.
1. Want of privity.
2. A purchase for valuable consideration, without notice.
3. Title paramount.

4th. That the right, though once existing, is barred.
1. By the act of the party.
1. Stated account.
2. Award.
3. Release.
2. By the act of law.
1. A fine and non claim.
2. A Recovery.
3. A Judgment.
4. A Decree, or dismissal of the suit.
3. By the act of God.
Contract becomes impossible to be performed.

N. B. The mode of defence which denies the *right*, is applicable where any of the above objections are apparent on the face of the bill.

FORMS.

BILLS (ADDRESS OF.)

1. In Chancery.

To the Right Honorable the Earl of Eldon, Lord High Chancellor of Great Britain.

Humbly complaining, etc.....Lordship.

2. When the Seals are in Commission.

To the Right Honorable A. B., C. D., and E. F., Lords, Commissioners for the custody of the Great Seal of Great Britain.

Humbly, etc.....Lordships.

3. In the Exchequer.

To the Right Honorable Frederick Robinson, Chancellor and Under Treasurer of His Majesty's Court of Exchequer at Westminster; the Right Honorable Sir Richard Richards, Knight, Lord Chief Baron of the same Court, and the rest of the Barons there.

Humbly, etc. ....Honors.

4. In the Chancery of Lancaster.

To the Right Honorable Charles Earl of Liverpool, Chancellor of the Duchy of Lancaster, and one of his Majesty's Most Honorable Privy Council.

Humbly, etc. .....Lordships.

5. In the Great Sessions of Wales.

To the Honorable A. B. and C. D., Esqrs., his Majesty's

Justices of the Great Sessions for the several Counties of Glamorgan, Brecon and Radnor.

Humbly, etc. .....Lordships.

6. In the Lord Mayor's Court.

To the Right Honorable A. B., Lord Mayor of the City of London, and the Worshipful, his Brethren, the Aldermen of the same City.

Humbly, etc.....Lordship and Worships.

COMMENCEMENT.

1. In Chancery.

Humbly complaining, showeth unto your Lordship, your orator, A. B., of (*place of abode and addition*), that etc., etc.

2. In the Exchequer.

Humbly complaining, showeth unto your *Honors*, your orator, A. B., of, etc., debtor and accountant to his Majesty, as by the records of their honorable court, and otherwise it doth or may appear, that, etc.

3. By a Peer.

Complaining, showeth unto your Lordship, your orator, the Right Honorable A. Earl of B., (*or as the case may be*), that, etc.

4. By a Body Corporate.

Humbly complaining, show unto your Lordship, your orators, the Mayor, bailiffs, and commonalty of the City of A., that, etc.

5. By Creditors, Legatees, etc., on behalf of themselves and other Creditors.

Humbly complaining, show unto your Lordship, your

orators and oratrixes, A. B., of, etc., C. D., of, etc., E. F., of, etc., spinster, G. H., of, etc., on behalf of themselves and all other the bond and simple contract creditors (*or legatees or next of kin*) of I. J., late of, etc., deceased, who shall come in and contribute to the expenses of this suit, that, etc.

6. By an Infant.

Humbly complaining, showeth unto your Lordship, your orator, A. B., an infant under the age of 21 years, that is to say, of the age of —— years, or thereabouts, by C. D., of, etc., his (*relation*) and next friend, that, etc.

7. By a Feme Covert.

Humbly complaining, show unto your Lordship, your orator and oratrix, A. B., of, etc., and C., his wife, that, etc.

8. By a Feme Covert, claiming in opposition to her Husband.

Humbly complaining, showeth unto your Lordship, your oratrix, C., the wife of A. B., etc., by D. E., her next friend, that, etc.

9. By a Feme Covert whose Husband is an Exile, etc.

Humbly complaining, showeth unto your Lordship, your oratrix, A. B., of, etc., the wife of C. B., late of, etc., who hath by due course of law been sentenced to transportation to parts beyond the sea, where he now is (*or who hath abjured the realm, or who is an alien enemy*), that, etc.

10. By a Lunatic.

Humbly complaining, show unto your Lordship, your orators, A. B., of, etc., and C. D., late of, etc., but now of etc., against whom a commission of lunacy has lately been awarded and issued, and is now in force; and under which

commission the said C. D. was duly found and declared to be a lunatic, and your orator, A. B., appointed committee of his estate; that, etc.

11. Information on behalf of the Crown.

Informing, showeth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of his Majesty, that, etc.

12. Information on behalf of those who partake of the Prerogative.

Informing, showeth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of his Majesty, and the masters, fellows, and scholars of Trinity College, Cambridge, (*or as the case may be*) that, etc.

13. Information with a Relator.

Informing, showeth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D., clerk, vicar of the parish of E., and F. G. and H. J., church wardens of the same parish, for and on behalf of themselves and the rest of the parishoners of the said parish, (*or as the case may be*) that, etc.

14. Information and Bill.

Informing, showeth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D. and E. F., of, etc., and humbly complaining show unto your Lordship, the said C. D. and E. F., that, etc., (*statement*). And his Majesty's Attorney General, by the relation aforesaid, informeth; and your orators further show unto your Lordship, that, etc.

15. Information on behalf of a Lunatic.

Informing, showeth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of C.

D., a lunatic, at and by the relation of E. F., of, etc., that, etc.

16. Information for the Queen.

Information, showeth unto your Lordship, A. B., Esq., Attorney General of her Majesty the Queen Consort, that, etc.

Statement of Requests and Charge of Confederacy.

And your orator hath accordingly, both by himself and his agents, frequently and in a friendly manner applied to and requested the said C. D. and E. F., (*the defendants*) to, etc.; and your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been. But now so it is, may it please your lordship, the said C. D. and E. F., combining and confederating with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays he may be at liberty to insert in this his bill, with apt and proper words to charge them as parties defendant hereto, and contriving how to injure and oppress your orator in the premises, the said C. D. and E. F., absolutely refuse to comply with your orator's aforesaid reasonable requests; and to countenance such their unjust conduct, they sometimes pretend that (*pretences and charges*). All which actings, pretences, and refusals of the said confederates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

Clause of Equity, and Commencement of the Interrogating Part.

In consideration whereof, and forasmuch as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of

equity, where matters of this sort are properly cognizable and relievable; to the end that the said C. D. and E. F., and their confederates, when discovered, may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and distinct answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively, distinctly interrogated; and more especially that the said defendants, C. D. and E. F., may, in manner aforesaid, answer and set forth whether, etc.

SPECIAL INQUIRIES.

1. As to Applications and Requests.

And whether your orator hath not by himself or agents, or how otherwise, made such applications and requests to the said defendants, as are hereinbefore in that behalf mentioned, or some such or the like, or any, and what other applications and requests in respect of the several matters aforesaid, and whether the said defendants have not refused to comply therewith, and why?

2. As to a Deed set forth in the Bill.

Whether such indenture, bearing date on or about the —— day of ——, as hereinbefore particularly mentioned, was not made between such parties as hereinbefore stated; or whether some indenture of some and what date was not made between some and which of the said parties, and was not of some such or the like purport or effect, or how otherwise.

3. For an Account of Money had and received.

And that the said defendants may set forth an account of all and every sum and sums of money received by them or either of them or by any person or persons by their or either of their order, or for their or either of their use, for or in respect of the said (*as the case may be*), and when and from whom, and from what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

4. For an Account of the Rents and Profits of a Testator's Real Estate.

And the said defendants may set forth a full, true, and just rental and particular of the real estates, whereof or whereto the said testator was seized or entitled in fee simple, at the time of his death; and also a full, true and particular account of all and every sum and sums of money, which hath or have been received by them, or any other person or persons by their or either of their order, or for their or either of their use, for or in respect of the rents and profits of the said estates, or any part thereof; and whether any, and which of the said estates, or any part or parts thereof, have or hath not been sold or disposed of, and at what price or prices respectively, and when and to whom; and whether such price or prices respectively have or hath not been paid, and to whom; and if not, why not.

5. For an Account of Personals.

And that the said defendants may discover and set forth a full, true, and particular account of all and singular the personal estate and effects of the said testator, and of every part thereof, which hath been possessed by or come to the hands of the said defendants, or either of

them, or to the hands of any other person or persons, by their or either of their order, or for their or either of their use; with the particular nature, quantities, qualities, and true and utmost values thereof, and of every part thereof respectively; and how the same, and every part thereof, hath been applied and disposed of; and whether any and what part thereof, now remains unapplied and undisposed of, and why; and whether any, and what part of such personal estate remains outstanding, to any, and what amount, and why; and that the said defendants may also set forth an account of the debts due from the said testator, and of his funeral expenses and legacies; and whether any, and which of such debts are outstanding; and why.

6. For the production of Deeds and Papers.

And that the said defendants may set forth a list or schedule and description of every deed, book, account, letter, paper or writing relating to the matters aforesaid, or any of them, or wherein or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may particularly describe which thereof now are in their, or either, and which of their possession or power, and may deposit the same in the hands of their clerk or clerks in court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

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1. Prayer for General Relief.

And that your orator may have such further and other relief in the premises, as to your Lordship shall seem meet, and the nature and justice of the case may require, may it please, etc.

2. Prayer of Bill of Revivor.

To the end therefore that the said suit and proceedings therein may stand revived against the said C. D. and be restored to the same plight and condition as the same were in at the time of (*abatement*), or that the said C. D. may show good cause to the contrary, may it please, etc.

3. Conclusion of Prayer in a Bill of Discovery.

And that your orator may have a full disclosure and discovery of all and every the matters and things aforesaid, may it please, etc.

4. Prayer of a bill to perpetuate Testimony.

And that your orator may be at liberty to have his witnesses examined to the several matters and things hereinbefore mentioned, so that the testimony of the said witnesses may be preserved and perpetuated; and that your orator may be at liberty on all future occasions, to read and make use of the same, as he shall be advised, may it please, etc.

Clause of Equity in the same.

In consideration whereof, and forasmuch as your orator cannot have the said witnesses examined in order to perpetuate their testimony, without the aid of a court of equity, to the end, etc.

5. Prayer of Bill of Interpleader.

And that the said C. D. and E. F. may be decreed to interplead and adjust their said several claims and demands between themselves, your orator being willing and desirous that the said (*demand*) should be paid to such of said defendants as shall appear to be entitled thereto, and your orator doth hereby offer to pay the same

into the hands of the accountant general of this honorable court, to be disposed of as this honorable court shall direct (*if injunction*)—

6. Prayer for an Injunction.

And that in the meantime, the said C. D. and E. F., their counsel, solicitors, agents and attorneys may be restrained by the order and injunction of this honorable court, from prosecuting or commencing any action or actions at law against your orator, for or in respect of the several matters aforesaid, and that your orator, etc. (*general relief.*)

Clause of Equity, in a Bill of Interpleader.

In consideration whereof, and forasmuch as your orator is remediless in the premises, without the aid of a court of equity where the said several claimants may interplead and settle and adjust their several rights and demands between themselves, so that your orator may be enabled to pay the said (*demand*) with safety, to the end, etc.

7. Conclusion of Certiorari Bill.

In consideration whereof, and forasmuch as for want of jurisdiction in the said (*court below*) your orator is remediless there; and your orator is advised that he is entitled to have a writ of *certiorari* issued from this honorable court, and directed to (*court below*) commanding him to certify and remove said bill, and all proceedings thereon, unto this honorable court; may it therefore please, etc.

8. Prayer of Bill of Review.

And that for the reasons aforesaid, the said cause and decree therein pronounced, may be reviewed by this hon-

orable court, and that the said decree may be reversed for error apparent therein, and no further proceedings taken thereon; may it please, etc.

DEMURRERS, PLEAS AND ANSWERS.

(*Title of.*)

The Answer (*or Plea, or Demurrer*) of C. D., the defendant (*or one of the defendants*) to the bill of complaint of A. B., complainant.

Joint and Several Answers.

The joint and several Answer of C. D. and E. F. the defendants (*or two of the defendants*) to the bill of complaint of A. B., complainant.

Infant's Answer.

The Answer of C. D., an infant under the age of twenty-one years, by E. F., his guardian, one of the defendants to the bill of complaint of A. B., complainant.

1. Commencement and Conclusion of an Answer.

This defendant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, and answers and says, etc. . . (*conclude.*) And this defendant denies all and all manner, etc.

2. Joint Answer.

These defendants, etc., (*as before*) each answering for himself (*and herself*) and not the one for the other,

jointly and severally answer and say, etc.; and these defendants deny all, etc.

3. Infant's Answer.

This defendant, answering by his said guardian, saith, that he is an infant of the age of ——— years, or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause, to the protection of this honorable court; without this, that, etc.

4. Title of Further Answer, and of Answer to Amended Bill.

The further Answer of C. D., defendant to the (*original*) bill, (*and his answer to the amended bill*) of complaint of A. B., complainant.

This defendant, saving and reserving to himself the same benefit of exception to the said (*original*) (*and amended*) bill, as by his former answer to the said (*original*) bill is saved and reserved, for answer thereto, etc.; (*conclude*) without this, that, etc.

5. Answer and Disclaimer.

The Answer and Disclaimer of C. D., one of the defendants, to the bill of complaint of A. B., complainant.

This defendant, etc.; (*conclude.*) And this defendant saith, that he never had, or claimed or pretended to have, nor has he now, nor does he claim, or pretend to have any right, title, or interest of, in, or to the said (*matter in question*) or any part thereof; and this defendant disclaims all right and title of, in or to the same, and every part thereof; and this defendant denies, etc.

6. The Answer of a Formal Party, who is a stranger to the Facts charged.

This defendant, saving and reserving to himself, etc.,

answers and says, that he is a stranger to all and singular the matters and things in said complainants bill of complaint contained, and therefore leaves the complainant to make such proof thereof as he shall be able to produce, without this, that, etc.

N. B. This is the usual answer of the Attorney General.

7. *Conclusion of an Answer, claiming the same Benefit of Defence as if the Bill had been demurred to for want of equity.*

And this defendant submits to this honorable court, that all and every of the matters in the said complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said complainant's bill; and this defendant denies, etc.

THE COMMENCEMENT AND CONCLUSION OF A DEMURRER.

1. *To the whole Bill.*

This defendant, by protestation, not confessing or acknowledging 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, doth demur thereto; and for cause of demurrer showeth that, etc. (*conclude.*) Wherefore, and for divers other causes of demurrer, appearing in said bill, this defendant humbly demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed,

with his reasonable costs, in this behalf most wrongfully sustained.

2. Demurrer to Part of the Bill, and Answer to the Residue.

This defendant, by protestation, etc., as to so much of the said bill as seeks (*parts demurred to*), doth demur; and for cause of demurrer showeth, that, etc. (*conclude.*) Wherefore, and for divers other causes of demurrer, appearing in the said bill, this defendant humbly demands the judgment of this honorable court, whether he shall be compelled to make any further answer unto such part of the said bill as is so demurred unto aforesaid; and as to the residue of said bill this defendant not waiving his said demurrer, but relying thereon, and saving and reserving to himself, etc. (*as before, vide answer.*)

3. Commencement and Conclusion of a Plea.

This defendant, by protestations, etc. (*as in demurrer*), doth plead thereto, and for plea saith, etc. (*conclude.*) All which matters and things this defendant doth aver to be true, and is ready to prove, as this honorable court shall direct. Wherefore, he doth plead the same (*in bar, or as the case may be*) to the said bill, and humbly demands the judgment, etc. (*as in demurrer.*)

4. Plea to part and Answer to residue of Bill.

(*Is the same as Demurrer and Answer, mutatis mutandis.*)

EXCEPTIONS.

1. To an Answer.

Between A. B.....Complainant,
and C. D.....Defendant.

Exceptions taken by the said complainant to the answer

put in by the said defendant, C. D., to the said complainant's bill of complaint.

1st. For that the said defendant, C. D., has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether (*the interrogatory verbatim as in the bill.*)

2d. For that the said defendant hath not in manner aforesaid, answered and set forth whether, etc.

In all which particulars the said answer of the said defendant, C. D., is, as the said complainant is advised, imperfect, insufficient and evasive; and the said complainant therefore excepts thereto, and prays that the said defendant, C. D., may put in a further and better answer to the said bill of complaint.

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2. *Exceptions to Master's Report.*

In Chancery.

Between { A. B., Complainant, and C. D., Defendant.

Exceptions taken by the said complainant to the report of E. F., Esq., one of the masters of this honorable court, to whom this cause stands referred, bearing date the day of

First exception: For that the said master has, in and by his said report, certified, etc. (*as the case may be.*) Whereas, the said master ought to have certified that, etc.

Second exception: For that the said master has certified, etc.

In all which particulars the report of the said master is, as the said defendant is advised, erroneous, and the said defendant appeals therefrom to the judgment of this honorable court.

INTERROGATORIES.

For the Examination of Witnesses.

In Chancery.

Between A. B., Complainant, and C. D. and E. F., Defendant.

Interrogatories to be exhibited to witnesses to be produced, sworn and examined in this cause, now depending and at issue in this honorable court.

On the part of the said complainant:

1st. Do you know the parties, complainant and defendant, in the title of these interrogatories named, or any and which of them, and how long have you known them, or any and which of them, respectively? Declare the truth of the several matters by this interrogatory inquired after, according to the best of your knowledge, remembrance and belief, with your reasons at large.

2d Interrogatory: Whether or no, etc. (*as the case may be*), declare, etc.

Lastly: Do you know, or can you set forth, any other matter or thing which may in anywise tend to the benefit or advantage of the complainant in this cause? If yea, set forth the same, and all the circumstances and particulars thereof, as if you had been interrogated thereto, according to the best of your knowledge, remembrance and belief, with the reasons for such your belief, fully and at large.

Interrogatories before the Master (title of).

In Chancery.

Between A. B., and C. D., Complainants, and E. F. and G. H., Defendants.

Interrogatories to be exhibited before I. J., Esq., one of the masters of this honorable court, for the examina-

tion of (*as the case may be*), pursuant to an order made in this cause (*or as the case may be*), bearing date the —— day of ——, in the year
First interrogatory, etc., etc.

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* PRECEDENT OF A BILL AND ANSWER.

(*From the Cursus Cancellariæ.*)

A Bill to cause one to show his Writings, whereby he holds his Lands, etc.

Humbly complaining, W. B. showeth, etc.: That, *whereas*, about four years last past, one T. L., of, etc., upon a certain judgment in a plea of debt, amounting to the sum of, etc., or thereabouts, by him obtained in her Majesty's court of common pleas, against one G. L., of M., in the county of, etc., sued forth her Majesty's writ of *fieri facias*, directed to the sheriff of the said county, for the levying of the said debt of the goods and chattles of the said G. L. By virtue of which writ the said sheriff did, amongst other things, take into his hands one lease for divers years yet to come, made to the said G. L. by one T. S., Esq., in the county of D., of three parcels of land, called or known by the name or names of, etc., with all and singular their appurtenances, lying and being in the parishes of, etc., in the said county of, etc., together with all and singular woods, underwoods and trees, growing or being in or upon the premises, or any part thereof; together, also, with the reversion and reversions of the premises aforesaid, and of every part and parcel thereof, together with all manner of commons, ways, estovers, profits, commodities, hereditaments, and appurtenances to the same premises, belonging or appertaining. And afterwards, that is to say, on the —— day of, etc., he, the said

* Referred to in page 377.

sheriff, by his deed bearing date, etc., under his hand and seal, did, in consideration of, etc., to him paid towards the satisfaction of the debt and the judgment aforesaid, bargain, sell, assign and set over the said lease and term of years yet to come, of all and singular the said premises, unto one W. B., of London, Gent. Which said W. B., not long after did, in consideration of, etc., by your orator to him paid, bargain, sell, assign and set over unto your orator, all and singular the said premises, and every part thereof; upon which bargain, sale, and assignment of the said premises so made as aforesaid, your orator was in very good hopes to have peaceably and quietly entered into the said premises, and so to have held, occupied and enjoyed the same accordingly. *But now* so it is, may it please your Lordship, that one T. R., of, etc., pretending to have a lease for divers years yet to come, of some part of the said lands made unto him by the said G. L., long time before any such sale or assignment made thereof to your orator as aforesaid, hath and still doth keep your orator out of the possession of the said lands and premises; upon which lease or demise he, the said T. R., pretends a certain yearly rent is reserved to the said G. L., his executors or assigns; which rent (if any be), your orator hath heard is, etc., by the year, and which your orator, by reason of the lawful conveyance to him made as aforesaid, ought, both in reason and good conscience, to have and enjoy during such term as the said T. R. shall hold and occupy the land aforesaid, by reason of the said lease which he so pretendeth to have. But forasmuch as your orator doth not certainly know whether the said T. R. has any such lease, or (if he hath any such lease) what date the same beareth, nor what term the said T. hath herein unexpired, nor what rent is thereby reserved, nor what covenants are therein contained; and also, forasmuch as your orator cannot, by the strict rules of law, enter into

the premises, nor knoweth how in due form of law to commence any action against the said T. R., either for the recovery of the said land or the rent aforesaid. And for that the said T. R. doth not only use and occupy the said lands and premises to his own profit and advantage, without yielding or paying any rent therefor to your orator, or to any other person lawfully claiming the same, but doth also utterly refuse to show his said lease whereby he claimeth to hold the said lands aforesaid, either to your orator or any other person; and for that the said T., in combination and confederacy with, etc.,(*as the usual clause of confederacy*). All which actings and doings of the said T., etc., are contrary to right, equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator. In tender consideration whereof, and forasmuch as your orator is remediless, etc. (*as usual*); and for that your orator hath no ordinary way by the ordinary course of the common law to enforce the said T. R. to produce or show to your orator such writings as he hath for the holding and occupying the lands aforesaid, but is altogether destitute of the means to have a sight of the same, but by the aid and assistance of this honorable court. To the end, therefore, that the said T. R. may be enforced upon his oath to discover what right he hath to the premises, or any part thereof, and what rent or rents he hath paid for the same, and to whom; and that he may also set forth in his answer, upon oath, a true copy or true copies of such lease or other writings *in hæc verba*, whereby he claimeth the premises aforesaid, or any part thereof; and that the said T. may truely and directly answer upon oath all the matters and things hereinbefore contained, as fully and perfectly as if the same had been here again repeated and interrogated, and may particularly set forth upon oath whether, etc. May it therefore please your Lordship to grant, etc., process prayed, vers. T. R.

The Answer of T. R., Defendant, to the Bill of Complaint of W. B., Gent, Complainant.

The said defendant now, and at all times hereafter, saving, etc., saith, That the said G. L. named in the complainant's said bill, was possessed for divers years yet to come of the said parcels of land in the said bill mentioned, and called or known by the name of, etc., by virtue of a lease thereof, made by the said T. S., Esq., in the said bill also named, unto the said G. L. long before the supposed extent specified in the said bill of complaint. And the said G. L. so being thereof possessed long before the supposed extent (if any such there were) had in such manner as in the said bill of complaint is supposed, made a lawful demise and lease of part of the said three parcels of land, containing fourteen acres, or thereabouts, unto the said defendant for divers years yet to come; upon which lease the said G. L. reserved a yearly rent, to be paid during the continuation of the said lease; by force of which lease the defendant entered into the said fourteen acres, part of the said three said parcels of land, and was, and yet is lawfully possessed accordingly, and ever since hath, and yet doth enjoy the same, by virtue of the said lease and demise, and is thereby to have and enjoy the same during the continuance of the said years, of which there are at this time about sixty years to come and unexpired, and saith, That the complainant is a person altogether unknown to this defendant, being one he, this defendant, never had any dealings or correspondence with, and therefore this defendant cannot but wonder at this suit, commenced by the said complainant against this defendant, touching the premises. And this defendant saith, That the said G. L., after the said lease and demise so made to the said defendant, of the said fourteen acres of land as aforesaid, and before the said supposed extent, made a grant and assignment of the interest and term of the said

G. L., as well of the fourteen acres, which the said defendant hath and occupieth by virtue of the said lease, for divers years thereof yet to come and undetermined; as also of the residue of the said three parcels of land mentioned in the said bill of complaint, unto H. L., son of the said G. L., unto which grant and assignment the said defendant was privy. And therefore this defendant humbly conceives, and is advised, That he, this defendant, is, for the payment of his rent, chargeable, and ought by the law to pay, the same rent so reserved, unto the said H. L., and not to the said complainant, which said R., this defendant, doth verily think is the lawful landlord during the said term for years yet to come, and not the said complainant, who is altogether a stranger to this defendant, and saith, That the said complainant never at any time heretofore demanded any rent for the said part of the land that this defendant hath, and occupieth, by virtue of the said lease for years; And also saith, that he is sued by the said W. B. in the said bill of complaint named, in her Majesty's Court of Queen's Bench, in an action of debt brought by him against the said defendant; and therefore the said defendant is somewhat surprised at this suit brought against him by the said complainant, touching the premises, whereby this defendant is wrongfully vexed, and sued without any just cause; *without that*, that there is any such extent made of the said three parcels of land, called, etc.; or that after the same extent there was any such bargain and sale made by the sheriff of the said term and lease for years to the said W. B. as in the said bill set forth, or that the said W. B. bargained or sold the premises to the complainant, or that the said complainant ought to have and enjoy the said premises to the knowledge of this defendant. And without that there is any other matter, cause, etc., (*as before.*)

INDEX.

(*The References are to Paragraphs.*)