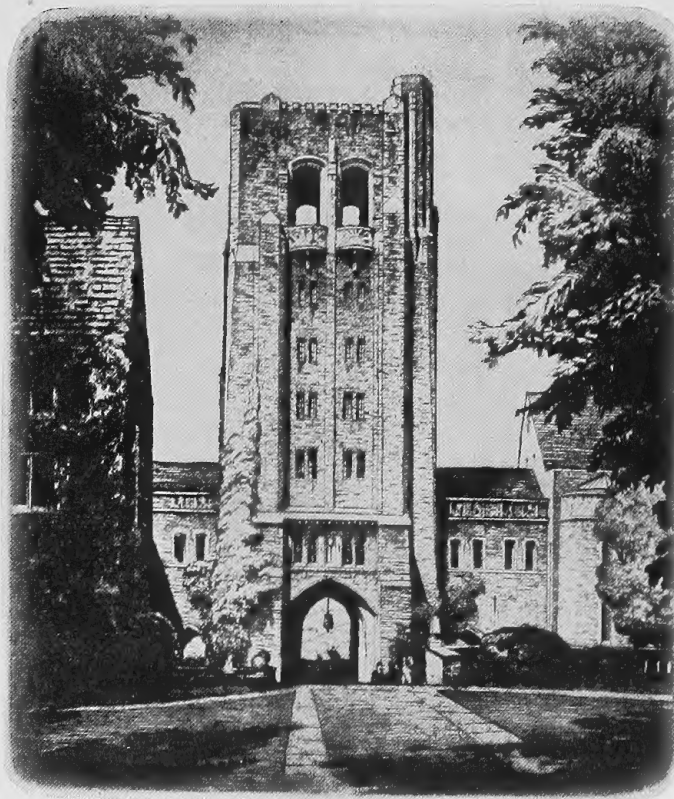




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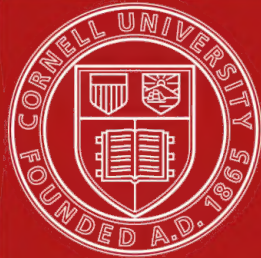
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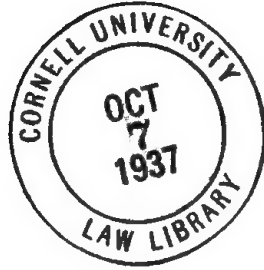


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INSTITUTES  
OF  
AMERICAN LAW.

BY JOHN BOUVIER.

In societate civili, aut lex aut vis valet.—BACON.

Ce qui est bien classé, est à moitié su.—DUVAL.

VOL. IV.

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INSTITUTES  
OF  
AMERICAN LAW.

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BOOK IV.—OF REMEDIES.

TITLE IX.—OF THE DIFFERENT FORMS OF ACTIONS.

CHAPTER II.—OF ACTIONS ARISING EX DELICTO.

SECTION 3.—OF THE ACTION OF REPLEVIN.

3555. Replevin is the name of an action brought for the recovery, in specie, of a personal chattel, which has been unlawfully taken and detained from the owner's possession, together with damages for the detention.<sup>(a)</sup>

The invention of this action is ascribed to Glanvil, chief justice under Henry II.<sup>(b)</sup> In its origin it was confined to the single instance of taking a distress, and this circumstance probably gave to this action its character of locality, though its remedial operation has since been extended, and it has now become the appropriate form of suit for every dispossession of

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<sup>(a)</sup> Ham. N. P. 372; Replevin, or replevy, in Latin *replegiare*, signifies to take back the pledge. This was so called, because, at common law, a person distrained upon applied to the sheriff or his officers, and by their means had the distress returned into his own possession, upon giving security to try the right of taking it in a suit at law, and if that should be determined against him, to return the chattel and goods into the hands of the distrainor. 3 Bl. Com. 13; Co. Litt. 145, b.

<sup>(b)</sup> Mirrour, c. 2, s. 6; Glanv. lib. 4, c. 5, Beames' translation, p. 87.

personalty, whether the seizure was made in the name of a distress, or otherwise.(a)

In the investigation of this action, it will be proper to take a brief view of, 1, the proceedings; 2, what property is the subject of this action; 3, what rights the plaintiff must have in the same; 4, the injury; 5, the pleadings; 6, the evidence; 7, the verdict and judgment; 8, writs of second deliverance.

§ 1.—Of the proceedings in replevin.

3556. These proceedings relate, 1, to the writ; 2, to its return.

*Art. 1.—Of the writ of replevin.*

3557. This writ commands the sheriff that justly and without delay, he cause to be replevied the cattle or goods claimed, which should be particularly specified and described; for a want of such specification or description will render the writ voidable, and it may be quashed;(b) and, when it does not include all the property, the defect cannot be cured by enlarging the description in the declaration.(c) It should be made returnable at the next term of the court, when and where it is issued, and not permit a term to intervene before the return day.(d) But the time and manner of issuing this writ, are regulated by the provisions of the statutes of the several states, which must of course be observed.(e)

(a) *Weaver v. Lawrence*, 1 Dall. 157; *Woods v. Nixon*, Addis. 134; *Sherick v. Huber*, 6 Binn. 3; *Stoughton v. Rappalo*, 3 S. & R. 562; *Bruen v. Ogden*, 6 Halst. 370. In Connecticut, replevin can be sustained only in cases of attachment or distress. *Watson v. Watson*, 9 Conn. 140. In Illinois; to maintain this action there must have been an unlawful taking. *Wright v. Armstrong*, 1 Breese, 130. See *Meany v. Head*, 1 Mason, 319. So in North Carolina, *Cummings v. McGill*, 2 Tayl. 98. In Mississippi, it lies only in case of distress for rent. *Wheelock v. Cozzens*, 6 How. Mis. 279.

(b) *Snedecker v. Quick*, 6 Halst. 179; *Magee v. Siggerson*, 4 Blackf. 70.

(c) *Sanderson v. Marks*, 1 Har. & Gill, 252. But see *Finehout v. Crane*, 4 Hill, 537.

(d) *Gayward v. Doolittle*, 6 Cowen, 602.

(e) In some of the states, before issuing the writ the plaintiff must make affidavit of the truth of the facts which authorize its issue; 2 Rev. Stat. of

*Art. 2.—Of the return of the writ of replevin.*

3558. As the object of the action is to take the property out of the hands of the defendant and deliver it to the plaintiff, it is but just and reasonable that the latter should give security to return the same, if, upon trial, the jury should find he is not entitled to it; this is done by giving a replevin bond, which stands in the place of the property attached; (a) it is incumbent on the sheriff to see that the security is good before he returns the property on the replevin, (b) for he is responsible at common law that the sureties in the replevin bond shall prove sufficient on the termination of the trial. (c) If the plaintiff has thus given security to the sheriff, and this officer has found the goods, it is his duty to deliver them to the plaintiff, and make this return to his writ. If the defendant claims property in the goods described in the writ, he has a right to retain them by giving a *property bond*, the condition of which is, that he will return the goods, if, upon trial, they shall be adjudged to belong to the plaintiff. In such case the sheriff makes a return according to the facts; and when he replevies the goods and delivers them to the plaintiff, as well as when the defendant claims property, he returns that he has summoned him to appear in court. If the officer cannot find the goods he returns *elongata* or *eloigned*, that the goods have been removed out of his jurisdiction.

3559. Upon this return, at common law, the plaintiff may sue out a *capias in withernam*, by which the sheriff is commanded to take the defendant's own goods, which may be found in his bailiwick, and keep

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New York, 523, § 7; *Millikin v. Selye*, 6 Hill, 623. In Illinois the plaintiff, or some one for him, must make affidavit that "the plaintiff in such action is the owner of the property," etc. *Frink v. Flanagan*, 1 Gilman, 35.

(a) *Buel v. Devenport*, 1 Root, 261.

(b) *Murdock v. Will*, 1 Dall. 341.

(c) *Oxley v. Commonwealth*, 1 Dall. 349; *Pearce v. Humphreys*, 14 S. & R. 23. See *Commonwealth v. Rees*, 3 Whart. 124.

them safely, and deliver them to the plaintiff, until such time as the defendant chooses to submit himself, and allow the distress, and the whole of it, to be replevied; and he is thereby further commanded, that he do return to the court in what manner he shall have executed the writ. This, and various other proceedings in English practice, are but little known or used in the United States, the action of replevin being regulated by statutes.

§ 2.—For what property replevin may be maintained.

3560. Replevin lies for chattels personal only, and these alone can be recovered in this action; it cannot, therefore, be maintained for writings which concern the realty; (a) the chattel must also possess *indicia*, or earmarks, by which it may be distinguished from all others of the same description; for otherwise the plaintiff would demand what could not be returned to him; but although replevin would not lie for loose money, which could not be identified, yet it may be maintained for money in a bag, and taken from the plaintiff in that state. (b)

Although, in general, replevin will not lie for any thing which concerns the *realty*, yet it may be maintained for trees cut down, though made into posts and rails; (c) and trees cut down by the tenant for life, become the property of the remainder man, for which he can maintain replevin. (d) But where one disseises the owner of land, and cuts and removes the crops sown by the owner, replevin is not the proper remedy. (e)

Replevin will not lie when the plaintiff has no *title* to the subject matter of the action as a chattel; as to recover

(a) 1 Brownl. 168.

(b) *Wilson v. Duchet*, 2 Mod. 61.

(c) *Snyder v. Vaux*, 2 Rawle, 423.

(d) *Richardson v. York*, 2 Shep. 216.

(e) *De Mott v. Hagerman*, 8 Cowen, 220.

a negro apprentice;(a) nor by a stranger, where the goods are deposited by him with the defendant.(b)

In several of the states of the Union, replevin cannot be maintained for goods which have been seized by virtue of an execution, or are otherwise in the *custody of the law*. This is owing to statutory provisions, the policy of which is to prevent delay, but not to deprive the injured party of his remedy; he may, in general, maintain replevin against the sheriff's vendee.(c)

When the chattel which is the subject of the replevin, has been condemned by a *decree of the admiralty as a prize*, the plaintiff must fail, because such a decree is conclusive.(d)

§ 3.—What rights the plaintiff must have to maintain replevin.

3561. The principal object of this suit is to obtain the chattel; the plaintiff must have a right to it, and if it can be shown he has no claim to it, his action is barred, notwithstanding he may be entitled to some compensation for the act of dispossessing him.(e) If the plaintiff has no property in the goods, he can have no right to recover them, whether the defendant himself or another, is the proprietor. To entitle the plaintiff to recover, he must therefore, at the time of the caption, have had either the *general property*, or a *special property*, in the chattel. The general owner may maintain this action, though he never had possession, because the ownership of the property draws to it the right of possession; but one having a special property must have had possession, and also the right of possession; and this right, in both cases, must

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(a) *Morris v. Cannon*, 1 Harring. 220. See *Robinson v. Colloway*, 4 Pike, 94; *Bower v. Higbee*, 9 Mis. 259.

(b) *Harrison v. McIntosh*, 1 John. 380.

(c) *Shearick v. Huber*, 6 Binn. 2.

(d) *W. B. v. Latimer*, 4 Dall. App. i.

(e) *Templeman v. Case*, 10 Mod. 25.

continue till the time of judgment, for otherwise the plaintiff has no claim to a restoration of the property. (a) When the plaintiff has not the right of possession, his remedy is by an action on the case. (b)

3562. When several persons have a *separate* interest, they cannot join in this action; but when they have a *joint* interest, as joint tenants and tenants in common, they must join. One tenant in common or joint tenant cannot maintain replevin against his co-tenant, because they are equally entitled to the property. (c)

The defendant must plead a special plea when he intends to dispute the plaintiff's title, because the general issue *non cepit* does not deny the plaintiff's right to the property. (d)

§ 4.—The injury done to the property.

3563. Originally this action was confined to cases for the unlawful taking of a distress; but though at common law it was required that there should have been an unlawful taking, the remedy was extended to other than cases of distress. (e) In general, replevin lies where trespass *de bonis asportatis* can be maintained; (f) but when there is an intent to interfere with the owner's dominion, as merely the wrongful turning out horses from a ferry boat, replevin could

(a) Mead *v.* Kilday, 2 Watts, 110; Pangburn *v.* Patridge, 7 John. 140; Smith *v.* Williamson, 1 Har. & J. 147; Cullum *v.* Bevans, 6 Har. & J. 469; Woods *v.* Nixon, Addis. 131; Brooks *v.* Berry, 1 Gill, 153.

(b) Gordon *v.* Harper, 7 T. R. 9.

(c) Barnes *v.* Bartlett, 15 Pick. 71; Wills *v.* Noyes, 12 Pick. 324; Prentice *v.* Ladd, 12 Conn. 331.

(d) Bull. N. P. 54; Vickery *v.* Sherburne, 2 Appl. 34; Wilson *v.* Royston, 2 Pike, 315; Trotter *v.* Taylor, 5 Blackf. 431; Harper *v.* Baker, 3 Monr. 421; Galucha *v.* Butterfield, 2 Scam. 227; Rowland *v.* Mann, 6 Iredell, 38; Ringo *v.* Field, 1 Eng. 43.

(e) 1 Chit. Pl. 159. In some states the remedy is much more restricted than in others. Wheelock *v.* Cozzens, 6 How. Mis. 279; Watson *v.* Watson, 9 Conn. 140; Cummings *v.* McGill, 2 Tayl. 98; Wright *v.* Armstrong, 1 Breese, 130; Meany *v.* Head, 1 Mason, 319; Vaiden *v.* Bell, 3 Rand. 448.

(f) Marshall *v.* Davis, 1 Wend. 109; Bruen *v.* Ogden, 6 Hals. 370; Crocker *v.* Mann, 3 Mis. 472.

not be maintained. (a) In Pennsylvania, (b) Massachusetts, (c) and Maine, (d) replevin lies wherever there is an unlawful detention of the goods.

§ 5.—Of the pleadings. (e)

3564. The pleadings in replevin differ from the pleadings in every other action; they consist of, 1, the declaration; 2, the pleas; 3, the replications and subsequent pleadings.

*Art. 1.—Of the declaration.*

3565. The *venue* in replevin, at common law, is local; the declaration must, therefore, disclose the place where the chattel was taken, and the jury should come from the county in which the cause of action is alleged to have arisen; it ought to state a place certain, within the village or town; (f) but in Pennsylvania, it has been held sufficient to allege the taking to be within the county; (g) the omission in this respect is cured by verdict. (h)

3566. The declaration is of two descriptions: the plaintiff either declares that the chattels taken are “yet detained,” which is termed “counting in the *detinet*;” or he affirms that they “were detained until replevied by the sheriff,” which is expressed shortly

(a) *Foulkes v. Willoughby*, 8 M. & W. 540. See *Plumer v. Brown*, 8 Met. 578.

(b) *Weaver v. Lawrence*, 1 Dall. 156.

(c) *Badger v. Phiney*, 15 Mass. 359; *Baker v. Fales*, 16 Mass. 147; *Marston v. Baldwin*, 17 Mass. 606.

(d) *Seaver v. Dingley*, 4 Greenl. 306; *Sawtelle v. Rollins*, 10 Shep. 196.

(e) In the action of replevin, the names of the pleadings differ from the names in other actions. When the defendant pleads some matter confessing the taking, but showing a lawful title or excuse, such pleading is not, (as it would be in other actions,) called a plea in bar, but an *avowry* or a *cognizance*. The answer to the avowry or cognizance is called a *plea in bar*; then follows the *replication*, *rejoinder*, etc., the ordinary name of each pleading being thus postponed by one step.

(f) *Gardner v. Humphreys*, 10 John. 53.

(g) *Mock v. Folkrod*, 1 Browne, 60.

(h) 10 John. 53.

thus, "detained until," etc., which is called declaring in the *detinuit*.(a)

. When the chattels taken are in their nature distinguishable from all others of a similar kind, the same particularity in *describing* them which is sufficient in an action of trover, will also be sufficient in replevin. But if they do not possess the property of being distinguishable from all others of the same kind or sort, it must be shown in the declaration what *indicia* or earmarks are peculiar to them.

It is to be remarked that when the replevin is in the *detinuit*, the plaintiff should not count for more nor less than the identical chattels replevied; for when he declares for a *greater* number, the defendant will be entitled, if he avows for the whole and succeeds, to have judgment *de retorno habendo*, for the entire number; and in case he declares for *less* than the quantity or number replevied, the defendant will, *quoad* the number omitted, be entitled to the same judgment, notwithstanding he had no right to take them.(b)

When the replevin is in the *detinet*, the value of the chattels must be stated in the declaration, and proved on the trial, because if the plaintiff succeeds, the judgment must be that he recover the goods or their value; on the contrary, if the replevin is in the *detinuit*, the value need not be shown, because in this case the plaintiff has the goods already, and, of course, he cannot recover their value, but only damages for the unlawful taking.(c)

3567. It must appear by the declaration that the plaintiff is *proprietor* of the chattels; and an allegation that they are *his* goods, is a sufficient averment of his title; but the allegation that he is entitled to

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(a) 1 Saund. 347, b, n. (2).

(b) See *Root v. Woodruff*, 6 Hill, 418.

(c) 1 Saund. 347, b, n. (2); F. N. B. 69, (L); Bull. N. P. 52.

the possession is insufficient; it is necessary he should show a general or special property in them.(a) The declaration should also show that the goods were in his possession at the time they were taken.(b)

3568. Formerly, it was presumed that this action was instituted to decide the title to real property; it was then necessary that the defendant should be informed to what spot in particular the plaintiff intended to assert his claim, in order that the defendant might have an opportunity of contesting its validity. For this purpose the plaintiff was obliged to name in the writ the *place* where the chattel was taken.(c) Although it is not now assumed that the action is brought to determine whether or not the plaintiff has the right of possession of the *locus in quo*, it is nevertheless possible that it may have been commenced with that view; the form is, therefore, still preserved. But as it frequently happens that it is out of the plaintiff's power to ascertain in what place the chattel was first taken, the plaintiff may aver that it was seized in any place where it has been discovered in the possession of the defendant.(d)

3569. When *several chattels* have been taken at different places within the same county, the plaintiff may charge the defendant with the whole in one count. In such case, the better form seems to be, to show what portion of goods was taken in one place and what in another, to enable the court to give the proper judgment, in the event of the defendant avowing for a different cause in each place, and succeeding in his avowry; though it is said he may declare generally for taking twenty oxen in A and B.

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(a) *Pattison v. Adams*, 7 Hill, 126; *Rowland v. Mann*, 6 Iredell, 38; *Heath v. Conway*, 1 Bibb, 398; *Smith v. Hancock*, 4 Bibb, 222.

(b) *Bond v. Mitchell*, 3 Barb. Sup. Ct. Rep. 304; *Redman v. Hendricks*, 1 Sandf. Sup. Ct. Rep. 32.

(c) 1 Saund. 347, n (1).

(d) *Walton v. Kersop*, 2 Wils. 354; *Abercrombie v. Parkhurst*, 2 B. & P. 481; 1 Saund. 347, n. (1); Bull. N. P. 54.

3570. The declaration should also allege *damages*, for an omission in this respect will be fatal.(a)

*Art. 2.—Of pleas.*

3571. These are, 1, pleas in abatement; 2, the general issue; 3, special pleadings.

1. *Of pleas in abatement.*

3572. A plea in abatement does not deny, and therefore, till something further is disclosed, admits the plaintiff's right to detain the chattels, consequently a return to the defendant cannot be awarded under it. When the defendant has a right to a return, he ought, in addition to the plea in abatement, to avow.(b) This is a double plea, and, at common law, it would have been objectionable, were it not admissible from necessity; for without it, complete justice could not be done; and as the plaintiff has occasioned the duplicity, he cannot complain.(c) This is the only stage in the case when the defendant can take advantage of the non-joinder of a co-plaintiff in the suit.

2. *Of the general issue.*

3573. The general issue is formed by pleading *non cepit*. In its form it may answer the taking alone, and not reply to the detention, because if the defendant did not seize the chattels, replevin is not the appropriate form of suit. This plea controverts all material averments in the declaration, excepting that which affirms that the goods are the property of the plaintiff.(d) But the defendant cannot have a return of the goods

(a) *Faget v. Brayton*, 2 Har. & John. 350.

(b) *Lawes on Pl.* 78.

(c) *Ham. N. P.* 463.

(d) *Trotter v. Taylor*, 5 Blackf. 431; *Wilson v. Royston*, 2 Pike, 315; *Vickery v. Sherburne*, 2 App. 34; *Galusha v. Butterfield*, 2 Scam. 227; *McKinley v. McGregor*, 3 Whart. 370; *Hill v. Miller*, 5 S. & R. 357; *Williams v. Smith*, 10 S. & R. 202.

under this plea; (a) and therefore, if he wants a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration. This is done by the entry of *cepit in alio loco*. (b) The defendant can only plead *non cepit* or *cepit in alio loco*, in case he never had the cattle at all in the place mentioned in the declaration; for, if the plaintiff prove the defendant had the cattle mentioned in the declaration in that place, he will be entitled to a verdict, notwithstanding the original taking was in another place. (c) In order to have a return, the defendant must avow or make cognizance, stating the cause for which he distrained. (d)

When the declaration is for the unlawful detainer of goods, *non cepit* is not a good plea; the general issue in such case is *non detinet*. (e)

### 3. Of special pleadings in defence in replevin.

3574. These may be classified as follows: 1, avowries and cognizances; 2, pleas to the property; 3, pleas in justification; 4, pleas in excuse and discharge.

#### 1° Of avowries and cognizances.

3575. Avowries and cognizances are substantially the same, they differ from each other mainly in name and form. When the defendant justifies and claims a return of the goods and chattels, or damages in his own right or that of his wife, he begins his pleading by averring that he "well avows, the taking of the goods," and then proceeds to state upon what ground and by what right he took them, as for rent due, damage done by the plaintiff's cattle, and the like. But when he justifies as bailiff or servant of another, and in the

(a) *Simpson v. McFarland*, 18 Pick. 427; *Whitwell v. Wells*, 24 Pick. 25.

(b) *Williams v. Welsh*, 5 Wend. 290.

(c) *Walton v. Kersop*, 2 Wilson, 354; 1 Saund. 347, n. (1.)

(d) 1 Saund. 347, n. (1.)

(e) *Walpole v. Smith*, 4 Blackf. 304.

right of the latter, he begins by saying, that he "well acknowledges the taking," and then proceeds as in the former case. In the case first stated, the defence is called an *avowry*; in the latter, a *cognizance*.<sup>(a)</sup>

Avowries and cognizances partake as much of the nature of a count or declaration, as of a plea in bar; for, at the same time that they entitle the defendant to a return of the cattle, goods or chattels distrained, or the amount of them in damages, with costs, if the action of replevin be determined in his favor; they import a justification of the taking of the distress, either in the defendant's own right, or in the right of another, and so protect or defend him from the claim or charge brought against him by the plaintiff.

It is for this reason that the defendant in replevin is said to be both actor and defendant. As *defendant*, he may plead in abatement to the plaintiff's writ, and that were vain if he could not have a return of the things distrained; he is allowed, therefore, after his plea in abatement, to make avowry and cognizance *pro retorno habendo*, as it is called. As *actor*, he claims a right to distrain, and, therefore, ought to make title to the distress against the plaintiff in replevin, who claims property in it.

The *criterion*, when the defendant should, or should not, make avowry or cognizance, is this: when the defendant claims property in himself, he shall have a return, on establishing his plea, without making avowry or cognizance, because his plea destroys the title of the plaintiff. The title of the plaintiff is equally invalidated, when he pleads property in a stranger, and, therefore, there shall be a return without avowry or cognizance; because, at the time of the distress, the defendant had the possession, which, if his plea be true, was illegally taken from him by the plaintiff, in making

<sup>(a)</sup> 1 Saund. 347, c, n. (4); Com. Dig. Pleader, 3 K, 13, 14; Steph. Pl. 218, note; Lawes on Pl. 83.

the replevin when he had no right. On the contrary, in all pleas that do not show property to be out of the plaintiff, there must be an avowry or cognizance made.

The statute of 4 Anne, c. 16, s. 4, allows the defendant or tenant in any action or suit, or for the plaintiff in replevin, with leave of court, to plead as many several matters thereto as he may think necessary. Therefore, not only may the defendant in replevin, as such, make several avowries or cognizances, but the plaintiff may also, by leave of court, plead as many pleas in bar thereto as he may think proper.

Many rules may be found in the elementary books respecting the forms of avowries and cognizances, but as they are governed, in general, by the same rules as in other cases, it will scarcely be necessary here to state them in detail.<sup>(a)</sup> Considered as declarations, avowries are subject to the same general rules as declarations in personal actions; as special pleas in bar, they must possess the same properties which belong to such pleas.

*2° Of pleas denying the plaintiff's property.*

3576. Pleas of this kind are obviously pleas in bar, and not in abatement, for they show that the plaintiff has no right to have the chattel restored to him, which is the primary object of the suit.<sup>(b)</sup> If the defendant has pleaded property in a stranger, he will be entitled, upon proof, to have the goods returned to him.<sup>(c)</sup> When it is pleaded that the property is in a stranger, the plea should not only allege that the goods and chattels mentioned in the declaration were not the pro-

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<sup>(a)</sup> See Ham. N. P. 465, et seq.; Lawes on Pl. 77 to 87; Com. Dig. Pleader, 3 K, 13, 14; Bac. Ab. Replevin, K; Dane's Ab. Index, h. t.

<sup>(b)</sup> Rogers v. Arnold, 12 Wend. 30; Martin v. Ray, 1 Blackf. 291; Harrison v. McIntosh, 1 John. 380; Ingraham v. Mead, 1 Hill, 353; Chambers v. Hunt, 3 Harr. 339.

<sup>(c)</sup> 1 Hill, 353; Phillips v. Townsend, 4 Mis. 101.

perty of the plaintiff, but should also state whose they were; (a) and when the defendant pleads property in himself, he must still traverse the plaintiff's title. (b)

3° *Pleas in justification.*

3577. As matters of defence, pleas in justification are similar to avowries, though they differ in form in this, that they disclose the accident which precludes the defendant having the chattel returned to him; they commence with an *actio non*, and conclude with praying judgment of the plaintiff's suit.

The following is an instance of a plea of justification. If two are defendants in replevin, the one having taken the chattels as servant of the other, though the principal plead *non cepit*, this will not preclude the servant from justifying in right of his master, and, by that means, exonerate himself from the charge of damages; for the master's plea is not conclusive that he neither did nor could authorize the taking; this, however, is a justification, and not an avowry, for the bailiff is, in any case, to have a return only in his master's right, and the latter has abandoned his claim by not insisting on it.

A defendant may also plead in justification, when he was authorized by statute to take the chattel; thus, to an action of replevin for a horse, the defendant pleaded that he took him up as an estray, by virtue of the statute, at his residence, etc., and advertised him as required by law, and that the plaintiff brought the action before ten days had expired, etc. The plea was held good. (c)

4° *Of pleas in excuse and discharge.*

3578. Pleas in excuse and in discharge of the action

(a) *Anstice v. Holmes*, 3 Denio, 244.

(b) *Pringle v. Phillips*, 1 Sandf. Sup. Ct. Rep. 292.

(c) *Barnes v. Tannehill*, 7 Blackf. 604.

of replevin, are, both in form and substance, precisely similar to pleas of a like description in trespass.

*Art. 3.—Of replications and subsequent pleadings.*

3579. At common law, the replication to a plea in abatement, could only take notice of the plea itself, and not of the avowry which is made in addition to it, because, if he replied to both, it might have been objected to, on the ground of duplicity;(a) and if he replied to the avowry only, he would have admitted the falsity of his writ. One of the objects of the statute of Ann. above mentioned, was to remove the only ground of exception to the practice of answering both the plea and the avowry.

The reply to the avowry, is either a plea in abatement or in bar, according to its subject matter. The plea in abatement admits the claim to be well founded, and consequently, that the avowant is entitled to a return, but contends that the right has not been insisted on in its appropriate form. The plaintiff's reply to the avowry, is considered as a *plea in bar*, or a plea to the action of the avowry, because it opposes the defendant's claim to have the chattel returned; it is also a replication, because it maintains the demand in the writ.

When the defendant has pleaded *cepit in alio loco*, the plaintiff may reply, if the facts warrant it, that the *locus in quo* is known as well by the name given to it in the declaration, as by that assigned to it by the defendant, or he may take issue on the plea.

A general replication *de injuria* cannot be replied in replevin, but the opposite party must take advantage of the error by special demurrer.(b)

(a) In Ohio, the plaintiff may put in a double replication, in a case of replevin. *Cotter v. Doty*, 5 Ham. 393.

(b) *Hopkins v. Hopkins*, 10 John. 369.

## § 6.—Of the evidence in replevin.

3580. Much of what might have been introduced under the head of evidence, has been anticipated in considering other parts of this subject.

The general issue *non cepit* admits the plaintiff's title, and of course he need not prove it; but he is required to prove that the defendant had the goods in the place mentioned in the declaration, for the action being local, the place is traversable; but as the wrongful taking is continued in every place in which the goods are afterward detained, proof that they were, at any time after the taking, in that place, is sufficient.(a)

When, in addition to the plea of *non cepit*, the defendant also pleads property, either in himself or a stranger, the *onus probandi* is cast upon him.(b)

In those cases where the plaintiff pleads *non demisit* or *non tenuit* to an avowry for rent in arrear, the defendant must prove the demise, because, on the existence of that, his title to recover depends, and the demise proved must be precisely the same stated in the avowry;(c) an agreement for a demise is not sufficient.

*Rien in arrear*, which is the proper plea, where the defendant alleges that he has paid up his rent, admits the demise as laid in the avowry, and puts in issue the fact that nothing is due.(d) The avowant must recover if he can prove that *any* rent is due, though he may not prove that all is due which he has alleged.(e) The plaintiff may prove that he has paid the rent to one who had a superior title, as a ground landlord, or for taxes. The time at which the rent was payable,

(a) 1 Saund. 347 a, note (1.)

(b) Com. Dig. Pleader K 12; *Clemson v. Davidson*, 5 Binn. 399; *Seibert v. McHenry*, 6 Watts, 301.

(c) *Dunk v. Hunter*, 5 B. & Ald. 322.

(d) *Williams v. Smith*, 10 S. & R. 203; 8 Wend. 448.

(e) *Bloomer v. Juhel*, 8 Wend. 448; *Hill v. Wright*, 2 Esp. 669. See *Weidel v. Roseberry*, 13 S. & R. 178.

and the amount due, must be proved as laid in the avowry for rent in arrear.(a)

§ 7.—Of the verdict and judgment.

3581. The judgment is either for the plaintiff, or for the defendant.

*Art 1.—Of judgment for the plaintiff.*

3582. This judgment varies according to circumstances.

1. When the replevin is in the *detinuit*, the judgment is, that he recover the damages assessed by the jury for the taking and unjust detention, or for the latter only, when the former was justifiable, together with costs.

2. But if the replevin is in the *detinet*, the verdict should be, in addition to the above, for the value of the chattels when still detained, not in a gross sum, but of each separate article, because the defendant may restore some of them, but not the whole, in which case the plaintiff may recover the value of the remainder.

*Art. 2.—Of judgment for the defendant.*

3583. In the same manner, the judgment in favor of the defendant varies according to the pleadings.

1. If the replevin is *abated*, the judgment is, that the writ abate, and when, with his plea in abatement, the defendant has avowed, as before mentioned, that he have a return of the chattels.

2. When the plaintiff is *nonsuited*, the judgment for the defendant, at common law, is, that the chattel be restored to him;(b) unless the defendant has pleaded, and it appears from the matter he has himself disclosed, that he has no right to retain the goods, as where he

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(a) *Waltman v. Allison*, 10 Penn. St. Rep. 464. See the reasoning of Coulter, J., as to what may be recovered, under an avowry.

(b) *Smith v. Winston*, 10 Mis. 299.

shows a defective title, excuses the act, or otherwise makes it plain that he has no title, for the court can make no intendment in his favor contrary to his own acknowledgment; the fact must be taken as admitted, and, according to that, he has no right to a return.

3. Some alterations in the common law judgment upon a nonsuit in replevin have been made by statute. The 21 H. VIII., c. 19, s. 3, gives damages and costs to the defendant in cases of nonsuit. And by 17 Car. II., c. 7, s. 1, when a nonsuit takes place before issue joined, a writ of inquiry may be issued to ascertain "the sum in arrear at the time of distress taken, and the value of the goods or chattels distrained." And in case the plaintiff shall be nonsuited, after cognizance or avowry made, and issue joined, or if the verdict shall be against the plaintiff, then the jury, at the prayer of the defendant, shall find the value of the goods, and the avowant or cognizor shall, thereupon, have judgment for such arrearages, or so much thereof as the goods amount to, together with costs.(a)

4. The plaintiff will not be entitled to judgment when there are two defendants, and the defence of one shows that the plaintiff has sustained no injury, or that he is not entitled to a restoration of the chattel; this bars his suit *quoad* the other, even though the latter has admitted the claim. Thus, where one defendant pleads *non cepit*, which is found against him, and the other makes an avowry which is decided in his favor, the plaintiff can have no judgment against either, because the right appears to be in the avowant.

5. If the avowant succeeds upon the *merits*, on the trial of his case, the judgment at common law was to have return irreplevisable.(b) The statute of 7 Hen. VIII., c. 4, s. 3, in addition, gives costs.(c)

(a) See *Howard v. Johnson*, 1 Ashm. 58.

(b) In New Hampshire, judgment for defendant in replevin must be for the value of the chattels replevied and damages, and not for a return of them. *Bell v. Bartlett*, 7 N. Hamp. 178.

(c) See *Easton v. Worthington*, 5 S. & R. 132.

6. When the judgment is given upon *demurrer* for the avowant, or him that makes cognizance, for any rent, the court may, by virtue of the statute of 17 Car. II., c. 7, s. 2, award a writ of inquiry,<sup>(a)</sup> and upon its return, judgment shall be given for the avowant, or him that makes cognizance, for the arrears alleged in such avowry or cognizance to be behind, if the goods or cattle distrained shall amount to that value; and in case they do not amount to that value, then for so much as the goods or cattle distrained shall amount unto, together with full costs of suit.

§ 8.—Of the writ of second deliverance.

3584. At common law, when the plaintiff in replevin was nonsuited, he might sue out a new replevin, which necessarily superseded the execution of the judgment rendered on the nonsuit in favor of the defendant *pro retorno habendo*, if it had not been enforced, or if executed, the chattels were again taken under the new writ, and restored to the plaintiff; and thus he might have suffered non pros. of the second, third, or any number of suits of replevin, and so by neglecting to follow his suit, he might have annoyed the plaintiff continually. To remedy this evil, the statute of Westminster second, 13 Edw. I., c. 2, was passed. This statute allows a second writ to be issued, upon security being given to the sheriff, “and if he that replevied make default again, or for any other cause return of the distress be awarded, being now twice replevied, the distress shall remain irreprevisable; but if the distress be taken of new, and for a new cause, the process above said shall be observed in the same new distress.” The writ given by this statute is termed a writ of *second deliverance*. It is founded on the record of the former suit.<sup>(b)</sup>

(a) *Gibbs v. Bartlett*, 2 W. & S. 29.

(b) 2 Inst. 341.

The action of replevin is regulated by the statutes of the different states; these legislative acts contain special provisions, so as to prevent the oppressions, which it was the object of the statute of Westminster second, to remedy.

SECTION 4.—OF THE ACTION OF TRESPASS.

3585. This action is instituted for the recovery of damages for such injurious acts and such only as have been committed with violence, *vi et armis*, to the person, property, or the relative rights of the plaintiff.

This section will be divided into four heads: 1, of the injuries for which trespass may be sustained; 2, of the pleadings; 3, of the evidence; 4, of the verdict and judgment.

§ 1.—Of the injuries for which trespass may be sustained.

3586. The subject will be considered with reference, 1, to the nature of the injury; 2, to the manner of committing the injury; 3, to injuries to the person; 4, to injuries to real property; 5, to personal property; 6, to the relative rights.

*Art. 1.—Of the nature of the injury for which trespass will lie.*

1. *Of the general nature of the injury.*

3587. Much difficulty exists in applying the rule which distinguishes the causes for which an action of trespass may be brought, from those where case may be maintained. (*a*) To determine whether a wrong is a trespass, or forcible injury, due regard must be had to the nature of the right affected. A wrong *with force*

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(*a* In some of the United States, the distinction between the two forms of action has been abolished by statute. In Maine, it is enacted that “the declaration shall be equally good and valid to all intents and purposes, whether the same shall be in form a declaration in trespass, or trespass on the case.” Rev. St. ch. 115, § 13.

can be committed only against the absolute rights of personal liberty and security, and to those of property corporeal. Injuries to health and reputation, and to property incorporeal, cannot be redressed by an action of trespass, because the subject matter to which they relate exists, in either case, only in idea, and is not to be seen and handled, and therefore not subject to any injury by force.

Trespass may be maintained for an injury to the relative rights occasioned by force, as for beating or wounding a wife or servant, by which the husband, master or servant, has sustained a loss ; though the injury or loss of service were consequential and not immediate ; as for criminal conversation, or seducing away a wife or servant, or for debauching a female servant ; for in these cases, force is implied, because the wife and servant are considered incapable of giving their consent. In these cases, however, it is more correct to declare in case, unless some other trespass has been committed at the same time by the defendant, as an illegal entry into the plaintiff's house ; and then, it is advisable to bring trespass and join the two causes in the same action.

To enable the party injured to maintain trespass, the wrong must have been the *immediate* consequence of the acts injurious to the plaintiff ; for if the damage sustained is a remote consequence of the act, the injury is to be redressed by an action on the case.(a)

An injurious effect or consequence alone is said to be immediate, which is produced by the primary original cause, without the intervention of any secondary agency ; thus, if Paul strike Peter, the injury is immediate, because nothing is interposed between the cause and its effects. But when a *secondary cause* intervenes, whether it is incited by its own free impulse, or compelled to exert it by the influence of the first, the

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(a) Cotteral v. Cummins, 5 S. & R. 343 ; Winslow v. Beall, 6 Call, 44.

injury has been occasioned by secondary means. Where a man sets a trap in the highway, which injures another, is an example of the first kind; and the second is illustrated by the case where Peter sets in motion an agent of destruction, a squib, which is cast toward Paul, who, in danger of being hurt, throws it toward James, and it burst and does him an injury.(a) Various other instances of secondary causes might be adduced, as where a dam is put across a stream of a river, by means of which the water is forced to overflow its banks and it injures the neighboring estate; or where the defendant shot the captain of a vessel just ready to sail, whereby the voyage was delayed to the injury of the owners.(b) In these cases the injury is so remote that trespass cannot be sustained, but case is the proper remedy for the consequential wrong.

But there is much difference between a *secondary cause* or agent, and a mere *instrument*, intervening between the original cause and the effect. If Peter thrusts Paul against James, to the injury of the latter, the wrong is immediate, because the force which occasioned the inconvenience to his person, is that of Peter himself, and Paul is the mere channel by which the *vis impressus* is communicated. This differs materially from the case of the throwing of the squib already mentioned; there Paul, though wholly innocent, is nevertheless the immediate cause or occasion effecting the mischief to James. For this reason, if an action of trespass be brought against him for the supposed injury, he must plead specially the matter in excuse, acknowledging that he himself committed the trespass, and showing that it was involuntary and inevitable; whereas, in the case where Peter thrust Paul against James, if sued in trespass, Paul may plead the general

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(a) *Scott v. Shepherd*, 3 Wils. 403. See *Beckwith v. Shordike*, 4 Burr. 2092; *Davis v. Saunders*, 2 Chit. 639.

(b) *Adams v. Hemmenway*, 1 Mass. 145.

issue, for he was the mere instrument in the hands of Peter.

2. *Of the damage which has ensued.*

3588. This action is brought for the recovery of damages; to maintain it, then, some injury must have been committed by the defendant against the plaintiff; for, unless some temporal damage has been done, and has actually resulted, or is likely to ensue, no action lies; for example, in contemplation of law, a man's land extends upward to the skies; now, suppose a man were to cross it in a balloon, he must break the ideal fence which the law has put around every man's land, and yet, as no damage would ensue from the act, no action of trespass could be maintained against the æreonaut, because he did no injury, and none could result from his act; but if any injury has been done, the degree is wholly immaterial, nor will distinct proof be required, upon every occasion, that an inconvenience has been sustained, because, in many instances, it is impossible to adduce any evidence of the injury. When one man strikes another it is impossible to say what pain or inconvenience the latter has suffered, and, to insure his safety, the law presumes an inconvenience has resulted to him, and a detriment has followed.<sup>(a)</sup>

When this detriment or injury results necessarily from the acts of the defendant, the damages sustained by the plaintiff are termed *general damages*, and it is not requisite that he should prove what loss he has sustained, for the proof of the injurious act is sufficient; and, if none greater are proved, the law will, in such cases, give *nominal damages*. But, in some cases, the plaintiff actually suffers loss, which is not necessarily a consequence of the act complained of, and, therefore, not implied by law; damages of this kind are

<sup>(a)</sup> *Bullock v. Babcock*, 3 Wend. 391; *United States v. Ortega*, 4 Wash. C. C. 534; *Dinkins v. Debruhl*, 2 N. & M. 85.

denominated *special damages*. These must be strictly proved.

The detriment or inconvenience sustained, must be the necessary consequence of the defendant's misconduct, and not the effect of the negligence of the plaintiff, or produced by the wrongful act of another.<sup>(a)</sup>

There may be not only acts or wrongs which are evidence of general or special damages, but also which are *matters in aggravation* of damages, which indicate the *animus* or intention by which the defendant was influenced at the time of committing the trespass; these may be shown in order to aggravate the damages.

In some cases the injury committed is to the feelings of the plaintiff, when in fact he has received no temporal or pecuniary loss or damage; here, the law, being founded on general principles, can give no remedy, as where the defendant seduced the daughter of the plaintiff, who was not his servant. But, although such injury is not of itself sufficient to support an action, yet, if the defendant entered the house of the plaintiff to commit the injury, an action may be brought for the wrongful entry, and the plaintiff may allege the seduction as matter of aggravation, and in this way recover damages for the injury done to his feelings.<sup>(b)</sup> In this case, the plaintiff does in fact, though not in law, recover for the seduction of his daughter.

But although a detriment has occurred, yet no damage or injury has been sustained by the plaintiff, when the act of the defendant can be justified or excused, as where the defendant acted in obedience to an authority in law or in fact, or in defence of his absolute or relative rights. And when an injury has taken place, which could neither be justified nor ex-

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<sup>(a)</sup> *Flower v. Adam*, 2 Taunt. 314. See *Vicars v. Wilcox*, 8 East, 1; *Morris v. Langdale*, 2 B. & P. 284.

<sup>(b)</sup> See Steph. Pl. 257.

cused, it may still be subject to *mitigation* of damages; as where a reasonable cause of suspicion that the plaintiff had committed a felony, exists, it may be shown, in mitigation of damages, in an action for false imprisonment; (a) for when a party is placed under suspicious circumstances, though sometimes it may be only his misfortune, yet it is generally his fault, and the law very properly casts a part, at least, of the ill consequences upon himself. The defendant, in an action for the seduction of a wife or daughter, may, in mitigation of damages, give evidence of facts which show that the consequence resulted, in part, from the improper, negligent, or imprudent conduct of the plaintiff himself. (b)

These matters, in aggravation or mitigation of damages, are facts and circumstances which may be proved to increase or diminish the *extent* of the injury itself; the tort remains, and the circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is entitled to receive, and the defendant is liable to pay, damages only to the extent of the injury. (c)

*Art. 2.—Of the manner of committing the injury.*

3589. The injury for which an action of trespass will lie, may be committed, 1, by the defendant himself, by one under his command, or by his cattle; 2, without process, or under color of legal proceedings.

1. *By whom the injury may be committed.*

3590. The individual who commits the unlawful act which has caused the injury is, in general, personally responsible for the consequences, and when

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(a) *Chinn v. Morris*, Ry. & Mo. 424.

(b) Bull N. P. 27, 296; Selw. N. P. 25; 2 Greenl. Ev. § 56.

(c) 2 Greenl. Ev. § 267. See *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420.

several have joined, they are all responsible as principals, for in trespass there are no accessories; he who commands or requests another to commit a trespass, is himself a principal if the other complies, upon the principle, *qui facit per alium facit per se*. In such case they are both liable, and may be sued jointly or severally by the party injured; the agent, because the authority of the principal cannot justify the wrongful act; the person who directs the act to be done is responsible, according to the maxim, *respondeat superior*.(a)

Not only may he who commands the commission of a wrong, by which an injury results to another, be held responsible, but, also, he who after its commission sanctions it, either expressly or by implication. By the common law, "he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, *omnis ratihabitio retro trahitur, et mandato æquiparatur*."(b) This rule, in relation to the ratification or adoption of the acts of a trespasser, is subject to some exceptions. An infant and a feme covert having no legal power to consent, will not be considered a trespasser by any subsequent assent.

Without some command or assent after the trespass has been committed, trespass cannot in general be maintained, when the principal has commanded his

(a) 4 Inst. 114; *Sands v. Child*, 3 Lev. 352; *Jones v. Hart*, 1 Lord Raym. 738; *Britton v. Cole*, 1 Salk. 408; *Laugher v. Pointer*, 5 B. & Cr. 559; *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwall*, 4 M. & S. 259; Com. Dig. Trespass, C 1. Where an officer called a stranger to assist him in the execution of a process, and the process did not justify the officer, the person assisting him was held liable as a trespasser. *Elder v. Morrison*, 10 Wend. 128. But see *Oystead v. Shed*, 13 Mass. 524; *Hooker v. Smith*, 19 Verm. 151; *Payne v. Green*, 10 S. & M. 507.

(b) 4 Co. Inst. 317. See 4 B. & Ad. 616; *Nicoll v. Glennie*, 1 M. & S. 590; 9 East, 281; *Peddell v. Rutter*, 8 C. & P. 337.

servant to do a lawful act, and, contrary to his direction, he has committed a trespass; but the sheriff is an exception to this rule.(a)

3591. The owner of animals is responsible for an injury committed by them, through his fault or neglect. But a distinction must be observed, not only because the owner will, or will not be liable, under the circumstances, but also on account of the form of the action brought to redress the injury. When the animals are not necessarily inclined to do mischief, as dogs, horses and cows, and the owner has no knowledge of any evil propensity, he will not be liable, unless he has been guilty of some fault, or purposely caused the damage.(b) If he has knowledge of such evil propensity, which is called the *scienter*, he is responsible.(c) If, on the contrary, the animals are *feræ naturæ*; of a wild nature, or known to be mischievous or dangerous, as a bear, a lion or a wolf, or a dog known to bite, and the owner lets them go at large, and any mischief ensue, the owner is liable in trespass for the injury; for the law, in such cases, presumes the defendant knew of this mischievous propensity.(d) The owner is bound to confine animals *mansuetæ naturæ*, or those of a domestic nature, which have a propensity to rove, as cows, sheep, horses, and the like, and if they escape and commit a trespass on the land of another, unless through a defect of fences, which the latter is bound to repair, the owner is liable to an action of trespass.(e)

(a) Hazard v. Israel, 1 Binn. 240.

(b) Gardner v. Rowland, 2 Iredell, 247; Dolph v. Ferris, 7 Watts & Serg. 367; Angus v. Radin, 2 South. 815.

(c) Bouv. L. D. Scienter.

(d) Leame v. Bray, 3 East, 595; Bac. Ab. Action on the Case, F.

(e) Dolph. v. Ferris, 7 W. & S. 367; Angus v. Radin, 2 South. 815, Gardner v. Rowland, 2 Iredell, 247. In this respect the civil law agrees with our own. Domat, Lois Civ. liv. 2, t. 8, s. 2.

2. *When the injury is committed without process, and when under color of judicial proceedings.*

3592.—1. In most cases the injury is committed without any color of process, either under a pretence of right, or in open violation of that of the plaintiff. The defendant, in such cases, has no excuse, and is liable to an action of trespass, when the injury is immediate and with force, to the corporeal property of the plaintiff in possession.

3593.—2. When the injury has been committed under color of process, in some cases it can, and sometimes it cannot, be justified; and the process will shield some persons, and will not give any protection to others.

1. In the absence of fraud, a judgment of a competent court, having jurisdiction, is a complete justification to all persons acting under it, or any proceedings lawfully founded upon it, by authority of such court. The plaintiff, his attorney, and the ministerial officer, are fully justified. If fraud has been practiced in obtaining the judgment, trespass may be maintained against the person who has been guilty of it; (a) thus, where a justice of the peace, being the owner of a promissory note, payable to A, or bearer, instituted a suit upon it, in the name of B, as bearer, against the maker, returnable before himself, rendered judgment by default, issued execution upon it, and caused the defendant to be arrested and imprisoned, knowing at the time he was the owner, and acting therein to collect his own debt, he was held liable in trespass for such arrest and imprisonment. (b) It is a maxim, founded in common sense, that a man cannot, at the same time, be a judge and a party: *Nemo iudex in causâ propriâ*. (c) In case of an *excess* of jurisdiction

(a) *Johnston v. Sutton*, 1 T. R. 538.

(b) *Dyer v. Smith*, 12 Conn. 384.

(c) *Duval*, *Le Droit dans ses Maximes*, 15; 8 Co. 118; 21 Pick. 101; 14 S. & R. 157.

trespass may be supported for any thing done under such proceedings.(a)

2. When the court has *no jurisdiction* over the subject matter, this form of action is the proper remedy against all parties who have been guilty of a trespass, while acting under its judgment or subsequent proceedings.(b) But the officer who executes the writ will be protected, unless it appears upon its face that the court has no jurisdiction.(c) Where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain form in its proceedings, from which it deviates, the proceedings are rendered *coram non judice*, and, therefore, void; for an injury committed under them, where trespass would lie, if there had been no such proceedings, trespass is the proper remedy.(d)

3. When the court has jurisdiction but the proceeding is *defective*, as being irregular, it is nevertheless a judgment to all intents and purposes, until set aside by the court, who inadvertently, and through the fraud of the plaintiff, pronounced it;(e) for a record is of so high a nature that it cannot be impeached in a collateral proceeding, but when set aside, the case is then as if no judgment had ever existed, and the consequences are the same.(f) An erroneous judgment is the fault of the court, and not of the party; and

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(a) *Blood v. Sayre*, 17 Verm. 609.

(b) *Allen v. Greenlee*, 2 Dev. 370; *Allen v. Gray*, 11 Conn. 95; *Kennedy v. Terrill*, *Hardin*, 490; *Rembert v. Kelly*, *Harper*, 65; *Poulk v. Slocum*, 3 Blackf. 421; *Williams v. Brace*, 5 Conn. 190; *Stephens v. Wilkins*, 6 Penn. St. R. 260.

(c) *Grumon v. Raymond*, 1 Conn. 40; *Churchill v. Churchill*, 12 Verm. 661.

(d) Those acts are said to be *coram non judice* when the court has no jurisdiction, either over the person, the cause, or the process. 1 Conn. 40.

(e) *Egerton v. Hart*, 8 Verm. 208; *Warburton v. Aken*, 1 McLean, 460; *La Grange v. Ward*, 11 Ohio, 257; *Sweiggart v. Harber*, 4 Scam. 364; *Haner's Appeal*, 5 W. & S. 473.

(f) *White v. Albertson*, 3 Dev. 241; *Williams v. Woodhouse*, 3 Dev. 257; *Obert v. Hammel*, 3 Harr. 73; *Banister v. Higgison*, 3 Shepl. 73.

inasmuch as the judges will be protected in their acts done under it, notwithstanding it is afterward reversed, so will the plaintiff in the suit, and all who assist him.(a)

4. When the process has been *misapplied*, trespass will lie, as where the officer having a *feri facias* against Peter takes and levies upon the property of Paul;(b) or, if there be a misnomer in the process, though executed on the person or goods of the party against whom it was in fact issued; for upon the face of the proceedings it appears there was no authority,(c) unless, indeed, the defendant himself has occasioned the mistake.(d) But where an officer acts according to the exigency of his process in making an arrest, he is not a trespasser, although the party arrested is privileged from arrest.(e)

5. Trespass can be maintained against a sheriff and his officers for *abusing* the regular process of the court, if the conduct of the officer was in the first instance illegal, and an immediate injury to the person, personal or real property, ensue; as if the officer arrest the defendant out of his bailiwick, or after the return day of the writ;(f) or if he break open an outer door, without first making a demand to have it opened;(g) or if the process be served by a person not lawfully authorized.(h) Whenever the process is regular, and the conduct of the officer in the first instance is lawful, but his subsequent conduct becomes unlawful, by the abuse of his authority, he thereby becomes a trespasser *ab initio*;(i) as if he sell an article he has seized, before

(a) Phillips v. Hiron, Str. 509.

(b) Sanderson v. Baker, 3 Wils. 309.

(c) Cole v. Hindson, 6 T. R. 234.

(d) Price v. Harwood, 3 Campb. 108.

(e) Chase v. Fish, 4 Shep. 132; Carle v. Delesdenier, 1 Shepl. 363; Wilmarth v. Burt, 7 Met. 257.

(f) Parrot v. Mumford, 2 Esp. R. 585.

(g) Douglass v. The State, 6 Yerg. 525.

(h) Bebee v. Steel, 2 Verm. 314.

(i) Bac. Ab. Trespass, B.

the time prescribed by law ;(a) or if he levy upon property and advertise it for sale, and neglect to sell it upon the execution ;(b) or having a writ against one defendant, he sell the entire property in goods owned by two jointly ;(c) or where he sells, after knowing the judgment to be satisfied.(d) And in some cases, mere acts of nonfeasance will make him a trespasser *ab initio*; as where he neglects to discharge a party out of custody, when he ought to do so, as where he retains him for fees not due.(e) But, in general, case, and not trespass, is the proper remedy for mere nonfeasance.

6. When an arrest is made without warrant by a ministerial officer, on the information he has received from others, and the information turns out to be unfounded, he is liable to an action of trespass ; for he stands in the same situation as if he had received no such information ;(f) and, when an officer proceeds, without warrant and without foundation, upon his own apprehension, though there was probable cause, trespass is the form of action ; though, if there was probable cause, this may be shown in evidence, in mitigation of damages ; and it was held, that under the general issue, the defendant might, for the same purpose, prove what were the contents of the plaintiff's trunk, for the purpose of showing that he was addicted to burglary.(g)

7. No officer, authorized to execute a writ or warrant, is liable in trespass for executing such process, however malicious his conduct may be, because being authorized to execute the writ, the law will protect him in the performance of that duty ; and if he is

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(a) *Smith v. Gates*, 21 Pick. 55.

(b) *Bond v. Wilder*, 16 Verm. 393.

(c) *Waddell v. Cook*, 2 Hill, 47 ; *Melville v. Brown*, 15 Mass. 82 ; *Edgar v. Caldwell*, 1 Morris, 434.

(d) *Kuhn v. North*, 10 S. & R. 399.

(e) *Smith v. Gibson*, 1 Wils, 153.

(f) *Stonehouse v. Elliot*, 6 T. R. 316.

(g) *Russell v. Shuster*, 8 W. & S. 308.

guilty of any malicious conduct, he may be punished by being mulcted in damages in action on the case.(a)

*Art. 3.—Of injuries to the person.*

3594. For an injury done to the person, immediately and with force, trespass is the only remedy; as for an assault and battery, wounding, or false imprisonment.

*1. Of the nature of the injury to the person.*

3595. In another place the nature of assaults, batteries, woundings, mayhems, and all other injuries to the person, committed with force, has been fully considered;(b) for any of these the plaintiff may maintain an action of trespass.

*2. Of the damages consequent on the injury.*

3596.—1. The damage consequent upon an *assault*, consists in the inconvenience produced by the fear which the act impresses upon the plaintiff's mind; and such impression can only arise, when the attempt to injure is coupled with a present ability; the plaintiff must be placed within reach of the offensive means, or he has not been injured; thus, if the assault consists in lifting up one's fist in a threatening manner, the plaintiff must stand within reach of the blow; if pointing a gun at him, the plaintiff must be within its range.(c)

3597.—2. A *battery*, however slight it may be, causes a damage, for which an action of trespass may be maintained, for it may be assumed that pain has

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(a) *The People v. Warren*, 5 Hill, 440; *Hart v. Dubois*, 20 Wend. 236; *Parker v. Smith*, 1 Gilm. 411; *Ludington, v. Peck*, 2 Conn. 700; *Beaty v. Perkins*, 6 Wend. 382; *Fortner v. Flamagan*, 3 Port. 257.

(b) Ante, n. 2210 to 2234.

(c) Com. Dig. Battery, C; *Morton v. Swoppee*, 3 Gar. & P. 373.

followed the touch; and, unless it can be excused or justified, the plaintiff will be entitled to damages.(a)

*Art. 4.—Of injuries to real property.*

3598. Trespass is the proper remedy for the several acts of breaking through an inclosure, and coming into contact with any corporeal hereditament, of which another is the owner or in possession, and by which a damage has ensued. This subject will be examined with reference to, 1, the nature of the property affected; 2, the plaintiff's right or title in the same; 3, the nature of the injury.

1. *Of the nature of the property affected.*

3599. The real property affected must in general be something tangible and fixed, as a house, a room, an out-house or other building, or land; land, however, in its most extensive signification, includes all of these. There is an ideal or imaginary fence which encircles every man's estate, reaching in extent *a superficie terræ usque ad cælum*, when he is the owner of the surface, and downward as far as his property descends; this right entitles him to a compensation in damages for the injury he sustains, by the act of another passing through the boundary; this injurious act is denominated a *breach of the inclosure*.

The owner of the vesture of land, *vesturæ terræ*, or *herbagii pasturæ*,(b) has a right to exclude others from entering upon the superficies of the soil.(c)

To ascertain whether the right of the plaintiff has been invaded by an intrusion of his real property, consider whether the owner of an estate may encircle

(a) 1 Hawk. P. C. 263; 1 Saund. 14; *Jennings v. Fundeburg*, 4 McCord, 161; *Cole v. Turner*, 6 Mod. 149.

(b) By vesture of land is meant all things, except trees, which grow upon its surface, or which, as the term imports, clothe it externally.

(c) Co. Litt. 4 b.

it with a visible fence; if so, his right is complete, and the law raises an imaginary fence, where he had a right to put a substantial visible one. It is for this reason, that if a man enters into the house of another, the door being open, he is said to break into it.(a)

3600. As the public in general have only the easement or use of a highway, the soil remains in the owner of the land, and the owner of the soil may, therefore, maintain trespass against one who deposits fence rails on the highway;(b) for it is a breach of his close, the term *close* being technical, and signifying the interest in the soil, and not merely an inclosure in the common acceptance of the term.(c)

3601. The action of trespass to real estate is local; the property injured must, therefore, be situate within the territorial jurisdiction of the court where the suit is brought, so that trespass cannot be maintained in one state for a trespass in entering a house located in another.(d)

3602. The property affected must be *corporeal*, that is, such as is subject and palpable to the senses; and not such as is *incorporeal*, consisting of easements, rights of way, and the like. An action of trespass for an injury to a way, public or private, by which the plaintiff has sustained damages, cannot be maintained; the proper remedy is case.(e) Case is also the proper remedy for any disturbance of an easement.

3603. A *pew*, although tangible, is not such corporeal property in possession for which trespass will lie, and, therefore, the owners of a church or meeting

(a) 11 Hen. 4 Trin. 16, p. 75.

(b) Lewis v. Jones, 1 Penn. St. Rep. 336; Robbins v. Borman, 1 Pick. 122; Perley v. Chandler, 6 Mass. 454; Adams v. Emerson, 6 Pick. 57. But see 17 Pick. 357.

(c) Doct. & Stud. dial. 1, c. 8, p. 30; 2 Whart. 430; Stammers v. Dixon, 7 East. 207.

(d) Doulson v. Matthews, 4 T. R. 503.

(e) Com. Dig. Action on the case, Disturbance, A 2.

house may pull it down, and by that means destroy the pew.(a)

2. *Of the plaintiff's right to the property injured.*

3604. To maintain trespass for a tortious entry upon real estate, the plaintiff must have a title accompanied by actual possession, or simply the actual possession; and this property or right need not be to the fee; or it may be a property in trees, or vesture of the land, independently of the ownership in the soil. So it may also be in any portion of the vesture, as in the herbage, or the like; and the estate therein may, as in the land itself, be absolute, or only for a limited period. Each of these may be holden by a different tenure, and they are to be accounted as separate and distinct from one another.(b)

A trespass is not injurious to the right, but only to the possession; no one can, therefore, consider himself aggrieved by a trespass who was not in possession of the property injured at the time,(c) and had not a right to that possession.(d) But a constructive possession is sufficient for that purpose.(e)

The proprietor of land cannot maintain an action of trespass, unless he has first possessed himself of the soil by entry upon it, and it is immaterial whether he became proprietor by purchase or by operation of law. His entry, when once made, has a retrospective effect, and he is considered to have been in possession from the moment his title accrued; in the case of an heir,

(a) *Daniel v. Wood*, 1 Pick. 102; *Stocks v. Booth*, 1 T. R. 430.

(b) *Stammers v. Dixon*, 7 East, 200.

(c) *Bedlingfield v. Onslow*, 2 Lev. 209. A servant, put in the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may consider himself in possession. *Bertie v. Beaumont*, 16 East, 33.

(d) *Addleman v. Way*, 4 Yeates, 218; *Torrence v. Irwin*, 2 Yeates, 210; *Chatham v. Brainerd*, 11 Conn. 60; *Truss v. Old*, 6 Rand. 556; *Begelow v. Lehr*, 4 Watts, 337; *Shepard v. Pratt*, 15 Pick. 32; *Beggs v. Thompson*, 2 Ham. 95.

(e) *Davis v. Clancy*, 3 McCord, 422; *Bulkley v. Dorbeare*, 7 Conn. 233.

from the death of the ancestor ; a devisee, from the decease of the devisor ; a personal representative, from the demise of the testator or intestate ; and a purchaser, from the conclusion of the contract.

When the possession, once acquired, has been interrupted for a time, it must be regained before the owner of the land can punish a trespass committed after his right of repossession accrued. If, for example, Peter lease to Paul land for years, and after the determination of the term, before Peter reënters, John, a stranger, enters, and subverts the soil, Peter cannot demand a reparation for this injury before he repossesses himself of the property ; but, having done so, the same relation back which obtains in the former cases, has also place in this ; so that, after Peter's reëentry, he is considered as having been in possession from the moment when the term expired.

The entry may be made upon a part of the land, in the name of the whole,(a) either in person or by attorney. If a stranger, of his own accord, without any authority from the owner, enters to the owner's use, who afterward recognizes the act, this makes the stranger attorney *ab initio*.(b) And if one of several joint tenants, or tenants in common, enters, they being jointly entitled to the possession, his entry inures to the benefit of all.(c)

With regard to the nature of the possession, it is to be observed that a mere possession is sufficient against any party who cannot show a better title, or as it is generally expressed, against a mere wrong doer.(d) For example, a female servant has such possession of her bed room, as will enable her to maintain trespass against a person who wrongfully forces himself into it

(a) So a party who has possession of a farm may maintain trespass for an injury to the inclosed woodland attached to it. *Penn v. Preston*, 2 Rawle, 14.

(b) *Cro. Eliz.* 561.

(c) *Smith v. Dale*, *Hob.* 120.

(d) 1 *Saund.* 347 c, note.

while she is in bed;(a) and so a carpenter has sufficient possession to maintain trespass for an injury with force of premises which he possesses for the purpose of repairing them.(b) It is no defence to an action of trespass *quare clausum fregit*, brought by the plaintiff in possession, to show that the title of the premises is in a stranger, unless the defendant also show an authority from the stranger to do the act complained of.(c)

But though a tenant at will or sufferance may maintain trespass against a wrong doer, he cannot support this action against his landlord, because an entry by the latter determines the tenancy.(d)

One who has a mere incorporeal right cannot maintain trespass for its invasion; as a party having a right of common of pasture, cannot support trespass *quare clausum fregit* for treading down the grass growing upon the land upon which he has such right of common, for, although he has a right to take the grass by the mouth of his commonable cattle, still, he is not considered in possession of the land.(e)

A reversioner or remainder man, who has no right to possession, cannot maintain trespass for a wrong done to the estate; their remedy, when the reversionary interest of the remainder has been injured, is an action on the case.(f)

### 3. Of the nature of the injury.

3605. The injury to real property for which trespass can be supported, we have seen, must have been committed with force actual or implied, and must have

(a) *Lewis v. Ponsford*, 8 C. & P. 687.

(b) *Hall v. Davis*, 2 C. & P. 33. See *Graham v. Peat*, 1 East, 246.

(c) *Finch v. Alston*, 2 Stew. & Port. 83.

(d) Com. Dig. Trespass, B 2; *Starr v. Jackson*, 11 Mass. 520; *Hingham v. Sprague*, 15 Pick. 102.

(e) Bro. Trespass, pl. 174; Bac. Ab. Trespass, C 3.

(f) *Lienow v. Ritchie*, 8 Pick. 235; *Taylor v. Townsend*, 8 Mass. 411, 415; *Cannon v. Hatcher*, 1 Hill, S. C. 260; *Shattuck v. Gragg*, 23 Pick. 104.

been immediate. Though the act of breaking into the inclosure of the proprietor is, in general, injurious to him, still it may take place without causing him any damage, and in that case he cannot recover any compensation. It will be recollected that the owner of the superficies is entitled upward *a superficie terræ usque ad cælum*, and that his property is inclosed with an imaginary fence, of course extending upward *usque ad cælum*. The breaking of this imaginary line is a trespass; but if it be broken without causing any damage to the owner, as where a man flies a kite across the land of another, at a considerable height from the surface, no action lies. But to prove that it is a trespass, it is only necessary to consider that if the line should break, and the instrument fall upon the land, the owner would not be justified in entering upon it, to carry it away, as he would be if the kite had been placed there without any fault of his own.(a)

It is perfectly immaterial whether the wrong doer *intended* to commit a trespass or not, except that if it be clearly shown he did not intend to commit the injury, the jury will take this matter into consideration in assessing the damages; but he will be liable to make compensation for the injury he has caused. The injury may be committed without going on the plaintiff's land, as when the defendant shoots game on the land while standing on the public highway; in such case, the entry of the shot is considered as his entry,(b) though, in general, when the injury is committed off the plaintiff's land, the remedy is case.

3606. It frequently happens that the entry is lawful, and therefore no action could be had against the person who made it; but by his subsequent acts, which are unlawful, he becomes a trespasser *ab initio*, for the law will not permit that a man whom it has

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(a) Ham. N. P. 164, 165, 168; 2 Roll. Ab. 567 L, pl. 1.

(b) Keble v. Hickringill, 11 Mod. 74, 130.

armed with authority, shall, under pretence of enforcing its requirements, commit a wrong.(a) Thus, if a landlord enter to determine a lease at will, which is a lawful act, and he had the right so to enter, and afterward unlawfully make a search there for stolen goods, he will be a trespasser *ab initio*.(b) But the abuse of a license given to the defendant by the plaintiff to enter his land, will not make him a trespasser.(c)

*Art. 5.—Of trespass for injuries to personal property.*

3607. The action of trespass is the proper remedy for injuries to personal property, which may be committed by the several acts of unlawfully striking, chasing, if alive, and carrying away, to the damage of the plaintiff, a personal chattel, of which he is in possession.(d) It will be considered with reference, 1, to the nature of the thing affected; 2, the plaintiff's right to it; 3, the nature of the injury.

1. *Of the nature of the thing affected.*

3608. Trespass lies for taking or injuring all inanimate personal property of which possession may be had, and all animals of a domestic or tame nature, as horses, cattle, dogs, cats, and the like, and all animals of marketable value, such as parrots and monkeys; and it is the proper remedy also for taking or injuring animals *feræ naturæ* when reclaimed, or their bodies, when dead; the taking and injury may be done, either by striking, or chasing, if alive, and carrying away the chattel. Although the thing of which the plaintiff has been deprived, is only susceptible of a qualified

(a) *Gilson v. Fisk*, 8 N. Hamp. 404; *Bradley v. Davis*, 2 Shep. 44; *Jarrett v. Gwathmay*, 5 Blackf. 237; *Sackrider v. McDonald*, 10 John. 253.

(b) *Faulkner v. Alderson*, Gilmer, 221.

(c) *Cushing v. Adams*, 18 Pick. 110, 114; *Allen v. Crofoot*, 5 Wend. 506; *Wendell v. Johnson*, 8 N. Hamp. 220.

(d) 1 Saund. 84, n. 2, 3; F. N. B. 86; Bro. Trespass, pl. 407.

property, as are all animals *feræ naturæ*, still the plaintiff may claim in this action; for though, under these circumstances, a suit by which the value of the chattel is sought to be recovered, such as detinue or trover, cannot be supported, yet trespass may, for the very reason that the value of the property injured is not necessarily demanded in this action; the plaintiff may recover a compensation for the act of dispossessing him.

2. *Of the plaintiff's right to the thing injured.*

3609. It is not requisite that the plaintiff should have any other title to the property than *possession*, because it is for an injury to his possession that the compensation is given him. When the injury was committed, he must have had an actual or constructive possession, and also a general or qualified property.<sup>(a)</sup>

This property may be either, 1, where the party is general owner and entitled to immediate possession; 2, the qualified owner coupled with an interest, and also entitled to immediate possession; 3, a bailee with a naked authority simply; 4, actual possession without the consent of the owner, or even against his consent.

1° *Of the rights of the general owner.*

3610. It is a rule or maxim of law, that absolute property in personalty *primâ facie* draws to it the possession; <sup>(b)</sup> if a man, therefore, is the absolute proprietor of a chattel, and also entitled to possession, notwithstanding it is out of his custody, yet, in contemplation of law, he is actually possessed; as when the owner has parted with his possession to a carrier or a

<sup>(a)</sup> *Mather v. Trinity Church*, 3 S. & R. 512; *King v. Humphreys*, 10 Penn. St. Rep. 217; *Brainard v. Barton*, 5 Verm. 97; *Parsons v. Dickinson*, 11 Pick. 382; *Daniels v. Pond*, 21 Pick. 367; *Clark v. Carleton*, 1 N. Hamp. 110; *Daniel v. Holland*, 4 J. J. Marsh. 18; *Putnam v. Wyley*, 8 John. 432; *Hoyt v. Gelston*, 13 John. 141.

<sup>(b)</sup> *Burser v. Martin*, Cro. Jac. 46; 2 Saund. 47, a, b, d.

servant, giving him only a bare authority to carry or keep, not coupled with an interest in the thing. Assignees under a voluntary assignment, who are entitled to the possession of personal property, may therefore maintain trespass for it;(a) and so may executors or administrators for an injury to property committed after the death of the testator or intestate, and before probate or granting letters of administration.(b)

But if the general owner of property part with his possession, and the bailee at the time the injury was committed have a right exclusively to use the thing, the inference of possession is rebutted, and the owner has only a right of possession in reversion; in that case he cannot maintain trespass;(c) the bailee may support that action, and the general owner may have an action of trespass on the case for the injury done to his reversionary interest.

Trespass will not lie by a general owner against a bailee, for mere abuse of the chattel; though if the bailee destroy the thing, and the injury be with force, trespass will lie.

*2° Of the rights of the qualified owner.*

3611. In general the special owner must have reduced the chattel to his custody, before he can maintain trespass for a forcible injury done to it, unless he is a factor or consignee of goods, who has an interest in respect of his commissions; this is because the injury is done to his interest.(d)

When the qualified owner has reduced the chattel to his custody, and it is afterward forcibly injured, while his right continues, he may maintain trespass against the wrong doer, even against the general owner himself.

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(a) *Hower v. Geesaman*, 17 S. & R. 251.

(b) 2 Saund. 47, a, b, d.

(c) *Soper v. Sumner*, 5 Verm. 274; *Hart v. Hyde*, 5 Verm. 328; *Putgam v. Wiley*, 8 John. 432; *McFarland v. Smith*, Walker, 172.

(d) *George v. Ulaggett*, 7 T. R. 359; Bull. N. P. 38.

3° *Of the rights of a mere bailee.*

3612. A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury, amounting to a trespass, done while he was in the actual possession of the thing, as a carrier, factor, pawnee, or other bailee, having such an interest. But a servant, we may recollect, has no such interest, for he holds for the benefit of his master.(a)

4° *Of the rights of a possessor without the consent of the owner.*

3613. Such a possessor may have obtained his possession by *legal* means, although it may even be against the owner's desire, such as the finder of an article which has been lost; till the owner is discovered, the finder has the sole right to it, and he may maintain trespass against any one but the owner.(b) But the possessor may have obtained the possession, *unlawfully*, and, in that case, he can also support this action against any but the legal owner, and the defendant cannot, as in trover, show property in a stranger.(c)

3. *Of the nature of the injury for which trespass lies.*

3614. To entitle the plaintiff to compensation in damages, there must have been an *injury* to the property. Though general damages will be presumed for a battery to the person, and upon proof of the fact, he will be entitled to a verdict, because it is impossible to prove what have been his suffering; the rule is different with regard to personal property; it is not every unlawful touching of such property which will entitle the plaintiff to recover; when he alleges he has sustained a loss by such an act, he must in general show what special damages he has sustained. For

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(a) 2 Saund. 47, b, c, d.

(b) 2 Saund. 47, d.

(c) Aiken v. Buck, 1 Wend. 466. See Schermerhorn v. Van Volkenburg, 11 John. 529; Rotan v. Fletcher, 15 John. 207.

the mere battery of a horse, not accompanied with special damages, is not sufficient to maintain an action of trespass; (a) the chattel injured must have been lessened in value, or else no compensation is due.

3615. *Taking* goods from the owner's possession is injurious, for he is by such act deprived of their use and enjoyment, so that, although they may have been returned to the owner in the same condition in which they were when taken, yet he may have trespass for the act of dispossessing him. (b)

3616. Trespass is in general a *concurrent remedy* with trover, for most illegal takings, (c) though in some cases the latter action cannot be maintained; as when there is no intent to interfere with the dominion of the plaintiff, or to change the condition of the property so taken. (d) Trespass lies for any immediate injury to personal property, occasioned by actual or implied force, though the wrong doer might not take away or dispose of the chattel; as for shooting the plaintiff's horse, or for mixing water with his wine. (e)

3617. The *intent* with which the injury has been committed is altogether immaterial. If the injury were without justifiable cause or purpose, the defendant will be liable, though it were done accidentally or by mistake; as, if a sheriff by mistake should seize the goods of a wrong person on an execution; or if the defendant unintentionally, but with some negligence, run down a ship or a carriage; (f) or when the owner of a balloon accidentally descend with it into the plaintiff's garden. (g)

(a) Slater v. Swan, 2 Str. 872. Sed vide Barnes, 452.

(b) Bac. Ab. Trespass, E; Brown on Actions at Law, \*406; Price v. Helyar, 4 Bing. 597.

(c) Rackham v. Jessup, 3 Wils. 336.

(d) Foulkes v. Willoughby, 8 M. & W. 540; Plumer v. Brown, 8 Met. 578.

(e) 3 Bl. Com. 153; F. N. B. 88.

(f) Covell v. Laming, 1 Campb. 497; Higginson v. York, 5 Mass. 341; Hayden v. Shed, 11 Mass. 500.

(g) Guille v. Swan, 19 John. 381.

3618. Trespass may also be supported, in some instances, for injuries committed to personal property while in the lawful possession of the wrong doer, as where he has been guilty of an *abuse* which renders him a trespasser *ab initio*. A distinction here must be observed; an abuse of an authority given *by the law* will in general render the wrong doer a trespasser *ab initio*, but an abuse of an authority, in *fact*, as a *license given by the plaintiff*, will not make him such a trespasser.<sup>(a)</sup> When the authority given is a license in fact, the remedy is case, and not trespass.<sup>(b)</sup>

*Art. 6.—Of trespass for injuries to the relative rights.*

3619. Trespass to the *relative rights* consists in the several acts of committing adultery with another man's wife, seducing his servant, of offering a personal violence, or threatening to commit one, to his wife or servant, by which the party injured has sustained damage. This subject will be considered with reference to, 1, the nature of the plaintiff's right; 2, the nature of the injury; 3, the damages he has sustained.

1. *Of the nature of the plaintiff's right.*

3620.—1. To maintain trespass against a wrong doer, the plaintiff must be aggrieved and suffer a loss; when he sues for criminal conversation with his *wife*, it is clear he can have sustained no injury, unless the relation of husband and wife subsists between them *de jure*; but for all other injuries to her he is entitled to redress, if the relation subsist *de facto* only.<sup>(c)</sup>

3621.—2. When an action of trespass is brought against another for the seduction or injury of his servant, he must prove that she is such, and unless he can establish this point he cannot recover, for then he

<sup>(a)</sup> The Six Carpenters' case, 8 Co. 145; *Shorland v. Govett*, 5 B. & C. 485; *Bradley v. Davis*, 2 Shep. 44; *Jarrett v. Gwathmay*, 5 Blackf. 237.

<sup>(b)</sup> *Cushing v. Adams*, 18 Pick. 110.

<sup>(c)</sup> *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, Dougl. 171.

has not been injured. The relation of servant to the plaintiff is indispensable to support this action. The proof of it may be by evidence of an express or implied contract of service; the slightest act is sufficient, as the circumstance of her having milked the plaintiff's cows.<sup>(a)</sup>

In these cases force is implied, the wife and servant being incapacitated by law to give their consent. It is for this reason that trespass lies, but, unless in addition to the seduction, the defendant has also committed a trespass by unlawfully entering the plaintiff's house, it is more usual and more correct to bring an action on the case.

2. *Of the nature of the injury.*

3622. The injury must consist of the seduction, or of a personal violence, or threatening to commit one, to his wife or his servant. The fact that a wife is so *de facto* only, for example, that she has been received as the plaintiff's wife in the family, is sufficient to establish the relation between them, and entitle him to a compensation for the injurious consequences of violence or menace to her person. In such case, to entitle the husband to damages, she must have been actually incapacitated from discharging her relative duties, and distinct proof must be adduced to this point; with respect to any personal sufferings which the wife may have endured, the husband not being a sharer in them, they do not entitle him to claim a compensation. If damages are to be recovered for them, the wife should be joined in the action.

But in many cases, the injury to the master results in the loss of services, because the servant has been incapacitated to render them in consequence of the plaintiff's wrongful act; although the injury is not

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<sup>(a)</sup> *Bennett v. Alcott*, 2 T. R. 168. See *Moran v. Dawes*, 4 Cowen, 412; *Bennett v. Alcott*, 2 T. R. 166; *Maunder v. Venn*, 1 M. & Malk. 323.

immediate, still an action of trespass may be sustained. An injury to an apprentice, or to a servant, whether hired by the day or by the piece, if a loss to the master is the consequence, will subject the wrong doer to an action of trespass by the master.(a)

3. *Of the damages the plaintiff has sustained.*

3623.—1. The injuries to a man's relative rights are those which relate to him as husband and as master. As *husband* his rights are injured by the adultery of his wife. This crime renders the woman more or less unfit to discharge her relative duties, and so the interests of her husband are deteriorated by their non-performance. This has been fully explained in another place, to which the reader is referred.(b)

3624.—2. As *master* he is entitled to demand a reparation for the consequences of *personal violence* offered to his servant for any loss he may have sustained. For the *seduction* of his female servant, if the master has not sustained a loss of service, he cannot claim a pecuniary satisfaction against the seducer; for unless the physical powers of the servant have been so weakened and impaired, as to prevent the performance of the duties of her office, either altogether or up to their full extent, the master is not injured; and, as the law now stands, the master could not perhaps recover where there was a simple act of fornication, unattended by pregnancy.

The amount of damages which the law gives to the master, in case of seduction, is the value of the service lost; but the jury may, and usually do, take into consideration the injury to his feelings and the like, and increase the damages in proportion to the aggravating circumstances.

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(a) Vide *Hart v. Aldridge*, Cowp. 54. And see also ante, n. 2296.  
 (b) Ante, n. 2283.

## § 2.—Of the pleadings in trespass.

3625. The pleadings consist of, 1, the declaration; 2, the plea in abatement; 3, the general issue; 4, special pleas; 5, the replication.

*Art. 1.—Of the declaration.*

3626. Many matters which relate to the declaration in trespass have been treated of, when we considered the general nature of a declaration, and then much was anticipated of what might have been examined under this article.(a)

The declaration contains a concise and clear statement of the injury complained of, whether to the person, real property, personal property, or to the relative rights of the plaintiff, and should allege the injury to have been committed *vi et armis*.(b)

3627. When the plaintiff complains of *several* trespasses as having been committed at *distinct periods*, the plaintiff, that he may recover for all, should declare according to the truth of the case; therefore, when he names only one day or period of time in his count, as the time when the wrong was done, he will not be allowed to give evidence of injuries suffered at several days and times;(c) it is for this reason the common averment "*diversis diebus et temporibus*" is inserted. The particular times need not be inserted; it is sufficient if the declaration specifies two days, the first and the last day the plaintiff assumes when the trespass was committed, and leave the intervening days at large.

But when *several* distinct acts of violence have been

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(a) Ante, n. 1002.

(b) The omission of these words must be taken advantage of on special demurrer. *Higgins v. Hayward*, 5 Verm. 73.

(c) *Fontleroy v. Aylmer*, Ld. Raym. 240. See *Rucker v. McNeely*, 4 Blackf. 179.

offered to the person or property of another, *upon one and the same occasion*, they all together constitute but one injury, and must be redressed, if at all, in one action; and a recovery of damages for any portion of the grievance will bar a future action brought to obtain satisfaction for the residue. For example, when the defendant makes a wrongful entry on plaintiff's land, tramples upon the grass, and turns up the soil, here the acts of breaking the inclosure, treading down the herbage and subverting the ground, are distinct acts of trespass, but having been committed upon the same occasion, to the same subject matter, must be redressed together in one action. Again, if several blows are given, though each constituted a battery, if given at the same time, they constitute but one cause of action, and cannot be treated as distinct injuries.

3628. There is, however, an *exception* to this rule. When a tenant has been disseised, he may recover in an action, damages for breaking through his inclosure, and, after he has regained his possession, he may, in a second action, recover compensation for the trespasses done to his tenements in the interim between the ouster and the reëntry.<sup>(a)</sup>

3629. When the same acts of trespass have been continued for an uninterrupted period, the declaration should lay it with a *continuando*; as if Peter turns up the ground, and treads upon the herbage of Paul for three days together; here Paul would recover damages as well for the subsequent acts of treading down the grass and subverting the soil, as for the first; he must, therefore, complain of such subsequent trespasses in his action brought to recover a compensation for the former, and this he does by averring that Peter on such a day trampled upon the herbage and turned up the ground, "continuing the said trespasses for three days

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(a) Arden v. Kermit, Anthon, 83.

following;” though this averment, strictly construed, may seem to import a continuation of the very identical act of trespass, yet it has received another interpretation; it may also be taken to denote a repetition of the same kind and description of injury.(a)

But to be averred under a *continuando*, a trespass must be of the same kind; it cannot be averred, for example, when the injury consists in killing and carrying away an animal, because there remains nothing to which a similar injury may again be offered; for any trespass committed after the first, must be a new trespass to something else.(b)

There is a difference between a *continuando* and the averment *diversis diebus et temporibus*, on divers days and times. In the former, the injuries complained of have been committed upon one and the same occasion; in the latter, the acts complained of, though of the same kind, are distinct and unconnected.(c)

3630. If it is intended to recover damages for an abuse of an authority in law, by which the defendant has become a trespasser *ab initio*, the previous trespasses must be stated in the declaration; for, unless the claim is made there, it cannot be added to by the subsequent pleadings. It is true that this matter might be replied to a defence of justification, for the purpose of cutting down the defence, but it would give no title to recover, if not stated in the declaration.

3631. The allegation “*et alia enormia ei intulit*,” is introduced to enable the plaintiff to give in evidence such matters as aggravate the trespass to some extent. Matters of aggravation should, however, be set forth in the count, to enable the defendant to meet them in

(a) Gould on Plead. ch. 3, § 86; Bac. Ab. Trespass, 2; 3 Bl. Com. 212; 1 Saund. 24, n. (1); Saunders v. Palmer, 1 McCord, 165.

(b) Gould on Pl. ch. 3, § 88.

(c) Ham. N. P. 91; Gould on Pl. ch. 3, § 93, 94, 95.

evidence, or the plaintiff will not be allowed to prove them on the trial, unless decency required that they should be omitted.

3632. The plaintiff must lay an amount of *damages* sufficient to compensate him for his losses. If *special damages* have been the consequence of the trespass, they must be particularly set forth, with the same minuteness of detail as the cause of action in general, for this is equally a part of the complaint,<sup>(a)</sup> unless the nature of the case renders such detail impossible, and then less certainty in describing the inconvenience will be required, and so much as the subject matter admits of, will suffice, for *lex non cogit ad impossibilia*.<sup>(b)</sup>

*Art. 2.—Of pleas in abatement in trespass.*

3633. When another writ of trespass for the same cause is pending between the same parties, or, it seems, a co-trespasser,<sup>(c)</sup> the fact may be pleaded in abatement. But it must appear it is for the same cause of action, and this cannot be known until the plaintiff has declared.

3634. It is a general rule that all who have participated in the inconvenience, resulting from the trespass, should be made complainants in the suit brought to redress it. Its object is to relieve the defendant from a multiplicity of actions, so that he can only object to the non-joinder of the other parties aggrieved by plea in abatement; this right he may waive if he chooses, and then he will be liable to each one of the parties injured, for his share of the compensation to be recovered in damages.

3635. If the wife sues or is sued alone, the objection to the irregularity ought to be made by plea in abate-

<sup>(a)</sup> Hunt v. Jones, Cro. Jac. 499.

<sup>(b)</sup> Tresham's case, 9 Co. 110; Hartley v. Herring, 8 T. R. 130.

<sup>(c)</sup> Rawlinson v. Oriett, Carth. 96.

ment.(a) And in an action by husband and wife, if the defendant intends to controvert the fact of their marriage, he must do it at this stage of the proceedings, for he cannot do so under the general issue.(b)

*Art. 3.—Of the general issue.*

3636. The general issue is, *not guilty*, of the trespasses alleged by the plaintiff, and it must conclude to the country.

When the general issue is pleaded, the plaintiff is required to establish the several allegations contained in his count, and under this plea, therefore, their existence may be controverted by the defendant. But when the defendant pleads matter in justification or excuse, and alleges that in law he is not liable, he cannot show this under the issue of not guilty, because that simply denies the commission of a trespass, which the defences of justification, or excuse, admit. Besides, to constitute a trespass, some damage must have actually resulted, or must be likely to ensue, and consequently, the defendant is at liberty under the general issue to dispute this fact. If, for example, the plaintiff has declared for a battery, the defendant may show that he gently touched him for the purpose of engaging attention, and leave it to the jury to say, what inconvenience has happened or is likely to befall him. Again, when the trespass is in its nature a local injury, or is made so by statute, the locality of the suit is essential to the plaintiff's case; the defendant will succeed, therefore, unless the plaintiff can establish that the cause of action arose within the particular district or county laid in the declaration.

*Art. 4.—Of special pleas in bar, in actions of trespass.*

3637. Special pleas in bar, as we have already

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(a) *Milner v. Milnes*, 3 T. R. 627.

(b) *Dickenson et ux. v. Davis*, Str. 480.

seen,(a) are those which confess that the facts alleged in the declaration are true, and disclose some circumstances which show that, in law, no injury has been sustained, or that the right of action is discharged.(b)

When the *matter* of the plea is not, in law, an answer to the entire declaration, a prefatory recital of those trespasses to which it applies must be made in the outset; but otherwise such introduction is not requisite.(c)

The plaintiff is not required to confine himself to any particular *time* on which to charge that the offence was committed; he may select any day he thinks proper, and the plea must not vary from it, unless the nature of the defence requires that it should be truly stated.(d)

For the same reason, when the trespass is not transitory in its nature, the plaintiff may lay the offence to have happened in any county he pleases, and, therefore, unless it is essential to the defence that the *place* where it really took place should be disclosed, the plea must accord with the declaration, in this respect.(e)

In general, no plea is required to *matters in aggravation*, because when the plea, if true, destroys the claim of the plaintiff to recover at all, it necessarily avoids all matters laid in aggravation of the principal charge.

In an action of trespass *quare clausum fregit*, the defendant may deny the plaintiff's title, by pleading *liberum tenementum*, that he himself holds the freehold, and consequently cannot be guilty of entering it.

The defendant may also plead a *license* to enter the premises either in law or in fact.

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(a) Ante, n. 2923.

(b) The reader is referred to n. 2923 for a more full exposition of the law relating to special pleas.

(c) Vincent v. Preston, 12 Mod. 602. See Parker v. Parker, 17 Pick. 236.

(d) Purset v. Hutchings, Cro. Eliz. 312.

(e) Errington v. Thompson, Ld. Raym. 183.

3638. A special plea which amounts to the *general issue*, is defective ; for this reason, care must be taken that the matter of the special plea be such as shows and confesses that a trespass has been committed ; otherwise it will amount to the general issue.(a)

When there are *several defendants*, they may join in pleading these matters, which are a defence to all alike, or they may sever. If the subject matter of their respective defences, however, is peculiar to each individually, they must, of necessity, sever in their pleas.

But the defendants must be careful not to join in a plea, the matter of which is a good defence for one of them, but not for the other, for such plea is bad altogether. Being an *entire* plea, it cannot be separated into parts, and being defective in part, it is so in all ; if, for example, the sheriff, his bailiff and the plaintiff in an original suit, are jointly sued in trespass, and they jointly plead a plea of justification under a void writ, it will be bad, because, although the sheriff and his bailiff might be justified under it, the original plaintiff could not be, and so the plea would be bad as to all.(b)

Special pleas are classified into those which are in justification, in excuse, or in discharge. These have already been fully considered.(c)

*Art. 5.—Of the replication.*

3639. When the defence is local, varying from and traversing the *venue* in the declaration, and all other places beside the one named in the plea, the plaintiff may either tender an issue upon the traverse, or pass it by, and answer the matter of the defence.(d)

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(a) *Brown v. Archer*, 1 Hill, 266 ; *Abel v. Abel*, 1 Root, 549.

(b) *Phillips v. Biron*, Str. 509 ; *Smith v. Boucher*, Str. 993 ; *Middleton v. Price*, Str. 1184.

(c) *Ante*, u. 2923.

(d) *Serle v. Darford, Ld.* Raym. 120.

If the defendant has justified by his plea under an authority in law, the plaintiff may reply that he has abused such authority, and thereby become a trespasser *ab initio*. This form of replying is sometimes termed *a replication in the nature of a new assignment*.

The replication *de injuriâ suâ propriâ absque tali causa*, denies the whole plea, and puts in issue, and compels the defendant to prove every material allegation in his plea. In form, it is that the defendant committed the trespass or grievances *of his own wrong without the cause by him in his plea alleged*. The word *without* is adopted in all formal traverses, and is negative, here signifying *and not for*, as is evident from the language of the ancient entries, which is "*et nemy pur tiel cause.*"(a)

§ 3.—Of the evidence in actions of trespass.

3640. This will be divided into two articles: 1, of the evidence to support the action; 2, of the evidence in favor of the defence.

*Art. 1.—Of the evidence in support of the action.*

3641. The evidence in favor of the plaintiff relates to, 1, the right of the plaintiff; 2, the injury committed by the defendant; 3, the damage done.

1. *What right the plaintiff must prove to maintain his action.*

3642. The invasion of the plaintiff's right of *possession* is sufficient to support this action; though the right of property may and frequently does become a subject of controversy, still the gist of the action is the injury done to the plaintiff's possession.

The possession of the plaintiff, which may be thus invaded, is actual or constructive; and it is rightful or *de facto*. Upon proof of an injury done to his

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(a) The reader is referred, for a full explanation of the replication *de injuria*, to n. 2977.

possession, when the possessor does not hold for another, he may maintain his action.

3643. The general owner has not only a *constructive possession*, when the property is in the care and custody of his servant, agent or overseer, or in the hands of a bailee for custody, carriage, or any case as borrower, depositary or mandatory, when the bailee has no vested interest, and then he may sue in trespass; but he has also a constructive possession as against his bailee or tenant, who having a special property in the chattel, has violated his trust by destroying that which was confided to him. Thus, where a bailee of a horse kills him, or if a joint tenant or tenant in common destroy the joint property, or if a tenant at will cuts down trees, the interest of the wrong doer is thereby determined, and proof of these facts will be sufficient to entitle the plaintiff to recover.

3644. But one not having a right of possession, but being entitled merely to a *reversionary interest*, cannot maintain trespass, as we have seen; but for the injury which he has sustained he may have an action on the case.

3645. With regard to fences and hedges, and other *erections on the boundaries of an estate*, on a question of trespass between two proprietors, the plaintiff, to support his action, must prove them to be his, and if he built them at his own expense upon his own land, they are his; but if he built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land.<sup>(a)</sup> When there is no proof as to who is the owner of a partition fence, it is presumed to be common property of both.<sup>(b)</sup>

2. *The injury must be committed by the defendant.*

3646. However great may have been the injury to

<sup>(a)</sup> *Matts v. Hawkins*, 5 Taunt. 20.

<sup>(b)</sup> *Cubit v. Porter*, 8 B. & C. 257, and note. See *Vowles v. Miller*, 3 Taunt. 138; Archb. N. P. 328; 2 Greenl. Ev. § 617.

the plaintiff, he cannot recover unless he can prove that it has been committed by the *defendant*. Positive proof that he committed the injury will be sufficient to make him liable, unless he had a lawful justification or excuse. He will be chargeable also if it be proved that the wrong was done by his command, or that he subsequently sanctioned it, or took advantage of it for his own benefit, or participated with others in the acts, or by inciting others to it.<sup>(a)</sup>

It must be proved that the act was done *with force*, directly applied, for without this there was not such an injury for which trespass will lie.

### 3. *Of the damage.*

3647. Although the act complained of may have been committed with force to the person, personal or real property of the defendant, yet if it caused *no damage*, the plaintiff cannot recover. We have already mentioned the following cases: where the defendant proved that he gently touched the plaintiff to draw his attention; where he committed a battery on his horse which was not followed by any damage; and where he flew a kite over his fields, without otherwise entering the plaintiff's close. In these cases trespass cannot be maintained.

### *Art. 2.—Of the evidence for the defence.*

3648. Under the general issue of *not guilty*, the defendant may prove that he did not take the goods, or that the plaintiff had no property in them; or that he did not enter the plaintiff's close; or that the freehold and immediate right was and still is in himself, or in one under whom he claims title. He may also prove under this issue, that he made a distress for rent, when it was made on the premises; but, if it were made elsewhere, or for any cause but rent in

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(a) *Petrie v. Lamont*, 1 Car. & Marsh. 93.

arrear, no evidence of it can be admitted, except under a special plea.(a) Matters in justification, or excuse, or in discharge of the action, we have seen, must be specially pleaded, and cannot be given in evidence under the general issue; but matters in mitigation of the wrong and damages, may be given in evidence under this issue.(b) Thus in an action of trespass for false imprisonment, against an individual who was a police officer, when the general issue was pleaded, evidence of reasonable suspicion of the plaintiff's having been guilty of felony, was received in reduction of damages;(c) and in a similar case evidence was allowed to be given of the contents of the plaintiff's trunk, for the purpose of showing that he was addicted to burglary; but it was held that the plaintiff's character could not be given in evidence under the general issue.(d)

3649. Under the plea of *liberum tenementum*, the defendant must prove that he has a title to the premises. This may be done either by documentary evidence or by proof of actual adverse possession for twenty years. The plea admits the possession to have been in the plaintiff as described in the declaration, and that the defendant committed the acts complained of. If the defendant succeeds in establishing a title to part of the close, he will succeed, though he does not prove a title to the whole.(e)

3650. Under the plea of *license*, the defendant may prove a license in law or in fact, express or implied. If he can prove that he entered to serve a legal process, the doors being open,(f) or to distrain for rent,

(a) 1 Chit. Pl. 493, 494; *Furneaux v. Fotherly*, 4 Campb. 136.

(b) 3 Steph. N. P. 2642.

(c) *Chinn v. Morris*, 1 Ry. & Mo. 424; and see Vin. Ab. Evidence, 16; 2 Bos. & Pull. 225; *Beckwith v. Philby*, 6 B. & Cress. 635; *Samuel v. Payne*, Dougl. 359; *Mure v. Kaye*, 4 Taunt. 34.

(d) *Russell v. Shuster*, 8 Watts & Serg. 308.

(e) *Smith v. Royston*, 8 M. & W. 381; *Richards v. Peake*, 2 B. & C. 918.

(f) *Chipman v. Bates*, 15 Verm. 51.

or to do any of the numerous acts which justify an entry on the land of another, he will be justified.(a)

3651. We have seen that the replication *de injuriâ sub, absque tali causa*, puts in issue the whole of the plea of the defendant; the whole plea being thus traversed, under this replication, the plaintiff may adduce any evidence disproving the facts alleged in the plea; but he cannot go into evidence of new matter, which shows that the defendant's allegation, though true, does not justify the trespass.(b)

§ 4.—Of the verdict and judgment in trespass.

3652. When the verdict has been rendered for the plaintiff in trespass, the judgment is, that he recover his damages assessed by the jury and costs. The rule in assessing the damages is to include not only the principal transaction, but all its attendant circumstances, and its natural and injurious results.(c) The effect of such judgment, when it is rendered for seizing personal property and retaining it, are the damages given for the value and the tortious taking, and changes the title to it, so that the trespasser becomes the owner.(d)

3653. The judgment for the defendant is for costs.

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CHAPTER III.—OF MIXED ACTIONS.

3654. Mixed actions are such as appertain, in some degree, to both real and personal actions, and, therefore, are properly reducible to neither of them, being

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(a) See ante, n. 2370.

(b) *Sayre v. Rochford*, 2 W. Bl. 1165; *King v. Phippard*, Carth. 280; *Warral v. Clare*, 2 Campb. 629.

(c) *Barnum v. Vandusen*, 16 Conn. 200; *Warfield v. Walter*, 11 G. & J. 80; *Hammatt v. Russ*, 4 Shepl. 171.

(d) *Fox v. Northern Liberties*, 3 Watts & Serg. 103.

brought for the specific recovery of lands, tenements or hereditaments, and for the damages for injuries sustained in respect of such property.(a) These are principally ejectment and waste.

SECTION 1.—OF THE ACTION OF EJECTMENT.

3655. *Ejectment* is the name of an action which lies for the recovery of the possession of real property, and of damages for the unlawful detention.(b) It was formerly an action of trespass, now it has become the principal, and, in some states, the only action, by which title to real estate is tried, and the land recovered. In a number of the states of the Union, the form of the action for the recovery of lands is regulated by statute, and though called an ejectment, such remedy bears much resemblance to some of the forms of real actions. The matters concerning ejectments will be considered with reference to, 1, the form of the proceedings; 2, the nature of the property or thing to be recovered; 3, the right to such property; 4, the nature of the ouster or injury; 5, the pleadings; 6, the evidence; 7, the verdict and judgment; 8, of the action for mesne profits.

§ 1.—Of the form of the proceedings in ejectment.

3656. The principles which govern the different forms of ejectment now in use, whether under the common law or the statutes, are essentially the same. The real plaintiff recovers on the strength of his title only; he is required to show that he has a legal and not merely an equitable interest, and a possessory title not barred by the statutes of limitations.

In the English practice, which is still adhered to in some of the states, in order to lay the foundation of

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(a) Steph. Pl. 3; Co. Litt. 284, b; Com. Dig. Actions, D 4.

(b) Bac. Ab. Ejectment, A.

this action, the party claiming title enters upon the land, and then gives a lease of it to a third person, who being ejected by the other claimant, or some one else for him, brings a suit against the ejector in his own name. To sustain the action, the lessee must prove a good title in the lessor, and, in this collateral way, the title is tried. To obviate the difficulty of proving these forms, this action has been made, substantially, a fictitious process.(a) The defendant agrees, and is required, to confess that a lease was made to the plaintiff, that he entered under it, and that he has been ousted by the defendant; or in other words, to admit or confess the lease, entry and ouster, and that he will rely only upon his title.(b) An entry is still supposed, and, therefore, an ejectment will not lie if the right of entry is gone.(c)

These fictions have been abolished by statute, in several of the states; there the writ of ejectment sets forth the possession of the plaintiff, and an unlawful entry on the part of the defendant, the declaration is very simple, claiming the property, and describing it

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(a) Professor Walker, in his Introduction of American Law, page 512, has given a clear history of the action of ejectment.

(b) This is called the *consent rule*. The defendant is required to enter on record that he confesses lease, entry, and ouster of the plaintiff. This rule contains the following particulars, namely: 1. The person appearing consents to be made defendant instead of the casual ejector. 2. To appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. 3. To receive a declaration in ejectment, and plead not guilty. 4. At the trial of the case to confess lease, entry, and ouster, and insist upon his title only. 5. That if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros*, and suffer judgment to be entered against the casual ejector. 6. That if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant. 7. When the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order. Adam. Ej. 233, 234; and for a form, see Ad. Ej. Appx. No. 25.

(c) 3 Bl. Com. 199 to 206.

by metes and bounds. The plea is equally easy, the general issue being not guilty, as in Pennsylvania, under which nearly all matters of defence may be given in evidence.

§ 2.—Of the nature of the property or thing to be recovered.

3657. Ejectment is in general sustainable only for the recovery of the possession of property upon which an entry might in point of fact be made, and of which the sheriff could deliver the possession; it cannot, therefore, be sustained for the recovery of property which in legal consideration is not tangible; as, for example, a rent or other incorporeal hereditament, or a water course, or for the mere privilege of landing in common with other citizens of a town.<sup>(a)</sup> This action lies for land by its reputed name,<sup>(b)</sup> for a boillery of salt, for herbage, for a coal mine, and it is said for a pool, *pro stagno*, because, it is said, in law *stagnum* comprehends both land and water;<sup>(c)</sup> but it is better to claim so many acres of land, covered with water.<sup>(d)</sup>

§ 3.—Of the right of the plaintiff to the property sued for.

3658. In its nature ejectment is a mere possessory action; the plaintiff must, therefore, be entitled to *possession*, for it is not sufficient that he has the *title*, because, when he has leased the premises to another, whose term has not expired, he cannot recover against his lessee.<sup>(e)</sup> He must have a legal right of entry at

<sup>(a)</sup> *Black v. Hepburne*, 2 Yeates, 321; *Jackson v. Buel*, 9 John. 298; *Jackson v. May*, 16 John. 184; *Bear v. Snyder*, 11 Wend. 592; *Stackpole v. Healy*, 16 Mass. 35; *Rees v. Lawless*, 6 Litt. R. 184; *Judd v. Leonard*, 1 Chip. 204.

<sup>(b)</sup> *Foulke v. Kemp's lessee*, 5 Har. & John. 137.

<sup>(c)</sup> Bac. Ab. Ejectment, D; Yelv. 143; Co. Litt. 5.

<sup>(d)</sup> Co. Litt. 4, b.

<sup>(e)</sup> *City of Cincinnati v. White*, 6 Pet. 431; *Gumes v. Dunn's lessee*, 14 Pet. 322; *Strother v. Lucas*, 12 Pet. 410; *Lessee of Devatch v. Newsam*, 3 Ohio, 59; *Lessee of Penn. v. Devillin*, 2 Yeates, 309.

the time he brings his ejectment,(a) and a right of exclusive possession of some duration, for a mere right in a standing place, or to use the land, is not a sufficient right to maintain an ejectment.(b) Any exclusive right of possession, however, is sufficient; so that a tenant in fee, in tail, for life or years, may maintain this action, and that whether he claim in his own right, or in right of his wife, or as guardian, heir at law, devisee, executor or administrator, or assignee of a bankrupt or insolvent,(c) or as mortgagee.(d)

It is a general rule that the plaintiff must recover upon the *strength of his own title*, and he cannot in general found his claim on the weakness of that of his adversary, for possession gives the defendant a right against every person who cannot show a sufficient title,(e) and the party who would change the possession must therefore first establish a legal title,(f) and an equitable title in another would be no bar to the plaintiff's recovery.(g) Possession is presumptive

(a) *Redman v. Sanders*, 2 Dana, 68; *Siglar v. Van Riper*, 10 Wend. 414. In Maryland, a plaintiff in ejectment must, at the time of instituting suit, and at the trial of the cause, have a legal title to the land he sues for. *Carroll v. Norwood*, 5 Har. & J. 155. The same rule exists in Vermont. *Burton v. Austin*, 4 Verm. 105. In Kentucky, the lessor of the plaintiff must show a title at the date of the demise. *Anderson v. Turner*, 3 A. K. Marsh, 131; *Marshall v. Depuy*, 4 J. J. Marsh. 388. See *McCulloch v. Cowher*, 5 Watts & Serg. 427.

(b) *The King v. Mellor*, 2 East, 190; *Goodtitle ex dem. v. Wilson*, 11 East, 345; *Hilton v. Brown*, 1 Wash. C. C. 204.

(c) *Brown on Act.* 464, 465; *Smith v. Lorillard*, 10 John. 338.

(d) *Bac. Ab. Ejectment*, A 2, Bouv. ed.; *Smith v. Buchanan*, cited in 1 *Yeates*, 13. See *Jackson v. Marsh*, 5 Wend. 44; *Phyfe v. Riley*, 15 Wend. 248; *Jackson v. Tuttle*, 9 Cowen, 233.

(e) *Walker v. Coulter*, Add. 390; *Laney v. Reynard*, 2 S. & R. 65; *Covert v. Irwin*, 3 S. & R. 288; *Woods v. Lane*, 2 S. & R. 53.

(f) *Wright v. Douglass*, 3 Barb. S. C. Rep. 554.

(g) *Doe d. Shewen v. Wroot*, 5 East, 139; *Goodtitle d. Miller v. Wilson*, 11 East, 334; *Smith v. Allen*, 1 Blackf. 23; *Spencer v. Markel*, 2 Ohio, 264; *Cawsey v. Driver*, 13 Ala. 838. See *Robinson v. Campbell*, 3 Wheat. 212. In Pennsylvania, the ejectment being an equitable action, it may be sustained on an equitable title. *Lessee of Swayre and wife v. Burk et al.* 12 Pet. 11; 1 Wash. C. C. 354; 2 Wash. C. C. 33; *School Directors v. Dunkleberger*, 6 Penn. St. R. 29. In Kentucky, a mere equity can neither maintain nor bar an ejectment. *Gilpin v. Davis*, 2 Bibb, 416; *Innis v. Crawford*, 2 Bibb, 412.

evidence of right, and, therefore, the defendant cannot be deprived of his possession by any person but the rightful owner of the land.<sup>(a)</sup> It is a principle engrafted upon the law of property that a tenant, whose term has expired, can never dispute the lessor or landlord's title.<sup>(b)</sup>

In trespass to real property, we may recollect, an *actual* entry is requisite to support the action. The rule is not the same in ejectment; but, still, it is frequently advisable to make such an entry, particularly to prevent the bar to the right of action, by the lapse of time for twenty years.<sup>(c)</sup>

§ 4.—Of the nature of ouster or injury.

3659. The injury or wrong for which ejectment can be maintained must, in fact or in law, amount to an *ouster* or dispossession of the lessor of the plaintiff, or of the plaintiff, where the fiction has been abolished, at the commencement of the suit,<sup>(d)</sup> for if there be no ouster, or the defendant be not in possession at the time of bringing the action, the plaintiff must fail.<sup>(e)</sup> What will amount to an ouster has been elsewhere considered.<sup>(f)</sup>

§ 5.—Of pleadings in ejectment.

*Art. 1.—Of the declaration.*

3660.—1. The *venue* in this action is strictly local,

(a) *Hall v. Gettings*, 2 Har. & J. 112.

(b) *Boyer v. Smith*, 5 Watts, 55; *Millar v. McBrian*, 14 S. & R. 382; *Love v. Dennis*, Harper, 70; *Phillips v. Robertson*, 2 Overt. 399; *Robinson v. Hathaway*, Brayt. 151; *Anderson v. Darby*, 1 N. & M. 369; *Galloway v. Ogle*, 2 Binn. 468.

(c) See *Huey v. Smith*, 3 Penn. St. R. 353.

(d) *Cooley v. Penfield*, 1 Verm. 244.

(e) *Goodtitle d. Batch v. Rich*, 7 T. R. 327; *Penn. d. Blanchard v. Wood*, 1 B. & P. 573; *Jackson d. Clowes v. Hakes*, 2 Caines, 335.

(f) *Ante*, n. 2352.

and confined to the county where the lands are situated.(a)

3661.—2. The *demise* declared upon in modern practice, is fictitious only; but still it must be consistent with the title of the lessor; and, therefore, a fictitious lease is to be tested by the same rules as if it were actually made and produced.(b) Such a demise must be supposed to be made, as would, if actually made, have transferred the right of possession to the lessee. Thus, if there be several lessors, and a joint demise by all be alleged, such a title must be shown at the trial, as would enable each of them to demise the whole; because if any one of the lessors have not the legal interest in the whole premises, he cannot in law be said to demise them.(c) But separate demises from several lessors may be laid in the declaration, and the plaintiff at the trial may give evidence of separate titles of the several lessors to separate parts of the premises in question, and recover accordingly.(d)

The *time* of laying the demise should be stated, and, in general, it must appear to have been before the ouster; but where the demise was alleged in the declaration to have been made on the first day of October, 1819, and the ouster to have taken place afterward, to wit, on the second of April in the same year, it was held that the declaration was good, and the *scilicet*, being contrary to the word *afterward* and the precedent matter, was repugnant and void.(e)

The *day* on which the demise is stated to have been made, is so far material, that it must be subsequent to the time when the claimant's right of entry accrues;

(a) Anon. 6 Mod. 222.

(b) Den v. McShane, 1 Green, 35.

(c) Skyle v. King, 2 A. K. Marsh. 385.

(d) Jackson v. Sidney, 12 John. 185; Magruder v. Peter, 4 Gill & John. 323.

(e) Armstrong v. Jackson, 1 Blackf. 210; Brown v. Lutterlop, C. & N. 425.

for if the lessor have not the right to enter, he cannot have the right to demise the lands.

The demise must not be laid *before* the title of the plaintiff's lessor accrues, or the plaintiff cannot maintain his action, because, by his own showing, it appears the lessor of the plaintiff had no right in such case to make the demise.(a) The date of the demise and the commencement of the term should be stated, in order to show the plaintiff's title.(b)

The *description of the property* in the demise should be stated with such sufficient certainty as to enable the jury to identify the lands claimed.(c) But the quantity of land mentioned in the declaration need not correspond with that which the lessor of the plaintiff claims.(d) And a general description of the premises is in most cases sufficient;(e) it has been held that the word "tenement" is sufficiently descriptive, the metes and bounds being given.(f)

3662.—3. The *entry* of the plaintiff on the land need not be alleged in the declaration, to be made on a particular day, although it is usually stated to be so in the precedents. It is sufficient to state generally that the plaintiff entered by virtue of the demise.

3663.—4. The day upon which the *ouster* of the plaintiff, by the casual ejector, is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry. This is required in order to support the consistency of the fiction; because, as the title of the plaintiff is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own showing, he had any claim to be

(a) *Coxe v. Joiner*, 3 Bibb, 297; *Wood v. Grundy*, 3 Har. & John. 13.

(b) *Hogg v. Shaw*, C. & N. 457; *Van Allen v. Rogers*, 1 John. Cas. 283.

(c) *Newman v. Lawless*, 6 Mis. 283; *Fenwick v. Floyd*, 1 Har. & Gill, 172.

(d) *Huggins v. Ketchum*, 4 Dev. & Bat. 414.

(e) *Barclay v. Howell*, 6 Pet. 498.

(f) *Den v. Woodson*, 1 Hayw. 24.

possessed. It is not, however, necessary, that this consistency should be preserved; for as the words "afterward, to wit," are always used immediately before mentioning the day of the ouster, the courts would in cases of this kind consider the ouster laid previous to the day of the entry, as impossible or repugnant, and as such reject it. (a)

*Art. 2.—Of pleas in ejectment.*

3664. The general issue in ejectment is *not guilty*. As by the consent rule the defendant must admit lease, entry and ouster, it seldom happens that he can plead any other plea.

§ 6.—Of the evidence in an action of ejectment.

3665. The evidence is first for the plaintiff, and, secondly, for the defendant.

*Art. 1.—Of evidence for the plaintiff.*

3666. When the title of the plaintiff to the premises is controverted, under the general issue, he is required to establish the following facts: 1, that he had the *legal estate* in the disputed lands at the time of the demise laid in the declaration; 2, that such legal estate was then accompanied by a *right of entry*; and, 3, that the defendant, or those claiming under him, were in *possession* of the premises at the time when the declaration in ejectment was delivered. (b)

The evidence required is different as the parties are or are not privy to each other; in the first case much less evidence is required than in the second.

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(a) *Adams v. Goose*, Cro. Jac. 96; Bull. N. P. 106. See *Wood v. Grundy*, 3 Har. & John. 13; *Coxe v. Joiner*, 3 Bibb, 297.

(b) *Ad. Ej. c. 10*, p. 247; 2 Greenl. Ev. § 304; *Bailey v. Fairplay*, 6 Binn. 454.

1. *Of the evidence required to establish title when the parties are privy to each other.*

3667. When a privity exists between the parties to ejectment, the claimant, instead of proving his title, should show the *existence* and *termination* of the privity; for a privity will not be presumed to exist without proof, but being proved, the presumption is in favor of its continuance. Thus, if the defendant be let into possession pending a negotiation for a purchase or a lease, proof must be given of the circumstances under which he was let into possession, and also of the breaking off of the negotiation before the day of the demise in the ejectment, or of the issuing of the writ, where the fiction has been abolished; (a) and, in some cases, he must prove a previous demand. (b)

The reason why proof of the plaintiff's title will not be necessary when a *privity* has subsisted between the parties, is because a defendant is not allowed to dispute the original title of him by whom he was admitted into possession, (c) although he may show such title has expired. (d) When the relation of landlord and tenant has once been established, the defendant and those under whom he claims are estopped from disputing the plaintiff's title; for the succeeding tenants are as much affected by the acts and admissions of their predecessors, in regard to the title, as if they were their own. (e) But the rule that the tenant and those claiming under him cannot controvert the title

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(a) *Wright v. Moore*, 21 Wend. 230; *Hogeboom v. Hall*, 24 Wend. 146.

(b) *Den v. Westbrook*, 3 Green, 371; *Dennis v. Warder*, 3 B. Munr. 173; *Stackhouse v. Doe*, 5 Blackf. 570; *Jackson v. Moncrief*, 5 Wend. 26; *Jackson v. Niven*, 10 John. 335.

(c) *Driver v. Laurence*, W. Bl. 1259.

(d) *England d. Syburn v. Slade*, 4 T. R. 682.

(e) *Burwick d. Mayor of Richmond v. Thompson*, 488; *Taylor v. Needham*, 2 Taunt. 278; *Doe v. Mills*, 2 Ad. & Ell. 17; *Doe v. Lewis*, 5 Ad. & Ell. 577; *Galloway v. Ogle*, 2 Binn. 468; *Cooper v. Smith*, 8 Watts, 536; *Graham v. Moore*, 4 S. & R. 467; *Jackson v. Harsen*, 7 Cowen, 323.

of the lessor, is founded on the presumption of the lease having been obtained without fraud, force or illegal behavior on the part of the lessor; therefore, where a lessor threatened to turn the lessee off by force of arms if he did not take a lease, it was held that the lessee might contest the landlord's title.(a) And the acceptance of a lease for a small part of a tract of land, will not estop the lessee from controverting the lessor's title to the remainder of the tract.(b)

But although the defendant, who stands in such privity to the plaintiff, cannot dispute the title of the latter, yet he may show that it has *expired*.(c) or that the plaintiff has sold his interest in the premises,(d) or that it has been sold by virtue of some competent judgment or decree, by authority of law.(e)

The privity is established by *express* proof of a contract between the parties, or by *implication*, as the payment of rent, which is always *primâ facie* evidence of the title of the landlord, and is conclusive against the party paying, and all other claiming under and in privity with him.(f)

When the parties claim *under the same third person*, the plaintiff is not bound to trace back his title beyond the common source of their right, and it is not required to prove the title of such third person;(g) when, in fact, another person has title, the defendant is required, under these circumstances, to show it.(h)

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(a) *Hamilton v Marsden*, 6 Binn. 45; *Miller v. McBrier*, 14 S. & R. 382; *Hockenburg v. Snyder*, 2 W. & S. 249.

(b) *Pederick v. Searle*, 5 S. & R. 236.

(c) *Neave v. Moss*, 1 Bing. 360; S. C. 8 Moore, 389; *Doe v. Whitroe*, 1 Dowl. & R. 1; *Brook v. Briggs*, 2 Bing. N. C. 572. See *Rugan v. Phillips*, 4 Yeates, 382; *Zeigler v. Fisher*, 4 Penn. St. R. 365.

(d) *Doe v. Watson*, 2 Stark. 230.

(e) *Camp v. Camp*, 5 Conn. 291; *Jackson v. Davis*, 5 Cowen, 123.

(f) *Doe v. Pegge*, 1 T. R. 758, 759, n.; *Hall v. Butler*, 10 Ad. & Ell. 204.

(g) *Riddle v. Murphy*, 7 S. & R. 230.

(h) 7 S. & R. 230.

2. *Of the evidence where there is no privity between the parties.*

3668. But, when there is no privity, the plaintiff must establish a *legal*, and not merely an *equitable* title; depending upon the *strength* of his own, and not upon the *weakness* of that of his adversary.(a) This rule, however, will not avail a defendant who has fraudulently induced a plaintiff to purchase a bad title;(b) nor can a defendant require of the plaintiff a better title than a naked possession when he has wrongfully put him out of possession.(c) If he can, the defendant must show a better title, in order to support his action.(d)

The title to be established, when no privity exists between the parties, relates to the rights of, 1, the heir at law; 2, a devisee; 3, a personal representative or guardian.

1° *Evidence of title in the heir at law.*

3669. When the plaintiff claims title as *heir at law*, he must prove that the ancestor, from whom he derives his title, was *the person last seised* of the actual freehold and inheritance; that is, that had last actual possession of the lands in fee simple, and that he, the claimant, is his heir.

The *seisin* may be proved, in the first instance, by showing that the ancestor was either in the actual possession of the premises, at the time of his death, or in the receipt of the rent from the tenant; for possession is presumptive evidence of a *seisin* in fee, until the contrary has been proved.(e) This presumption may, of course, be rebutted, and, for this reason, the

(a) Ante, n. 3658.

(b) Lane v. Reynard, 2 S. &amp; R. 65.

(c) Woods v. Lane, 2 S. &amp; R. 53; Jackson v. Harder, 4 John. 202; Jackson v. Hazen, 2 John 22; Law v. Wilson, 2 Root, 102; Campbell v. Roberts, 3 A. K. Marsh. 623; Ludlow v. Barr, 3 Ham. 388.

(d) 2 S. &amp; R. 53.

(e) Smith v. Lorillard, 10 John. 338; Doe v. Butler, 3 Wend. 149; Jackson v. McCall, 10 John. 377; Bull. N. P. 103.

plaintiff should be prepared with other evidence of his ancestor's title.

When the plaintiff claims as *lineal heir*, he is required to produce this proof; when he claims as *collateral heir*, he must prove the descent to himself, and the person last seised, from some common ancestor, together with the extinction of all those lines of descent which would claim before him, and defeat his right. He must, therefore, prove all the marriages, births and deaths, necessary to complete his title, and the identity of the persons. This is done by the usual mode of proving pedigrees.(a)

2<sup>o</sup> *Evidence of title in a devisee.*

3670. When the plaintiff claims as *devisee* of a freehold, he must prove the seisin and death of the deviser, and that his will, devising him the estate, has been properly executed, according to the requirement of the law. The proof is to be made by the production of the attesting witnesses, when it has been attested by them, if they can be procured; if not, by proving their handwriting; when it has not been attested, it must be proved as other writing. But, in case of a will thirty years old, it may be read without further proof, on account of the difficulty of proving it, as the witnesses may all be dead; and the age of the will, in these cases, is to be reckoned from the date of the will, and not from the death of the testator.(b)

The *seisin* of the testator may be proved as the seisin of an ancestor.

When the lessor of the plaintiff, or the plaintiff, where the fictions in ejectment have been abolished, claims as *legatee of a term of years*, he must give in evidence the probate of the will, and also prove the

(a) Ad. Ej. 254; 2 Greenl. Ev. § 309, 311.

(b) Ad. Ej. 259; 2 Greenl. Ev. § 310; Jackson v. Blasham, 3 John. 292; Jackson v. Christman, 4 Wend. 277; Doe v. Walley, 3 B. & C. 22; McKenire v. Fraser, 9 Ves. 5.

assent of the executor to the legacy, for this is essential to his title. This *assent* may be proved by the express agreement of the executor, or implied from his acts, as where he permits the legatee to receive the rents, and apply them to his own use, and, once given, this assent cannot be revoked.(a) The plaintiff must also prove the title of his testator, and show that he had a chattel and not a freehold in the premises; for, when a party dies in possession, he is presumed to be seised of the fee, until the contrary be shown. The production of the lease, in a case of this kind, is the most satisfactory, but it may be proved by any solemn admission of the defendant.(b)

3° *Evidence of title in a personal representative or guardian.*

3671. When an ejectment is brought by a *personal representative*, to recover a chattel real, he must prove the probate of the will or the grant of letters of administration, or the book of the proper office where they are entered. In addition, he must prove the testator or intestate's title.

3672. When the plaintiff claims as *guardian*, he is required to prove not only the title of the ward and his minority at the time of the demise laid in the declaration, but also the appointment by virtue of which he claims, the deed or will, when he acts under these instruments, or the letters or certificate of a competent tribunal appointing him guardian.(c)

3. *Of evidence of possession by defendant.*

3673. The plaintiff is bound to prove the *identity* of the lands and the *possession* of them by the defendant;(d) this can be done without difficulty when a

(a) Ad. Ej. 271; 1 Roper on Leg. 250; 2 Greenl. Ev. § 314.

(b) Doe d. Digby v. Steel, 3 Camp. 115.

(c) Ad. Ej. 274; 2 Greenl. Ev. § 315; 2 Phil. Ev. 303.

(d) Albertson v. Reding, 2 Murph. 283. See Den. v. Snowhill, 1 Green, 23; Pickett v. Doe, 5 Sm. & Marsh. 470; Mordicai v. Oliver, 3 Hawks. 479.

privity exists between the parties, by proof of the payment of rent, or by the acknowledgment of the defendant that he is tenant, or by any other competent evidence of the fact; for this is a mere fact, provable, like any other, by parol evidence. When there is no privity, the general mode of proof is by reading the deeds or wills under which the lessor or plaintiff claims, and showing that the names and abutments of lands, in the defendant's possession, agree with the premises described in these instruments. The verbal declarations of the defendant may also be given in evidence to prove his possession; (a) and the fact that he was in possession at the time of commencing the suit, raises a presumption that he held in hostility to the plaintiff. (b)

*Art. 2.—Of evidence for the defendant in ejectment.*

3674. The principle already stated, that the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary, is so firmly established, that but little can be said about the evidence required to be produced by the defendant. The lessor of the plaintiff, or the plaintiff himself, must establish a clear and substantial *possessory title* to the premises in question. The defendant's evidence is altogether confined to falsifying, contradicting or explaining his adversary's proofs, or rebutting the presumption which may arise out of them. It entirely depends on the nature of the proofs advanced by his adversary, and need not extend beyond the rebuttal of them.

Thus, when the lessor or plaintiff claims as *heir*, the defendant may show a devise by the ancestor to a stranger, or that the claimant is a bastard, or any other circumstance which will invalidate his title.

(a) *Banyer v. Empire*, 5 Hill, 48; *Mordicai v. Oliver*, 3 Hawks, 479.

(b) *Sharp v. Ingraham*, 4 Hill, 116.

When the claimant claims as *devisee*, the defendant may prove that the will was obtained by fraud, or not duly executed, or that the testator was a lunatic, or any other fact which will destroy the validity of the supposed will. And on whatever right the claimant may rest his case, the defendant may establish facts and circumstances, if he can, to destroy the apparent right of the claimant.

3675. The defendant may also prove, that however regular the paper title of the lessor or plaintiff may be, he has a superior title, which has been gained by *adverse possession for the space of twenty years*; (*a*) that is, the enjoyment of land or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued, under an assertion of right on the part of the possessor. (*b*)

When the possession has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises a presumption of a grant. (*c*) But this presumption arises only when the use or occupation would have been unlawful. (*d*)

(*a*) In Pennsylvania *twenty-one* years are required. *Hawk v. Senseman*, 6 S. & R. 21. In most of the states statutes have been passed regulating the time when an adverse possession will give title; some requiring more, and others less than twenty years.

(*b*) *Waggoner v. Hastings*, 5 Penn. St. R. 300; *Overfield v. Christie*, 7 S. & R. 177; *Moore v. Small*, 9 Penn. St. R. 196.

(*c*) Angell on Wat. Courses, 85 et seq.

(*d*) The following rules, by which it may be ascertained that a possession is not adverse, are taken from Bouv. L. D. tit. Adverse possession:

1. When both parties claim under the same title; as, if a man seised of certain land in fee, have issue two sons and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims. Co. Litt. s. 396.

2. When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee. 8 East, 248.

This adverse possession may be either actual or constructive. It is *actual*, when the defendant has himself been in the enjoyment of the land; it is *constructive*, where a deed, or some other sufficient writing, in form to carry the title to the lands, where in fact a title exists, is set up to bar a recovery in an action of ejectment; and privity of contract, blood, or estate, must exist between the consecutive possessors of land to establish a continuity of constructive adverse possession.(a)

§ 7.—Of the verdict and judgment in ejectment.

3676.—1. The principal requisite of a *verdict* in ejectment, when for the complainant, is, that it find the facts laid in the declaration with certainty; for when the jury find an uncertain thing, the court cannot render a judgment, and if a judgment were rendered, it could not be executed; as a verdict for “one hundred and fifty acres,” without designating the part found, is void for uncertainty.(b)

The verdict may be for less, but never for more than the land claimed in the declaration.(c) But if the

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3. When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John died, and afterward the heirs of John and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for when two men are in possession, the law adjudges it to be the possession of him who has the right. Lord Raym. 329.

4. When the occupier has acknowledged the claimant's titles; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See Bos. & P. 542; 8 B. & Cr. 717.

(a) *Simpson v. Downing*, 23 Wend. 316.

(b) *Stewart v. Speer*, 5 Watts, 79. See *Burdick v. Norris*, 2 Watts, 28; *Stewart v. Martin*, 2 Watts, 200; *Gregory v. Jacksons*, 6 Munf. 25; *O'Keson v. Silverthorn*, 7 W. & S. 246; *Harrisburg v. Crangle*, 3 Watts & S. 460; *Clay v. White*, 1 Munf. 162.

(c) *Scott v. Bealle*, 1 A. K. Marsh. 69; *Van Alstyne v. Spraker*, 13 Wend. 578; *Harrison v. Stevens*, 12 Wend. 170; *Todd v. McGee*, 2 Bibb, 350; *Patton v. Cooper*, Cooke, 133.

jury should find a verdict for too much, the plaintiff may enter a *remittitur* to avoid a new trial.(a)

When the verdict is for the defendant, a new trial is seldom granted, because all the parties then remain in the situation they were, previously to the commencement of the action, and, therefore, the claimant may bring a new ejectment, without being subject to additional difficulties. But this is not the case when the verdict is against the defendant, because the possession then is changed. The defendant in the first ejectment, becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point of material consequence to him, "the courts rather lean to new trials on behalf of defendants in ejectments, especially on the footing of surprise."(b)

3677.—2. The party who has obtained a verdict is of course entitled to the judgment of the court, unless for some legal cause it has been set aside. By the judgment, when in his favor, the lessor of the plaintiff, or the plaintiff himself, where the fiction in this action has been abolished, obtains *possession* of the lands recovered by the verdict, but he does not acquire any other *title* to them than he had before.(c) When, therefore, he has a freehold interest in them, he is in as a freeholder; when he has a chattel interest, he is in as a termor; and when he has no title at all, he is in as a trespasser, and liable to account to the legal owner, without any reëntury on his part.(d) The verdict in the judgment is no evidence in a subsequent action, even between the same parties.(e)

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(a) *McAllister v. Mullanphy*, 3 Mis. 38.

(b) Per Lord Mansfield, in *Clymer v. Littler*, 1 W. Bl. 345, 348.

(c) But see *Parkes v. Moore*, 13 Verm. 183.

(d) *Coleman v. Doe*, 2 Scam. 251.

(e) *Clerke v. Rowell*, 1 Mod. 10.

Although the claimant has but a mere *possession* given to him by the judgment, yet he becomes seised, according to his title, if he have more than a chattel interest in the land. This is the effect of a fiction. It is a rule of law, that when a man, having a title to an estate, comes into possession of it by lawful means, he shall be in possession according to his title; now, when possession is given to him by the sheriff, the possession and the title are said to unite, and the lessor of the plaintiff holds the lands in this case, as in every other where he obtains peaceable possession, according to the nature of his interest in them.(a)

The judgment being grounded on the verdict, it ought not to be entered for more land, or for different parcels than the defendant was found guilty of by the verdict,(b) though a misprision or mistake, in this respect, made by the clerk, which causes a variance, is not fatal, but may be amended by the court.(c)

§ 8.—Of the action for mesne profits.

3678. The action of *trespass for mesne profits*, although a separate action, has always been considered as connected with the action of ejectment, and treated as such. It is an action brought, after a recovery in ejectment, to recover the value of the profits which the defendant has received while he unlawfully held the possession of the premises for which the ejectment was brought, this being the damages the defendant has sustained, and which, in this action, he seeks to recover. The subject will be considered in four articles: 1, for what causes this action may be brought; 2, the pleadings therein; 3, the evidence; 4, the verdict and judgment.

(a) Ad. Ejectm. 294.

(b) *Obert v. Hammel*, 3 Harr. 73; *Marfmaduke v. Tennant*, 4 B. Munr. 210.

(c) *Mason v. Fox*, Cro. Jac. 631.

*Art. 1.—What may be recovered in an action for mesne profits.*

3679. In the action of ejectment, the right of possession being the subject of controversy, the *damages* given are in general merely nominal.<sup>(a)</sup> To recover damages, the lessor of the plaintiff, or the plaintiff himself, where the fictions in ejectment have been abolished, is allowed to recover such damages in an action for mesne profits; although he may have recovered damages in the ejectment.<sup>(b)</sup>

The plaintiff in the action of ejectment, when brought under the statutes, or the lessor of the plaintiff, at common law, being the person concerned in interest, is the proper person to bring the action for mesne profits, though the action may also be sustained in the name of the nominal lessee. When brought by the former, he may, upon proofs, recover the rents and profits, received by the defendant, anterior to the time of the demise in ejectment, which cannot be done when the action is brought by the nominal plaintiff, and, for this reason, this course is preferable.<sup>(c)</sup>

The right to recover for mesne profits necessarily follows a successful termination of the ejectment in favor of the plaintiff.<sup>(d)</sup> The *amount* to be recovered is the value of the mesne profits, after deducting the value of *permanent improvements* the defendant may have made on the estate.<sup>(e)</sup> It has been held that the plaintiff may not only recover such profits, but is also entitled to be reimbursed in such amount as he has

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<sup>(a)</sup> In Pennsylvania, the plaintiff in ejectment may recover for mesne profits, upon giving notice that he means to proceed for them. *Battim v. Bigelow*, Pet. C. C. 291. In such case, the damages must be claimed in the declaration, or they cannot be recovered. *Bayard v. Inglis*, 5 W. & Serg. 465.

<sup>(b)</sup> *Van Alen v. Rogers*, 1 John. Cas. 281.

<sup>(c)</sup> Bull. N. P. 87.

<sup>(d)</sup> *Benson v. Matsdorf*, 2 John. 369; *Murphy v. Guion*, 2 Hayw. 145.

<sup>(e)</sup> *Jackson v. Loomis*, 4 Cowen, 168; *Hylton v. Brown*, 2 Wash. C. C. 165; *Cawdor v. Lewis*, 1 Y. & C. 427. But see *Russell v. Blake*, 2 Pick. 505; *Myers v. Sanders*, 8 Dane, 65.

in good faith been compelled to pay in obtaining, by legal means, the restoration of the property withheld by the defendant tortiously.(a)

*Art. 2.—Of the pleadings in an action for mesne profits.*

1. *Of the declaration.*

3680. In this action, the declaration must expressly state the different parcels of land from which the profits arose, or the defendant may plead a common bar. The time when the defendant broke and entered into the premises and ejected the plaintiff, the length of time during which he ejected him, and the value of the mesne profits of which he deprived him, must also be correctly stated; for if the declaration do not contain these statements, it will be bad on special demurrer.(b)

The statement of the damages in the declaration may include the costs of the ejectment, whether the judgment be against the casual ejector, or against the tenant or landlord.(c)

2. *Of the plea.*

3681. The general issue is *not guilty*. The defendant may also plead *not guilty within six years* before the commencement of the action, when the plaintiff claims the mesne profits for a longer period than six years before action brought.(d) The defendant cannot plead, as a matter of defence, what would have been a bar to the action of ejectment.(e)

*Art. 3.—Of the evidence in an action for mesne profits.*

3682. To entitle himself to recover, the plaintiff must prove, 1, his possessory title; 2, the wrongful

(a) *Doe v. Perkins*, 8 B. Mon. 198.

(b) See *Higgins v. Highfield*, 13 East, 407.

(c) Ad. Ej. 332.

(d) Bull. N. P. 88.

(e) *Baron v. Abeel*, 3 John. 481; *Jackson v. Randall*, 11 John. 405.

entry of the defendant; 3, the duration of time during which he occupied the premises; 4, the value of the mesne profits; 5, other damages to which he is entitled.

3683.—1 and 2. The plaintiff may prove *his possessory title* when the action is between the parties to the prior action of ejectment, and the plaintiff proceeds only for profits accruing subsequent to the alleged date of the demise by the record of the judgment, which, in that case, is conclusive evidence of the plaintiff's title and of the defendant's *entry* and possession, from the day of the demise laid in the declaration. (a) If, on the contrary, the plaintiff seek to recover profits antecedent to the time of the demise laid in the declaration, or bring his action against a precedent occupier, the record in the ejectment cannot be given in evidence, but the plaintiff must prove his title to the premises, from whence the profits arose, for, without such proof, there is no evidence he is entitled to them. (b)

3684.—3. The plaintiff is also required to prove the *duration* of the occupancy by the defendant, or by his tenant, when he is the landlord; this is proved like any other matter *in pays*.

3685.—4 and 5. He must also prove the *value* of the mesne profits, that is, the yearly value of the premises during the time of the tortious occupation; the costs of the ejectment; and, provided the plaintiff has specially alleged such claim in his declaration, he may give evidence to the jury of any injury done to the premises, in consequence of the misconduct of the defendant. (c)

(a) Ad. Ej. 334; Van Allen *v.* Rogers, 1 John. Cas. 281; Chiral *v.* Remicker, 11 Wheat. 280; Lion *v.* Burtis, 5 Cowen, 408; Aslin *v.* Parkin, 2 Burr. 668; Dodwell *v.* Gibbs, 2 C. & P. 615; Posterns *v.* Posterns, 3 W. & S. 182; Den *v.* McShane, 1 Green, 35; Poston *v.* Jones, 2 Dev. & Batt. 294; Whittington *v.* Christian, 2 Rand. 353.

(b) Bull. N. P. 87; Aslin *v.* Parkin, Burr. 665; Jackson *v.* Randall, 11 John. 405; West *v.* Hughes, 1 Har. & J. 574.

(c) Adams, Ej. 337; Huston *v.* Wickersham, 2 W. & S. 308; Coach *v.* Gerry, 3 Harring. 423; Doe *v.* Perkins, 8 B. Mon. 198.

3686. The *defendant* may rebut any of the facts which have been adduced by the plaintiff to make him liable, when such evidence is not conclusive upon him; for example, he may give evidence to contradict that of the plaintiff, where the latter alleges that he was in possession of the premises, before the time of the demise in the declaration, and show that in point of fact he had not occupied the premises before that time.<sup>(a)</sup> The defendant may also show that, pending the time laid in the declaration, he gave up the possession to the plaintiff, and he will not be liable after that time.<sup>(b)</sup>

*Art. 4.—Of the verdict and judgment.*

3687.—1. The jury are not confined in their *verdict* to the mere *rent* of the premises, although the action be brought to recover the *rents and profits* of the estate; they may give extra damages if they think proper, such as the circumstances of the case may require.<sup>(c)</sup> The plaintiff in ejectment recovers the mesne profits down to the time of the verdict.<sup>(d)</sup>

3688.—2. The judgment follows the verdict, and generally carries costs.

SECTION 2.—OF THE ACTION OF WASTE.

3689. It has been stated that waste is a spoil or destruction in houses, gardens, trees, and other corporeal hereditaments, to the disherison of him who has the reversion or remainder in the fee simple or fee tail.<sup>(e)</sup> To redress this injury there are two remedies; the first, by an action of waste, which is a mixed action, by which the plaintiff recovers the place wasted, and

<sup>(a)</sup> *Vance v. Inhabitants of Cong. Township*, 7 Blackf. 241.

<sup>(b)</sup> *Mitchell v. Freedley*, 10 Penn. St. R. 198.

<sup>(c)</sup> *Goodtitle v. Tombs*, 3 Wils. 118.

<sup>(d)</sup> *Dawson v. McGill*, 4 Whart. 230.

<sup>(e)</sup> *Ante*, n. 2397.

also damages for the injury; the second, by an action on the case, for the recovery of damages only.

In modern practice, the remedy usually adopted, is an action on the case; still, the old action of waste lies in some of the United States; but in others the only remedy is by an action on the case or an injunction.<sup>(a)</sup>

This section will be divided by taking a brief view of, 1, the parties to an action of waste; 2, the pleadings; 3, the judgment.

§ 1.—Of the parties to an action of waste.

*Art. 1.—Who may bring an action of waste.*

3690. By the 13 Edw. I., c. 22, the action of waste is given to one tenant in common against another. These words have been construed to include as well joint tenants as tenants in common, for both of them hold in communi.<sup>(b)</sup> And by a subsequent statute,<sup>(c)</sup> an action of waste is given to the heir, for waste done in the time of his ancestor, as well as for waste done in his own time. A purchaser is considered as coming within the purview of this statute, although it speaks of those who were inheritors.<sup>(d)</sup>

The plaintiff must have the next immediate estate of inheritance, in remainder or reversion,<sup>(e)</sup> for a contingent interest is not sufficient.<sup>(f)</sup>

(a) See *Shult v. Baker*, 12 S. & R. 273; *Sackett v. Sackett*, 8 Pick. 369; *Findlay v. Smith*, 6 Munf. 134; *Bright v. Wilson*, 1 Cam. & Nor. 21; *Shepherd v. Shepherd*, 2 Hayw. 382; *Carver v. Miller*, 4 Mass. 559; *Randall v. Cleaveland*, 6 Conn. 328.

(b) Bac. Ab. Waste, G.

(c) 20 Edw. I., stat. 2.

(d) 1 Inst. 53 b, 356; 2 Roll. Ab. 825.

(e) 1 Inst. 52, 53.

(f) *Mayo v. Feaster*, 2 McCord's Ch. 142.

*Art. 2.—Against whom waste may be brought.*

3691. The statute of Gloucester<sup>(a)</sup> enacts, that a man from henceforth shall have a writ of waste in the chancery against him that holds by the law of England; or otherwise for the term of life, or for the term of years, or a woman in dower.<sup>(b)</sup>

When waste was committed by an assignee of a tenant in dower or by the curtesy, the action, if brought by the heir of the husband or wife, must be against the original tenant, because the assignee is considered only as his bailiff or servant. In case, however, where the reversioner has also assigned his inheritance, and the assignee of the tenant has attorned, the latter is considered as the tenant, and the assignee of the reversioner, the landlord, so that the assignee of the tenant is alone liable for waste done by himself.

When the waste has been committed by a stranger, still the lessee will be liable for waste, for it is his duty to prevent waste by the stranger, and he may recover in trespass against him.<sup>(c)</sup> It seems to be the policy of the law to make the lessee liable for waste, whenever he could or ought to have prevented it. If any lessee for life or years commits waste, and afterward assigns his whole estate, the action of waste lies against the original tenant, and the place wasted may be recovered from the assignee, though he is not a party to the suit, the title of his assignor having been forfeited previous to the assignment.<sup>(d)</sup>

## § 2.—Of the pleadings in an action of waste.

3692.—1. The material averments in the declaration are, 1, that the plaintiff has a title to the inheritance; this must be averred as fully and correctly as in a writ of entry on intrusion; 2, the demise of

<sup>(a)</sup> 6 Edw. I., c. 5.<sup>(b)</sup> See Bac. Ab. Waste, H.<sup>(c)</sup> Bac. Ab. Waste, H 1.<sup>(d)</sup> 2 Greenl. Ev. § 652.

the tenant, if there be one, or such other complete title as he may possess; 3, the quality, quantity, and amount of the waste, and the place in which it was committed, as, whether in the whole premises, or in a distinct part of them, and whether it were done *sparsim*, as by cutting trees in different parts of a wood, or, totally, as by prostrating an entire building.(a)

It is also necessary to aver the kind of tenure by which the defendant holds, or held; when the defendant holds, the averment may be in the *tenet*, "which he, said Peter, holds," or, when he is no longer in possession, in the *tenuit*, "which he held;" and this has a reference to the time when the waste was done, and not when the action was brought. This averment is necessary, because, in the former case, the plaintiff will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in one part only, together with treble damages. In the latter case, on the contrary, the tenancy being at an end, the plaintiff will only recover his damages.(b)

3693.—2. The general issue in this action is, that the defendant "did not make any waste, sale, or destruction in the messuages and premises aforesaid, as the plaintiff in his writ and declaration hath supposed." But whether this puts in issue the whole declaration seems doubtful. It is, therefore, proper to plead any matter in discharge specially.(c)

§ 3.—Of the judgment in an action of waste.

3694. It is enacted by the statute already cited,(d) that he which shall be attainted of waste, shall lose the thing which he hath wasted, and moreover shall

(a) 2 Greenl. Ev. § 652.

(b) Bac. Ab. Waste, K, 1 and 2.

(c) Jackson on Real Actions, 339; 2 Saund. 238, note (5).

(d) Statute of Gloucester, 6 Edw. I., c. 5.

recompense thrice so much as the waste shall be taxed at. (a) The plaintiff may recover the place wasted, not only when the injury has been total, as the destruction of a building, but also when the waste has been done to separate parts of the inheritance, as, where trees growing *sparsim* in a close are cut; in an action of waste, all the close shall be recovered. (b)

3695. This action has been superseded by the more convenient action upon the case in the nature of waste. (c)

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CHAPTER IV.—OF SCIRE FACIAS. (d)

3696. After having considered the nature and requisites of personal actions arising *ex contractu*, and those arising *ex delicto*, and of the mixed action of ejectment and waste, the next object which will deserve our attention will be the action of *scire facias*; and this will complete the view which it was necessary to take of actions at law.

3697. A *scire facias* is the name of a writ, founded on some record, and requiring the defendant to show cause why the plaintiff should not have the advantage of such record, or when it is issued to repeal letters patent, why the record should not be annulled and vacated. (e)

The *scire facias* is sometimes called a *new action* and sometimes a *continuation of the former action*. It is

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(a) The statute of Gloucester, 6 Edw. I., c. 5, is in force in Massachusetts, so far as to give the action for the recovery of the place wasted, and treble damages, from the tenant for life; except in respect to tenants in dower, respecting whom the law has been altered by the statute. *Sackett v. Sackett*, 8 Pick. 309.

(b) Anon. Brownl. 240; Co. Litt. 54 a; Bac. Ab. Waste, M.

(c) Ante, n. 2413.

(d) Vide generally, Bac. Ab. h. t.; Bac. Ab. Execution, H; 11 Vin. Ab. 1; 19 Vin. Ab. 280; Com. Dig. Pleader, (3 L); Dane's Ab. ch. 190; Tidd's Pr. 982.

(e) Grah. Pr. 649; 2 Tidd's Pr. 982; 2 Sell. Pr. 187; 2 Arch. Pr. 76; Bac. Ab. *scire facias*, *in pr.*; Com. Dig. Pleader, (3 L.)

considered in the nature of an action, because the defendant may plead to it; (a) it is an original action when it is issued on a recognizance, or to repeal a patent and the like, there being no action on which it can then be founded; but when brought to revive a judgment after a year and a day after its rendition, or upon the death or marriage of the parties, it is a continuance of the action; (b) where, therefore, an interlocutory judgment was obtained against a testator, and pending that action the testator's attorney agreed that no writ of error should be brought; and, after his death, a *scire facias* being brought against his executors, the court held they could not bring a writ of error, because they were bound by the agreement of the testator's attorney, as the *scire facias* was not a new action, but only a continuance of the old one. (c)

Our inquiries, in this chapter, will relate to, 1, the form of the writ; 2, out of what court the *scire facias* must issue; 3, when it is a proper remedy; 4, the pleadings; 5, the evidence; 6, the trial and judgment.

#### SECTION I.—OF THE FORM OF THE WRIT.

3698. As the *scire facias* in many cases stands in the place of a declaration, it must contain such recitals, and state such facts, as will authorize the court to give a judgment upon it; (d) a *scire facias* to revive a judgment must, therefore, state that although a judgment was given for the plaintiff, yet execution of the debt and damages still remains to be made; and commands to the sheriff to make known to the defendant that he be in court at the return day, to show cause why the

(a) Co. Litt. 290; Potter v. Titcomb, 1 Shep. 36; Andress v. The State, 3 Blackf. 110; Pickett v. Pickett, 1 How. Miss. 267; Blacknell v. The State, 3 Pike, 320. See Ryder v. Glover, 3 Scam. 547.

(b) Dane's Ab. ch. 190, § 8.

(c) Wright v. Nutt, 1 T. R. 388.

(d) McVickars v. Ludlow, 2 Ham. 246; Toulmin v. Bennett, 3 Stew. & Port. 220; Prather v. Munro, 11 Gill & John. 261.

plaintiff ought not to have execution against him for the debt and damages, according to the form and effect of the recovery; this writ must pursue the judgment; if a joint judgment be obtained against two, the *scire facias* must be against both; when there is a material variance in setting out the judgment, it will be fatal on *nul tiel record*.

When the writ is issued on a recognizance, it must state a cause of action with as much precision as a declaration, therefore the condition of the recognizance must be set forth, and a breach must be shown.(a) It is fatally defective if it omit to aver that the recognizance was acknowledged before an officer properly authorized to take it.(b)

SECTION 2.—OUT OF WHAT COURT THE WRIT MUST ISSUE.

3699. The writ must issue out of the court in which the record has been made, if the record remains there,(c) or if it has been removed, out of the court where the record is,(d) for no other, in general, has jurisdiction, unless specially authorized by statute;(e) but in some cases a *scire facias* is issued upon certain records, which are not entered in the court whence the writ issues; in these cases the statute law authorizes the issuing of the writ. For example, a *scire facias* may be issued out of the courts of the United States,(f) to repeal letters patent.

(a) Hicks v. The State, 3 Pike, 313.

(b) Madison v. Commonwealth, 2 A. K. Marsh, 131.

(c) Com. Dig. Pleader, 3 L 3.

(d) Tidd's Pr. 1007; Osgood v. Thurston, 23 Pick. 110; Tindall v. Carson, 1 Harr. 94. See Baron v. Pagles, 6 Ala. 422; Heath v. Tyson, Wright, 442.

(e) Treasurer, etc. v. Erwin, Brayt. 218; Vallance v. Sawyer, 4 Greenl. 62; Carlton v. Young, 1 Aik. 332; Boylan v. Anderson, 2 Penn. 529; Wilson v. Tiernan, 3 Mis. 577.

(f) See Stearns v. Barret, 1 Mason, 153.

## SECTION 3.—WHEN A SCIRE FACIAS IS A PROPER REMEDY.

3700. In *real actions* when land was recovered, and a year and a day elapsed before execution was taken out, the demandant might, after that time, have taken out a *scire facias* to revive the judgment, because the judgment being particular *quoad* the land, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given; and, therefore, if there was no execution appearing on the roll, a *scire facias* issued to show cause why execution should not be awarded.<sup>(a)</sup> But there was another reason why a *scire facias* should issue in a real action, because if an execution was not sued out within a year, no other advantage could be taken of the judgment, as an action of debt could not be maintained on it.<sup>(b)</sup>

But the case was different when the plaintiff had obtained judgment in a *personal action*, and had lain by for a year and a day, and, during that time, had taken no process of execution; in that case he was compelled to sue again upon his judgment, (in England by a new original writ,) and no *scire facias* could issue, because there was not a judgment for any particular thing in the personal action, with which, as in a real action, the execution could be compared. After a reasonable time, that is, a year and a day, the judgment was presumed to be executed, and no *scire facias* was allowed the plaintiff, calling upon the defendant to show cause why he should not have execution. If the judgment was not satisfied, the plaintiff's only remedy was an action upon his judgment, and then the defendant was required to prove how it was discharged.<sup>(c)</sup>

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(a) Bac. Ab. Execution, H.

(b) 3 Salk. 321.

(c) Bac. Ab. Execution, H.

This inconvenience was remedied by statute,<sup>(a)</sup> which gave to the plaintiff in a personal action a *scire facias* to revive the judgment, when he had omitted to sue execution within a year and a day after judgment was obtained.<sup>(b)</sup>

A *scire facias* on a personal action may be had, 1, on judgments; 2, on recognizances; 3, on other records.

§ 1.—Of *scire facias* on judgments.

3701. This writ may be between the original parties, or between other parties who have acquired the rights of the plaintiff, or become subject to the liabilities of the defendant.

*Art. 1.—Between the original parties.*

3702. As between the *same* parties a *scire facias* may be brought in the following cases: 1, when the judgment has been rendered more than a year and a day, and it remains unexecuted; 2, when it is given on a covenant and annuity, or in debt on bond conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, and damages arise, or money becomes payable, on the same security, after the judgment; 3, where the debt and damages are to be levied of future effects, or in the case of an executor *de bonis propriis*.

1. *Of the scire facias on a judgment after a year and a day.*

3703. We have just seen by what authority the *scire facias* in personal actions may be issued. The judgment on which it is founded is generally more than a year and a day old, computing the time from the day of signing the judgment by calendar months, and not by terms; for, until the judgment has obtained

(a) Stat. Westm. 2, (13 E. I.,) stat. 1, c. 45.

(b) Bac. Ab. Execution, H.

that age, an execution may be issued. And if once a *fieri facias* or *capias ad satisfaciendum* be sued out within the year and day, and not executed, a new writ of execution may be taken out afterward, without a *scire facias*, provided the first writ be returned, and continuance entered from the time of issuing it.(a)

The time during which an execution may be issued, is to be computed, when there is a *cesset executio*, from the day when the stay of execution expires; the reason is, that the indulgence which the plaintiff has voluntarily given to the defendant, or which the law has granted him, ought not to be turned to the prejudice of the plaintiff. If he do not take out his execution, however, within the year after the *cesset executio* is determined, he must sue out a *scire facias*.

3704. For a similar reason, when the defendant has sued out a writ of error, by which the plaintiff has been delayed, and prevented from taking out execution within the year, and the plaintiff in error has been nonsuited, or the judgment has been affirmed, or the writ of error has been abated or discontinued, the defendant in error may proceed to execution, after the year, without a *scire facias*; because the writ was a supersedeas to the execution, and the defendant in error was compelled to await until its determination. And the same reason operates where the defendant has delayed the plaintiff by injunction.

3705. If, before the expiration of the year, the plaintiff has sued out a *scire facias* to revive the judgment, he cannot afterward issue an execution until judgment has been rendered on the *scire facias*.(b) And if, after having obtained judgment on the *scire facias*, he neglect to issue an execution within a year after the rendition of such judgment, he must issue a second *scire facias* before such execution can issue.

(a) Co Litt. 290; Lewis v. Smith, 2 S. & R. 142. See Pennock v. Hart, 8 S. & R. 377; Dunlap v. Spear, 3 Binn. 169.

(b) Roll. Ab. 900.

3706. In some of the states of the Union the time during which an execution may be issued is extended by statute much beyond one year.

2. *Of scire facias on demands arising after judgment.*

3707. In debt on bond, conditioned for the payment of money by *instalments*, where judgment is rendered for the penalty, and the proceedings are stayed on the payment of the instalment then due, and a stay of execution is given till the others become due, it is not requisite that a *scire facias* should be taken out, if execution has been sued out within a year after each default.

When a judgment is entered in an action of debt on a bond, or on any penal sum for the non-performance of covenants or agreements, in any indenture, deed, or writing contained, it is provided by the statute 8 and 9 W. III., c. 11, s. 8, that it shall remain a security to answer such damages as shall or may be sustained, for further breach of any covenant or covenants in the same indenture, deed, or writing contained; and the statute further directs that the plaintiff may have a *scire facias* upon the said judgment against the said defendant, or against his heir, terre tenants, executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to show cause why execution should not be awarded upon the said judgment; upon which, then, shall be the like proceeding, as in action of debt upon said bond or obligation, for assessing damages upon trial of issues upon such breaches, or injury thereof upon a writ to be awarded as therein directed; and that upon payment and satisfaction of such future damages, costs and charges, all the said proceedings on the said judgments are again to be stayed, and so *toties quoties*, and the defendant, his body, lands and goods, shall be discharged out of execution.

3. *When a scire facias on a judgment is proper for the purpose of reaching future effects.*

3708. Sometimes a judgment is rendered, and there is no property in the hands of the defendant which can be reached, but assets may afterward come into his hands; in such case, for the purpose of obtaining the fruit of his judgment, the plaintiff is driven to his action; a familiar example will illustrate this. When an executor or administrator is sued for a debt of the deceased person he represents, and he pleads *plene administravit*, that he has fully administered, and the plaintiff admits or confesses his plea, he has a right to take judgment for his debt, damages, and costs, to be levied as to the whole or in part, of the goods of the testator or intestate, which shall afterward come to the hands of the defendant to be administered; this is called a judgment of assets *quando acciderint*.(a)

By the plea of *plene administravit*, the defendant confesses the debt; the plaintiff may therefore take judgment, but he cannot have execution until the defendant have goods of the deceased, when he may sue out a *scire facias*, or bring an action of debt suggesting a *devastavit*. By taking the judgment of assets *quando acciderint*, the plaintiff admits that the defendant has fully administered to that time; and, therefore, the plaintiff will not be allowed to give evidence of effects come to defendant's hands before the judgment. For this reason the *scire facias* on a judgment of assets *quando acciderint*, must only pray execution of such assets as have come to the defendant's hands, since the former judgment, and, if it pray judgment of assets generally, it cannot be supported.(b)

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(a) Bull. N. P. 169; Bac. Ab. Executor, M. See Com. Dig. Pleader, 2 D 9; 11 Vin. Ab. 379.

(b) *Mara v. Quin*, 6 T. R.; 1 Pet. C. C. 442, n.; *McDowall v. Branham*, 2 N. & McCord, 572; *Bentley v. Bentley*, 7 Cowen, 701; *Wallace v. Barlow*, 3 Bibb, 169. See *Shaw v. McCameron*, 11 S. & R. 252.

*Art. 2.—Of the scire facias on a judgment on a change of parties.*

3709. It is a general rule that where a new person is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party to a judgment; and when the execution is not beneficial nor chargeable to a person, who was not a party to a judgment, a *scire facias* is unnecessary. These changes take place in the cases of marriage, bankruptcy and death. These will be considered separately.

1. *Of changes caused by marriage.*

3710.—1. When a *feme sole* obtains a judgment, or there is a judgment against her, and she afterward marries before execution, there must be a *scire facias* for or against husband and wife, in order to execute the judgment.

3711.—2. When the husband and wife obtain a judgment, for the proper debt of the wife, and afterward the wife dies, before execution, the husband alone may have a *scire facias*, without taking administration, for by the judgment the debt is altered; it survives to him, and becomes his own.

3712.—3. On the other hand, if a judgment be obtained against a *feme sole*, and she marry, and then the plaintiff sue out a *scire facias* against the husband and wife, and have a judgment *quod habeat executionem* against both, and afterward the wife die, the plaintiff may sue out a *scire facias*, and have execution against the husband.

2. *Of changes by bankruptcy and insolvency.*

3713. In general, the assignees of bankrupts and insolvents are entitled to all the choses in action of the bankrupt or insolvent; and the legal title to all judgments rendered in their favor is transferred to

them. In order to take advantage of such judgments as may have been rendered in favor of the bankrupt or insolvent, the assignee, not being an original party, must issue a *scire facias*, and obtain a judgment in his favor.

3. *Of changes of parties by death.*

3714. When the *plaintiff dies* after final judgment, or is adjudged civilly dead,<sup>(a)</sup> before they can have execution, his personal representatives must sue out a writ of *scire facias* against the defendant, to entitle themselves to the fruit of the judgment. If, on the contrary, the *defendant dies* after such judgment, a *scire facias* must be sued out against his personal representatives.<sup>(b)</sup>

When there are *two or more defendants*, and one of them dies after judgment, the *scire facias*, to revive the judgment, must be against the survivor alone.<sup>(c)</sup> But where there are two or more plaintiffs or defendants in a personal action, and one or more of them dies after judgment, execution may be had for or against the survivors, without a *scire facias*.

Various statutes have been passed, regulating the practice, with regard to the death of either of the parties between the rendition of the verdict and judgment, and between an interlocutory and final judgment, the details relating to which do not come within the plan of this work, and, besides, they are greatly modified by statute in the different states.<sup>(d)</sup>

§ 2.—Of *scire facias* on recognizances.

3715. A recognizance, we may remember, was defined to be an obligation of *record*, with a condition

(a) *Troup v. Wood*, 4 John. ch. 228.

(b) 1 Saund. 219, e, f; 2 Saund. 6, 72, o.

(c) Tidd's Pr. 1029.

(d) See Stat. 17 Car. II., c. 8; Stat. 8 and 9 W. III., c. 11, s. 6.

to do a particular act ;(a) these are either at common law or authorized by particular statutes ; they may be in favor of the government, that is, the United States or of a particular state, or they may be acknowledged in favor of private citizens ; of the former kind are recognizances to keep the peace, to appear to testify in a criminal case, and the like ; the latter, or those in favor of citizens, are recognizances of bail, and other similar obligations.

In these cases, before the party can have execution for damages, in consequence of a breach of the condition, he must sue out a *scire facias*, even within the year, because the law presumes that the debt might have been paid, and, therefore, will not suffer the debtor to be molested, unless it appear that he has not performed the condition.

In a suit on a recognizance, the plaintiff must not only show that the recognizance was entered into, but also a breach of the condition, before he can recover.(b)

§ 3. Of *scire facias* on other records.

3716. A *scire facias* may be brought not only to enforce an obligation of record, but for other purposes. It is the proper remedy, when authorized by statute, for vacating patents or vacating an act of incorporation, which has been unlawfully obtained, or when the exercise of the powers granted has been abused.(c)

In some states, as Pennsylvania and Illinois, a *scire facias* is given by act of assembly, on the record of a mortgage, on which a judgment is rendered, and the mortgaged premises are sold.

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(a) *Dillingham v. United States*, 2 Wash. C. C. 422. See *State v. Smith*, 2 Greenl. 62 ; *Van Antwerp v. Newman*, 4 Cowen, 82.

(b) *Frost v. Reynolds*, 2 Dana, 94.

(c) See *Sevier v. Hill*, 2 Tenn. 37 ; *Peter v. Kendall*, 6 B. C. 703.

## SECTION 4.—OF THE PLEADINGS.

3717.—1. In general the writ of *scire facias* supplies the place of a declaration, but still the plaintiff may file a *declaration*. In this case it must recite the *scire facias* and the proceedings which have been had under it, and the cause of action.(a)

3718.—2. To a *scire facias* on a recognizance or judgment the defendant may plead in abatement or in bar as in other actions.

To a *scire facias* against the bail in the action, the defendant may plead *nul tiel record* of the recognizance, or of the recovery against the principal; or payment by, or a release to the principal or bail; or that the principal has surrendered himself, or was rendered by his bail, before the return of the *capias ad satisfaciendum*; and he may also plead, in discharge of his liability, that there was no *capias ad satisfaciendum* sued out and returned against the principal.

When the *scire facias* is brought on a judgment, the defendant may plead *nul tiel record* of the recovery; payment or a release; or that the debt and damages were levied on a *feri facias*; or that his person was taken in execution on a *capias ad satisfaciendum*; but this plea will be defective, if it do not show how he was discharged.(b) He may also plead in bar that a *scire facias* has already issued on the judgment, and that a new judgment has been rendered upon it.(c)

It is a universal rule that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded in the original action.(d)

(a) Tidd's Pr. 1042. The plaintiff in a *scire facias* may dispense with a declaration; but in case of such election, he must set out in the writ all that would be essential in a declaration to authorize a recovery. Toulmin v. Bennett, 3 Stew. & Port. 220.

(b) Ballard v. Averritt, 1 Tayl. 69.

(c) Custer v. Detterer, 3 Watts & Serg. 28.

(d) Dickson v. Wilkinson, 3 How. U. S. 57; Sigourney v. Stockwell, 4 Met. 518; Hubbard v. Manning, Kirby, 256; U. S. v. Thompson, Gilp. 614; McFarland v. Irwin, 8 John. 77; Cardesa v. Humes, 5 S. & R. 65.

## SECTION 5.—OF THE EVIDENCE.

3719. When the defendant pleads *nul tiel record*, the burden of producing the record is thrown upon the plaintiff, and in this case he is required to show the record described in the writ of *scire facias*, or in the declaration. It must be *such* as is declared upon or described in the writ, for if there be a variance although it may be in favor of the plaintiff, that is, where the amount of the judgment produced is greater than the amount claimed, still the variance will be fatal, for it is not such a record as is described; (a) and a variance of six cents, is equally fatal, as if it was of a larger sum. (b)

On *nul tiel record* being pleaded to a recognizance, the plaintiff must produce a recognizance, properly acknowledged or taken before a competent officer, (c) by authority of law, and that it is matter of record. (d) He must also show a breach of it, for otherwise the defendant will not be liable; and a variance between the recognizance described in the writ or declaration will be fatal. (e)

3720. Under the plea of *payment*, the defendant may prove any facts of such payment to the plaintiff himself, or to his authorized agent, (f) and the mode of making it, may be by the actual payment of the cash, by giving another or higher security, where the parties agree that it shall be taken as payment; by the acceptance of the bill or note of a third person, unless such note may have been taken as a collateral security; or by the receipt of goods instead of money. (g) But

(a) *Eichelberger v. Smyser*, 8 Watts, 181; *Porter v. Brisbane*, 1 Brev. 456; *Giles v. Shaw*, 1 Breese, 169.

(b) *Bibbins v. Noxon*, 4 Wend. 207.

(c) *Long v. State*, 3 Blackf. 344; *Andress v. State*, 3 Blackf. 108.

(d) *Bridge v. Ford*, 4 Mass. 641; *Albee v. Ward*, 8 Mass. 79; *Green v. Dana*, 13 Mass. 493.

(e) *Dangerfield v. The State*, 4 How. Miss. 658.

(f) 2 Greenl. Ev. § 518.

(g) 2 Greenl. Ev. § 519—526.

in general, matter amounting to a discharge or legal payment of a recognizance, cannot be given in evidence under the plea of payment; such matter should be specially pleaded.(a)

## SECTION 6.—OF THE TRIAL AND JUDGMENT.

3721.—1. The *trial*, when the issue is on the *record*, is by inspection of the record, and such issue is not referred to a jury; it is for this reason that the plea of *nul tiel record* must not conclude to the country. Upon the production of the alleged record, the judges inspect it, and upon finding it regular in all respects, give judgment for the plaintiff; if, on the contrary, it does not correspond with the description of it, in the *scire facias* or the declaration, and there is a material variance between them, then, as the plaintiff has not supported the issue on the record by proof, the judgment is given for the defendant.

When there are several pleas, some concluding to the country, and also a plea of *nul tiel record*, the former must be tried by a jury, and the latter by the court. If it appears that the parties went to trial generally, and a judgment was rendered for the plaintiff, the supreme court will presume that the issues were respectively decided by the proper tribunal.(b)

3722.—2. The *judgment* on a *scire facias* on a judgment, should be, that “the plaintiff have execution of the debt or damages, etc. in the *scire facias* mentioned.”(c)

(a) *Heirs v. The State*, 1 Harring. 190.

(b) *Baxter v. Graham*, 5 Watts, 418.

(c) *Murray v. Baker*, 5 B. Munr. 172; *Tindall v. Carson*, 1 Harr. 94. See, as to the form of entering a judgment on the *scire facias* in Pennsylvania, under the act of 1798, *Meason's Estate*, 5 Watts, 464; *Breden v. Agnew*, 8 Penn. St. R. 233; *Fries v. Watson*, 5 S. & R. 222.

**BOOK V.—OF EQUITY.**

3723. In the preceding books we have considered the nature of legal rights, and the redress for the injury to those rights; in the present will be examined the nature of equitable rights and equitable remedies. These two systems of rights and remedies, though very different, form but one grand system for the administration of justice. In some countries legal and equitable remedies are administered by the same tribunal, and some of the American states administer justice in this manner; while in others the two jurisdictions are kept entirely separate. In all, however, the principles of equity are the same, in whatever way they may be administered. This book will be divided into two parts, which will treat, first, of the nature and principles of equity; and, secondly, of the remedies and proceedings in equity.

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**PART I.—OF NATURE AND PRINCIPLES OF EQUITY.**

3724. There is a kind of equity which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono*; this is called *natural equity*. It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range, that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the

policy of attempting to give a legal sanction to duties of imperfect obligations, such as charity, gratitude or kindness.

Differing altogether from this, there is another kind, called *civil equity*.<sup>(a)</sup> This is deduced from and governed by such civil maxims as are adopted by any particular state or community. This will alone form the subject of this book.

*Civil equity* may be taken in two senses in jurisprudence. It is, in the first place, that rule of right which determines the decision of a judge, when he has to follow the strict rule to which he is obliged to conform by the requirements of the law ; and, secondly, which

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(a) Doctor Ayliffe, in his *Pandects of the Civil Law*, Book 1, title 7, p. 37, 38, says: " Now, equity is two-fold, viz. natural and civil. I call that by the name of natural equity, which depends on, and is supported by natural reason ; and that I call civil equity, which is deduced from, and governed by such civil maxims, as are adapted to the state of any commonwealth, whether it be Roman or any other whatsoever. Civil and natural equity do sometimes clash and interfere with each other, and civil equity prevails over the other, as in *usucapions*, and the like. Some have divided equity into a written and an unwritten equity ; but this division I shall not meddle with in this place, having taken notice of it elsewhere. Equity not only corrects a law which savors of iniquity, or when the law in such a particular case commands an act which is founded upon iniquity ; but also when it commands a thing, which is too difficult and hard to be fulfilled ; as when it commands fasting, and sickness would ensue to the person that thus fasts in compliance with the law ; for in each case the law is or may be peccant, by commanding an evil, or a thing immoderately severe. Therefore, in both these cases the judge ought to pass by the words of the law, and to follow the intention of the legislator, which is not presumed to be unjust, or cruel. Equity has place not only in affirmative, but also in negative precepts. As for example, there is a general prohibition in the laws of England, that it shall not be lawful for any one to enter into another's freehold, without leave of the owner, or without authority of law ; yet this exception lies in equity from the said prohibition, according to reason, viz : if a man drives beasts on the highway, and they happen to get into his neighbor's corn, and he, to bring the said beasts out again, that they do not any hurt, goes into the ground and fetches them out, he may, in this case, justify his entry into the ground by law. Again, notwithstanding the statute of Edward the Third, whereby it is ordained, that no man shall upon pain of imprisonment give any alms unto any sturdy beggar, that is well able to labor ; yet, if a man meets with a sturdy beggar in very cold weather, and so lightly apparelled, that if he has not clothes given him, he must probably perish with cold, and he gives him clothes to save his life, he shall be excused."

is its true technical meaning, it is justice exercised, not according to the rigor of the law, but softened and moderated, so as to attain the views of the legislator; (a) it is to correct the law when it is defective, by reason of its universality. (b)

Law is nothing without equity, and equity is every thing, even without law. Those who perceive what is just and what is unjust only through the eyes of the law, never see it as well as those who behold it with the eyes of equity. Law may be looked upon, in some manner, as an assistance for those who have a weak perception of right and wrong, in the same way that optical glasses are useful to those who are short sighted, or whose visual organs are deficient. Equity, in its true and genuine meaning, is the soul and spirit of the law; positive law is construed, and rational law is made by it. (c)

When, in certain cases, the law is clear, it would be doing iniquity to depart from it, under the pretext of tempering and modifying its dispositions by particular principles of greater equity; otherwise the law, established to give to judges an invariable rule for their

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(a) Treat. of Eq. B. 1, c. 1, s. 3: "Equity, as it stands for the whole of natural justice, is more excellent than any human institution; neither are positive laws, even in matters seemingly indifferent, any further binding than they are agreeable to the law of God and nature. But the precepts of the natural law, when enforced by the laws of man, are so far from losing any thing of their former excellence, that they thence receive an additional strength and sanction; yet as the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases which cannot be determined by them; for there can be no finite rule of an infinite matter perfect. So that there will be a necessity of having recourse to the natural principles, that what was wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law; and seems to bear something of the same proportion to it in the moral, as art does to nature in the material world. For, as the universal laws of matter would, in many instances, prove hurtful to particulars, if art were not to interpose, and direct them aright: so the general precepts of the municipal law would oftentimes not be able to attain their end, if equity did not come in aid of them."

(b) 1 Woodes. Lect. 193; Taylor's Civ. Law, 91; Dig. 50, 17, 85 et 90; Code, 3, 1, 8.

(c) 3 Bl. Com. 329.



## RULES AND MAXIMS IN EQUITY.

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conduct, would have nothing certain, and the citizens would in vain repose under the shadow of its dispositions.

Equity is not an arbitrary opinion of the judge, it is subject to *certain and fixed rules*; for, unless it be directed by science, it becomes uncertain and unknown, and, in such case, the magistrate must tremble while sitting in the temple of justice. His mind will wander in pursuit of a phantom of equity purely imaginary. Frequently, what appears just to one man, seems unjust to another, and yet both act in good faith; each sustains the side he has adopted, apparently with arms of equal power, which renders it extremely difficult to whom to award the victory. But equity, like truth, is but a unit; it must manifest itself by its own power, and it is never better seen than through the medium of the law. There, it is made manifest, and it may be adopted without fear of a mistake; because the law must be considered as the wisdom and foresight of the legislator, and he is presumed to have studied equity, and embodied it in his work.

To classify our inquiries, this part will be divided into four titles: 1, of general rules and maxims in equity; 2, of the assistant jurisdiction of courts of equity; 3, of the concurrent jurisdiction of courts of equity; 4, of the exclusive jurisdiction of such courts.

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### TITLE I.—GENERAL RULES AND MAXIMS IN EQUITY.

#### CHAPTER I.—GENERAL RULES.

3725. Before we proceed to inquire in what cases courts of equity exercise jurisdiction, it will be proper to take a short view of the nature of equity, and the maxims by which it is governed.

Courts of equity are bound by the laws as much as courts of law, the difference is this: when the law is

clear and beyond a doubt, both must obey it, and enforce its mandates ; but the legislator cannot foresee all cases which may arise ; in cases of this kind many that happen may fall, if not within the letter, within the spirit of the law. These cases, thus out of the letter, are often said to be within the equity of the statute ; and cases within the letter, are frequently out of the equity. Equity, in cases of this kind, is nothing but a sound interpretation of the law. Both courts of law and courts of equity are, however, bound by the same rules of interpretation.

A court of equity is bound by rules and precedents, from which it will not depart, although the reason of some of them may not be quite clear. It is true such a court has a discretion, but that discretion is a science, and not an arbitrary act ; it is governed by rules of law and equity, which are not to oppose, but each, in its turn, is subservient to the other, and they are bound by precedents equally with a court of law.(a)

Formerly, no doubt, the administration of equity in England was arbitrary, and the boundaries of the jurisdiction of courts of equity were not strongly marked ; it was perhaps true what Selden said of them : “ For law we have a measure,” he says, “ and know what to trust to ; equity is according to the conscience of him that is chancellor ; and as that is larger or narrower, so is equity. ’Tis all one, as if they should make a standard for the measure, the chancellor’s foot. What an uncertain measure would this be ! One chancellor has a long foot ; another, a short foot ; a third, an indifferent foot. It is the same thing with the chancellor’s conscience.”(b)

In modern times, however, courts of equity have no more discretionary power to depart from principles than courts of law. They decide new cases, as they

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(a) Rook’s case, 5 Co. 99, b ; 3 Bl. Com. 432.

(b) Selden’s Table Talk, tit. Equity ; 3 Bl. Com. 432, note *y*.

arise, by the principles on which former cases have been decided; and may thus illustrate or enlarge those principles. But the principles are as fixed and certain, as the principles on which courts of common law proceed.(a)

The principal difference between these courts, consists in the different modes of administering justice in each: in the mode of proof, the mode of trial, and the mode of relief. This will more fully appear when we come to treat of the form of the remedies in equity, in the second part of this book.

CHAPTER II.—MAXIMS IN EQUITY.

3726. Maxims are rules or principles of law universally admitted, as being just and consonant with reason. They are something like axioms in geometry.(b) Many maxims are merely the statement of principles in short and pithy sentences, which claim the assent of mankind. These existed before the law, for it has been well observed, nations have been found

(a) Bond v. Hopkins, 1 Sch. & Lef. 428.

(b) 1 Bl. Com. 68; Co. Litt. 11, 67. Duval, in *Le Droit dans ses Maximes*, ch. 8, p. 65, gives a very animated description of the use of Maxims. He says, "La maxime, partout présente, offre à la fois des points d'appui à la mémoire, des conseils aux législateurs, des secours à la loi, des flambeaux aux jurisconsultes, des argumens au barreau, des motifs aux juges. Elle sert en même temps la science et la pratique, la loi et ses applications. *Ex regula*, dit Décius, dans son langage hardi, *non secius atque è tripode respondemus*. Du haut de la règle, comme d'un trépied sacré, nous rendons des oracles de droit et d'équité. La loi ne règle que quelques points; la maxime règne dans tout le droit. *Regula est deciduum totius juris*." The maxim, every where present, offers at the same time points of support to the memory, counsel to legislators, aids to the law, light to lawyers, arguments at the bar, motives to the judges. It serves at the same time science and practice, the law and its applications. *Ex regula*, says Decius, in his bold language, *non secius atque è tripode respondemus*. From the height of the rule, as from a sacred tripod, we dispense the oracles of law and equity. The law regulates only some points; maxims reign over all the law. *Regula est deciduum totius juris*.

without laws, none without maxims.(a) Such maxims may be considered as fragments of the natural law, which was promulgated at the beginning of the world. Of this kind are, *omne majus continet in se minus*;(b) *de non apparentibus et non existentibus eadem est ratio*, and the like. Other maxims derive their effect from the law, and have been adopted after the experience of ages; most of the examples we shall give in this chapter, are of this kind. Sometimes the law arises from the maxim, and the latter assumes the office of the former, hence the necessity of understanding them thoroughly.(c) “After having inspired the law, maxims remain and watch over it, and in its midst, somewhat like a lamp in the midst of the sanctuary, enlightening the points where the law applies, and showing those where it does not.”

3727.—1. The first is, that *he who will have equity done to him, must do equity to the same person*. An illustration of this maxim will be found in the case of a plaintiff who borrowed money upon usurious interest, and comes as complainant in equity, claiming to have the instrument given to secure the debt delivered up upon that ground; the court will require him to return the money he borrowed with lawful interest, before a decree can be made in his favor; but should the lender come into equity to compel the performance of the agreement, his bill will be dismissed as being in violation of a statute, and the defendant, who asks nothing, shall not be compelled to return the money.(d)

3728.—2. For the same reason, *he who has committed iniquity, shall not have equity*.(e) It would be manifestly unjust to permit a man who has committed iniquity toward the defendant, to come into chancery to compel

(a) Duval, *Le Droit dans ses Maximes*, 9.

(b) *Dig.* 50, 17, 110.

(c) *Dig.* 50, 17, 1.

(d) See *Francis' Max.*, *Max.* 1.

(e) *Francis' Max.*, *Max.* 2.

him to do equity to him. Thus, in cases of illegal contracts, where the plaintiff has put his property in the hands of another, for the purpose of defrauding his creditors, and he seeks a remedy in equity to be restored, his claim will be dismissed upon the ground that he has done iniquity; for, *in pari delicto melior est conditio possidentis*, is a maxim which applies in equity as well as at law.(a)

3729.—3. It is a maxim, that *equality is equity*.(b) In the settlement of accounts of contribution between co-contractors and sureties; in cases of abatement of legacies where the assets are insufficient; in cases of apportionment of incumbrances among different purchasers and claimants; and in cases where equitable assets are to be marshalled for distribution; this maxim applies.

3730.—4. *Equity suffers not a right without a remedy. Ubi jus ibi remedium.* This maxim, though generally, is not universally true. For example, where a judgment has been rendered at law, under all the circumstances of the case, equity will not interfere, notwithstanding an accident or unavoidable necessity. “There are instances in which a court of equity gives a remedy, where the law gives none, but when a particular remedy is given by law, and the remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up, where the law leaves it, and extend it further than the law allows.”(c)

3731.—5. That *where there is equal equity, the law must prevail*, is a maxim which is generally true, for in such case, the defendant has an equal claim with the plaintiff, to the protection of a court of equity for

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(a) *Armstrong v. Toler*, 11 Wheat. 258; *Hannay v. Eve*, 3 Cranch, 244; *Broom's Max.* 325; *Holman v. Johnson*, Cowp. 341.

(b) *Francis' Max.*, Max. 3.

(c) Per Lord Talbot, *Heard v. Sanford*, Cas. Temp. Talb. 174.

his title, and the court will not interpose on either side. *In aequali jure melior est conditio possidentis.*(a)

3732.—6. It is also a maxim, *qui prior est in tempore, potior est in jure.* When the equities are in other respects equal, the party who has a precedency in time will, in those cases, gain the advantage.(b) But when the equities are unequal, then the preference will be given to the superior equity.(c)

3733.—7. *Equity looks upon that as done, which ought to be done.* Equity will, therefore, treat the subject as to collateral consequences and incidents, in the same manner, as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them.(d)

3734.—8. It is a maxim, that *the fund which has received the benefit should make satisfaction.* When a debt is due, secured by bond and a mortgage, the personal estate is the debtor in the first place, and the land is the security. On the death of the debtor intestate, the personal estate goes to his personal representative, and the land descends to the heir; the question then is, out of what fund shall the debt be paid? The answer is evident, the personal estate received the benefit, it must therefore make the satisfaction.

3735.—9. Upon a similar principle, it is a maxim that *satisfaction should be made to that fund which has sustained the loss.*(e) Where lands are appointed or conveyed to pay debts, the heir is entitled to have the land after the debts are paid.

3736.—10. One of the most common and general

(a) Mitf. Eq. Pl. 215; Jeremy on Eq. Jur. 285; 1 Madd. Ch. Pr. 170; 2 Treat. of Eq. B. 3, c. 3, s. 1; Story, Eq. Pl. § 604; 1 Story on Eq. § 57; Dig. 50, 17, 128.

(b) Dig. 50, 17, 98.

(c) Jer. Eq. Jur. 285.

(d) 1 Fonbl. Eq. B. 1, ch. 6, s. 9, note; Craig v. Leslie, 3 Wheat. 563.

(e) *Secundum naturam est, commoda cujusque rei eum sequi, quem sequentur incommoda.* Dig. 50, 17, 10.

maxims in equity is, that equity follows the law, *æquitas sequitur legem*. Whenever the rules of law are in terms applicable, courts of equity will adopt and follow them; or, when such rules are not directly applicable, in cases of an equitable nature, equity will adopt and follow the analogies furnished by the rules of law.<sup>(a)</sup>

3737.—11. It is a maxim, that *æquitas agit in personam*. Equity acts upon the person, and not upon things. In cases of injunction, the party is enjoined to do or not to do a particular thing. If the injunction is not obeyed, the defendant will be attached and imprisoned. At law the courts have no jurisdiction respecting disputes about land, unless such estate be within their jurisdiction, because the actions are local; in equity, on the contrary, where the courts have jurisdiction over the person, and do exercise it over things, they have jurisdiction, although the lands may be in another country.<sup>(b)</sup>

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TITLE II.—OF THE ASSISTANT JURISDICTION OF COURTS OF EQUITY.

3738. The jurisdiction of courts of equity is considered under three points of view: 1, when it comes in aid of a court of law, and it is then called *assistant jurisdiction*; 2, when courts of law and courts of equity have each of them jurisdiction, when it is denominated *concurrent jurisdiction*; and 3, when it is the only remedy of the party aggrieved, in which case it has *exclusive jurisdiction*.

The assistant jurisdiction of courts of equity is exercised to enable courts of law to do more complete justice. At law, it frequently happens that a party

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(a) 1 Story, Eq. Jur. § 64: 3 Woodes. Lect. 479, 482.

(b) Penn v. Baltimore, 1 Ves. sen. 444; Earl of Athol, 1 Ch. Cas. 221.

has rights which cannot be established in consequence of the forms used and rules adopted, which have a general tendency, however, to procure justice. When in consequence of those rules the party is likely to be defeated of his rights, he may in some cases apply to a court of equity for assistance to enable the courts of law to do complete justice. This is done, 1, by bill of discovery; 2, by eliciting testimony from third persons.

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CHAPTER I.—OF BILLS OF DISCOVERY.

3739. It not unfrequently happens, that when an action is brought, justice may be defeated for want of a knowledge of facts which exist, but which are exclusively within the knowledge of the parties, and which cannot be obtained, because it is a rule at law that the parties in such case cannot be examined. Equity then interferes, and the plaintiff may file a *bill of discovery*, so called because it prays for the discovery of facts within the knowledge of the person against whom it is exhibited, or of deeds, writings or other things in his custody or power.<sup>(a)</sup> In one sense, every bill, except a bill of certiorari, may in truth be said to be a bill of discovery, for every bill usually seeks a disclosure of circumstances relative to the case; but that commonly and emphatically distinguished by this appellation, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or other writings or things in his custody and power. The sole object of this bill being a particular discovery, when that is obtained by the answer, there can be no further proceedings upon it.

There is a marked difference between a bill of discovery and a bill to perpetuate testimony, which will

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<sup>(a)</sup> Hinde's Pr. 20; Blake's Ch. Pr. 37; Jer. Eq. Jur. 257; 2 Story, Eq. Jur. § 1480; Mitf. Pl. 52; Coop. Eq. Pl. 58.

be considered in the next chapter. The former cannot be brought in many cases where the latter may. A bill of discovery cannot be brought where a penalty or a forfeiture of a public nature is involved; and, in cases which involve a penalty or forfeiture of a private nature, it cannot be maintained unless the party, entitled to the benefit of the penalty or forfeiture, waives it. With regard to a bill to perpetuate testimony, no such objection exists.<sup>(a)</sup>

This chapter will be divided into two sections: 1, by and against whom the discovery may be had; 2, of the nature of the discovery.

SECTION 1.—BY AND AGAINST WHOM A DISCOVERY MAY BE HAD.

3740. The plaintiff must have a legal title to the subject matter which is the object of the discovery; the defendant must have an interest in it; and the plaintiff must have a legal claim upon the defendant in respect to such subject matter as will form a fair action at law.

§ 1.—Of the plaintiff's title.

3741. The plaintiff must show, upon the face of the bill, that he has a *title* to the discovery which he seeks, or an interest in the subject matter to which the discovery is attached, capable of being established and vindicated in some other court;<sup>(b)</sup> unless the plaintiff's title be expressly admitted by the defendant, or impliedly confessed by him, as by his adopting a mode of defence which is held to be a tacit acknowledgment of the fact, or, in some instances, by his answering without denying it.<sup>(c)</sup> A mere stranger,

<sup>(a)</sup> Earl of Suffolk *v.* Green, 1 Atk. 450.

<sup>(b)</sup> Brown *v.* Dudbridge, 3 Bro. Ch. 321; Brownsword *v.* Edwards, 2 Ves. 243.

<sup>(c)</sup> Mountford *v.* Taylor, 6 Ves. 788; Marsden *v.* Panshall, 1 Vern, 407.

therefore, cannot maintain a bill for discovery of the title of another person.(a)

§ 2.—Of the defendant's liability.

3742. The plaintiff must also show that the defendant has *some interest* in the matter in dispute, for if he be a mere witness, he cannot be made to answer such a bill, because he can be compelled to give testimony in court.(b) But if a person originally disinterested, should become implicated in a transaction by his fraud or practice, he will be held liable for costs, and to that extent, interested.(c) A corporation is an exception to the general rule that where the defendant has no interest he need not answer and make the discovery; because the answer given by a corporation is under the corporate seal, and not upon oath,(d) and the discovery must be made by some officer under oath.(e)

§ 3.—Of the right of the plaintiff against the defendant.

3743. Not only must the plaintiff have a right, and the defendant be liable, but the plaintiff must have a right *against* the defendant. A discovery will not be compelled for the mere gratification of curiosity, but in aid of some proceeding.(f) And although both the plaintiff and defendant may have an interest in the subject, to which the discovery required is supposed to relate, yet when there is no privity between them, a discovery will not be enforced.(g)

Commonly, the application for a discovery is made

(a) See *Rondeau v. Waytt*, 3 Bro. Ch. Cas. 154; *Coop. Eq. Pl.* 58; *Mitf. Pl.* 189; *Jer. Eq. Jur.* 258.

(b) *Heyes v. Exeter College*, Oxford, 12 Ves. 343.

(c) See *Dummer v. Chippenham*, 14 Ves. 254.

(d) *Anon.* 1 Vern. 117; *Wych v. Meal*, 3 P. Wms. 310.

(e) 14 Ves. 254.

(f) *Kardale v. Watkins*, 5 Madd. 18.

(g) *Story*, Eq. Pl. § 571.

in aid of an action really pending, in which case a bill will lie for a defendant at law, for the purpose of defence,(a) as well as on the part of the plaintiff to support and substantiate his case.(b) But it is not indispensably necessary that the action should have been commenced; for where there is a *prima facie* ground for such proceeding, the court will compel a discovery in aid of an action to be brought thereupon,(c) except in the case of a common informer, who must first bring an action, for, until then, he has no right.(d)

SECTION 2.—OF THE NATURE OF THE DISCOVERY.

3744. Whenever the plaintiff can show a title to the subject matter in himself, and also an interest in the defendant, and an apparent legal right against the latter concerning it, which cannot be enforced without the aid of a discovery, a court of equity will compel it.

3745. But to this general rule there are many exceptions, among which may be mentioned the following:

1. The discovery must not be of a nature to endanger the defendant's title; for it does not follow that because a person is unable to substantiate every particular in the deduction of his title, which may be necessary to relieve it from doubt or defect, he may not possess the best title, and be in fact the owner. A plaintiff has a right to a discovery of what appertains to, or is necessary for his own title; and he has no right to pry into that of his adversary.(e)

2. It must not be immaterial or unnecessary, for in

(a) *Bishop of London v. Flytche*, 1 Bro. C. C. 96; *Andrews v. Berry*, 3 Anstr. 634.

(b) *Finch v. Finch*, 2 Ves. 491, 492.

(c) *Moodly v. Moreton*, 1 Bro. C. C. 469.

(d) See *Mynd v. Francis*, 1 Anst. 5.

(e) *Coop. Eq. Pl.* 97; *Hare on Discov.* 183 to 194; *Wigram on Discov.* 21, 111, 147.

this case it will not be enforced, as there could be no reason for compelling the defendant to make it.(a)

3. It must be of a nature that, if made it will not subject the defendant to pains, penalties, or forfeitures; because a court of equity will aid only in cases of civil, and not of a criminal nature, no man being bound to accuse himself.(b)

4. The discovery must not be for the attainment of an object which is illegal or *contra bonos mores*.(c)

5. A bill of discovery will not be entertained to assist another court, when the latter is, of itself, competent to grant relief.(d)

6. A discovery will not be compelled when it is against the policy of the law, in consequence of the particular relations of the parties. A bill filed against a married woman, to compel her to disclose facts which may charge her husband, will be dismissed.(e) Nor can a bill of discovery be sustained against one who has derived his information in the confidence reposed in him as counsel, solicitor, attorney or arbitrator, whose secret is the privilege of the client.(f)

7. Nor will such a discovery be compelled by or against persons who are not parties at law.(g)

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## CHAPTER II.—OF ELICITING EVIDENCE FROM THIRD PERSONS.

3746. In the preceding chapter we have considered the mode of obtaining the assistance of a court of

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(a) *Finch v. Finch*, 2 Ves. 491; *Anon.* 2 Ves. 451.

(b) *United States v. Bank of Virginia*, 1 Pet. 100, 104; 1 Madd. Ch. Pr. 173; *Cooper's Eq. Pl.* 191, 192; *Jer. Eq. Jur.* 265; 2 *Story Eq. Jur.* § 1494.

(c) *Cousins v. Smith*, 13 Ves. 542.

(d) *Gelston v. Hoyt*, 1 John. Ch. 547.

(e) *Cooper's Eq. Pl.* 196; *Le Texier v. Margrave of Anspach*, 5 Ves. 322; *S. C.* 15 Ves. 159.

(f) *Greenough v. Gaskell*, 1 Myl. & Keen, 100; *Preston v. Carr*, 1 Yo. & Jar. 175; *Hare on Discov.* 174; *Story, Eq. Pl.* 599, 600.

(g) *Glyn v. Soares*, 3 M. & Keene, 450, 469; *Story, Eq. Pl.* § 569.

equity, to obtain the facts from the parties in order to found a judgment, this will be the subject of the means of obtaining testimony from those who are not parties.

It not unfrequently happens that persons who can testify, cannot be present at the time of trial, and whose testimony would be lost, if it could not be taken before that period, and thus justice would be defeated. There are two modes of securing such evidence; the first by filing a bill praying that the testimony of the witnesses be taken *de bene esse*, and the other praying that the testimony may be taken *in perpetuam rei memoriam*. There is a considerable difference between the two cases. The court gives aid of the former kind generally, when the party seeking it is plaintiff or defendant in an action pending, or intended; and of the latter kind, when the party applying for it is in possession, but anticipates litigation, and an aggression upon his enjoyment at a future time, when his adversary shall have gained sufficient advantage by delay, or where he is out of possession, and has no present right to bring an action, or is prevented by the opposite party, as by injunction, from bringing such action. (a) In the first case, or when the testimony is taken *de bene esse*, it cannot be read at law, unless it has been proved that the witness is unable personally to attend; but such is not the rule when the testimony has been perpetuated. (b) There are two classes of cases where this testimony may be taken: 1, when a suit or action has been brought, and then the witnesses are examined *de bene esse*; and, 2, before any action has been commenced, and then a bill is filed to perpetuate the testimony.

SECTION 1.—OF THE EXAMINATION OF WITNESSES *de bene esse*.

3747.—1. When a witness resides abroad, out of

(a) Duke of Dorset *v.* Girdler, Prec. Ch. 531; 1 Sim. & Stu. 89.

(b) — *v.* —, 2 Ves. sen. 496, 498; Morrison *v.* Arnold, 19 Ves. 671.

the jurisdiction, and refuses to attend, the court of chancery has always exercised the power of issuing a commission to the judge of some foreign jurisdiction, where a witness resides, requesting him that in furtherance of justice, he will, by the proper and usual process of his court, cause certain witnesses to appear before him, or some other competent person, by him for that purpose to be appointed, at a particular time and place, to take the depositions of such witnesses.(a)

3748.—2. When the witness is aged, as of the age of seventy years and upward, the court of chancery will issue a commission, of course, to take the deposition of the witness.

Depositions, under these commissions, are taken *de bene esse*, that is, they shall be deemed to be well taken for the present, or until an exception or other avoidance, that is, conditionally, and in that meaning the phrase is usually accepted. If the witness can be had on trial, he must be produced.(b)

#### SECTION 2.—OF PERPETUATING TESTIMONY.

3749. There are several classes of cases where there is danger of losing the testimony of witnesses; first, where a party is out of possession, and whose right of possession has not yet accrued, and therefore he cannot bring suit; and, secondly, where the party is in possession, and he anticipates proceedings against him, upon a present apparent right, but the power of commencing suit lies in his adversary, who postpones, or may delay the attempt of investigation until the party in possession shall have lost the means of defence, by the death of his witnesses. In these cases, a court of chancery interferes by taking the proper

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(a) In the United States, the common law courts are generally authorized to issue commissions to take depositions in civil cases. 1 Greenl. Ev. § 321. See ante, B. 4, t. 8, c. 11, s. 3, § 3, branch 1, art. 3, n. 4.

(b) See 1 Greenl. Ev. § 320.

means of securing the evidence of the witnesses by having it reduced to writing, and properly made of record, which is called the *perpetuation of the testimony*. This is by a bill setting forth the nature of the interest of the parties, and the subject of future litigation; to this bill the defendant may set up his defence. These will be separately examined.

§ 1.—Of the form of the bill.

3750. It must name the parties having an interest, and state particularly the matter touching which the plaintiff is desirous to acquire evidence, so that the interrogatories on both sides may be directed to the true merits of the controversy. (a) It should show that the plaintiff has some interest in the subject matter which may be endangered, if the testimony in support of it should be lost; (b) it must also state that the defendant has, or pretends to have, or that he claims an interest to contest the title of the plaintiff in the subject matter of the proposed testimony. (c) The bill must also show some necessity or ground for perpetuating the evidence; as that the facts to which the testimony of the witnesses proposed to be examined relates, cannot be immediately investigated in a court of law; or, if they can be investigated, the sole right of bringing an action belongs exclusively to the other party; or some other cause which shows clearly that the plaintiff cannot otherwise secure his testimony, which is in danger of being lost. (d) Such a bill must also show the right in which it is brought, and it should be described with reasonable certainty, so as to point the proper interrogatories on both sides; for example,

(a) *Bartlet v. Hawker*, Mad. Ch. 157; *Coop. Eq. Pl. 53*; *Mitf. by Jer. 52*; *Story, Eq. Pl. § 300*.

(b) *Coop. Eq. Pl. 52*; 2 *Story on Eq. § 1511*; *Mason v. Goodburne*, Rep. Temp. Finch, 391.

(c) *Mitf. by Jer. 53*; *Coop. Eq. Pl. 56*; 1 *Mont. Eq. Pl. 271*; *Dursley v. Fitzhardinge*, 6 Ves. 260.

(d) *Story, Eq. Pl. § 303*; *Mitf. by Jer. 52, 148*, and note (y).

when the bill is brought to perpetuate the testimony of witnesses touching a right of way, the bill should state the *termini* of the way, and the *per et trans*, as exactly as in a declaration.(a) And when the bill seeks to perpetuate the testimony of witnesses to a will, it should set forth the whole will.(b) The bill should pray leave to examine witnesses touching the matter stated, to the end that their testimony may be taken and perpetuated; and it should also pray for a *subpœna*. But care must be taken to confine the prayer to the object of the bill, and not to pray for relief, or that the defendant may abide such order and decree as the court may make, which would make it a bill praying relief, and, for that cause, demurrable.(c)

§ 2.—Of the interest of the parties.

3751. To entitle the plaintiff to a bill to perpetuate testimony, he must show that he has an interest in the subject matter in dispute, but the amount of his interest, if actually a present interest, however small in value, and however distant the possibility of possession, and whether it be vested or contingent, is altogether unimportant.(d) But a mere expectation is not sufficient; and, therefore, the next of kin, or heir apparent of a person living, although the latter be a lunatic, has not such an interest as will support such a bill.(e)

§ 3.—Of the subject matter of future litigation.

3752. The property respecting which the testimony of witnesses may be perpetuated may consist of hereditaments, not merely those which are corporeal, but those which are incorporeal. With respect to personal

(a) *Gell v. Hayward*, 1 Vern. 312; Coop. Eq. Pl. 56; Welf. Eq. Pl. 145.

(b) Wy. Pr. Reg. 74; Story, Eq. Pl. § 305; Welf. Eq. Pl. 145.

(c) Story, Eq. Pl. § 306; Coop. Eq. Pl. 52; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

(d) *Dursley v. Fitzhardinge*, 6 Ves. 260; *Allan v. Allan*, 15 Ves. 135.

(e) 6 Ves. 260; *Sackvill v. Ayleworth*, 1 Vern. 105.

demands, it is not easy to say in what cases a bill to perpetuate testimony will be sustained.<sup>(a)</sup>

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TITLE III.—OF THE CONCURRENT JURISDICTION OF COURTS OF EQUITY.

3753. The *concurrent* jurisdiction of courts of equity is that which is exercised on subjects over which courts of law have also a jurisdiction.

In the proceedings in courts of law, owing to the nature of the subject, and the forms through which remedies at law are administered, it not unfrequently happens that there is a failure of justice. In cases where those courts cannot give adequate relief, courts of equity assume a jurisdiction, which is said to be concurrent. The modes of administering justice, in those cases where courts of law have a concurrent jurisdiction with courts of equity, afford either a peculiar or a general remedy. This title will be divided into three chapters, treating, 1, of the peculiar remedies in equity; 2, of the general remedies; 3, of remedies in particular cases.

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CHAPTER I.—OF THE PECULIAR REMEDIES.

3754. These peculiar remedies are either to secure justice to the parties, by certain proceedings introductory, and in some manner assistant to its own decisions, and by certain modes of effectually conferring its own measure of relief; or to prevent injustice by means of certain effective processes.

SECTION 1.—OF THE PECULIAR REMEDIES TO SECURE JUSTICE.

3755. These peculiar remedies consist in references

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<sup>(a)</sup> *Earl of Suffolk v. Green*, 1 Atk. 450.

to masters in chancery, and in directing trials and issues in courts of law.

§ 1.—Of references to masters.

3756. When a court of equity feels itself incompetent to grant complete relief, without some preliminary information, a reference is made to a master, who has power to procure such information, for the purpose of satisfying the conscience of the court.

The matters which are usually submitted to a master consist of matters of accounts, which it may be necessary to examine and settle in the progress of a cause; the investigation of claims upon property in suit, to admit those which are equitable and to reject others; to examine the title to estates, and to settle conveyances; to make sale of property, and to inquire into the propriety of granting leases, felling timber, or making repairs; the propriety of appointing new trustees of property, guardians of infants, and committees of idiots and lunatics.(a)

To facilitate inquiries and to render them more effectual, the master is generally authorized to examine witnesses and even the parties in the cause, upon interrogatories. The parties who have an interest, have a right to have a notice of the time and place of examination; and it seems to be a general rule that all persons interested, either in the estate or fund in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund; thus all parties entitled to a distributive share of a residue have a right to attend on those proceedings which tend to increase or diminish the residuary fund.(b)

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(a) Jer. Eq. Jur. 294.

(b) 2 Dan. Ch. Pr. 801.

After having heard the parties, their proofs and allegations, the master makes his report, which is his certificate to the court, how the facts or matters referred to him are or do, upon an examination, appear to him, or of something of which it was his duty to inform the court.<sup>(a)</sup> To this report exceptions may be filed, and, if well founded, the report will be set aside; on the contrary, if they are not sufficiently valid, the report will be confirmed, and the court will found a final decree upon it.<sup>(b)</sup>

§ 2.—Of issues directed to courts of law.

3757. When questions of legal or equitable title, of law or of fact, arise in the course of proceedings in equity, and they are of great importance, the court will not undertake to determine them; it will direct a trial at law, and, upon the result of that trial, will, in general, found its decree.<sup>(c)</sup> As no jury can be summoned to attend the court of equity, the matter directed to be tried at law, is tried in another court. The point which thus occurs, may be the proper subject of a trial, or it may be a mere question of law or fact. In the former instance, the court of equity, with the consent of all the parties, will direct, and when there is no such acquiescence, will sometimes allow an opportunity for such an action to be brought to try the question at law; in the latter case it will direct a feigned issue,<sup>(d)</sup> the nature of which has already been considered.<sup>(e)</sup> In the case of an issue upon a point of law, it is brought before the common-law judges on a demurrer; and if speed be required, a

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<sup>(a)</sup> Pract. Reg. 377.

<sup>(b)</sup> See, as to references to a master, 2 Daniell's Ch. Pr. 789 to 963; Jer. Eq. Jur. 293.

<sup>(c)</sup> 2 Story, Eq. Jur. § 1478; 3 Bl. Com. 452.

<sup>(d)</sup> Jer. Eq. Jur. 295.

<sup>(e)</sup> Ante, B. 4, tit. 8, c. 8, s. 3, § 2, a. 4, n. 3014.

*consilium*, that is, a special day will be appointed, for the purpose of hearing the argument.(a)

There is one class of cases where the courts of equity will never decide without a decision first being had at law. This is the case of a will of real estate; when disputed, it must be ascertained whether it is the will of the testator or not, by a trial under a feigned issue.(b)

SECTION 2.—OF THE PECULIAR REMEDIES TO PREVENT  
INJUSTICE.

3758. These remedies will be cursorily considered. They consist of, 1, injunctions; 2, bills *quia timet*; 3, bills of peace; and 4, interpleader.

§ 1.—Of injunctions.

3759. An *injunction* is a writ specially prayed for in a bill, by which a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.(c)

3760. This writ is evidently borrowed from the Roman law. The *interdict*, in that system of jurisprudence, has a striking resemblance to an injunction. Interdicts, were certain forms or arrangements of words, by which the prætor ordered or forbid certain things to be done; particularly in what related to contests, or the possession, or quasi-possession, of something.(d)

In their most general division, they were prohibitory, or forbidding the party to do certain things; restitutory, or commanding him to restore certain things; or exhibitory, which commanded him to pro-

(a) Jer. Eq. Jur. 296.

(b) In perhaps all the states of the Union provision is made by statute for the trial of disputed wills.

(c) Eden on Inj. 9; 2 Story, Eq. Jur. § 861; 1 Madd. Ch. Pr. 126; Mitf. Pl. 124; Jer. on Jur. 306.

(d) Just. Inst, 4, 15.

duce the thing. The object of some was to acquire the possession to the complainant; that of others, to maintain him in the possession he had; and, that of the third kind, to put him into the possession which he had lost. They were also temporary or perpetual.

These interdicts related to the person;(a) to real corporeal property, and to servitudes or easements;(b) and to personal property.

Injunctions will be considered, 1, with regard to their kinds; 2, the parties upon whom they operate; 3, for what causes they will be granted; and 4, as to their effects.

*Art. 1.—Of the several kinds of injunctions.*

3761. As to their *object*, injunctions are of two kinds; the one is a *remedial* writ, and the other is a *judicial* writ. As to the *time* during which they are to operate, injunctions are temporary or permanent.

*1. Of remedial injunctions.*

3762. This kind of injunction, or remedial writ, is in the nature of a prohibition, directed to, and controlling, not the inferior court but the party; it is granted when the party is doing, or is about to do, an act against equity and good conscience, or to pursue a litigious or vexatious course. In these cases, the court will not leave the party to feel the mischief or inconvenience of the wrong, and in vain look for redress, but will interpose its authority to restrain such unjustifiable proceedings.

This kind of injunction may relate to stay proceedings in courts of law, or in some other court; or it may be unconnected with legal proceedings, as to

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(a) The interdict *de homine libero exhibendo*, which was in the nature of a writ of *habeas corpus*, was an injunction commanding a person who held another in confinement to bring him before the prætor. Dig. 43, 29, 1 et 3, § 1. Vide ante, n. 211, note.

(b) Dig. 43, 21, 1.

restrain the indorsement or negotiation of bills of exchange and promissory notes, or the sale of land, or the sailing of a ship, the alienation of a specific chattel, or the transfer of stock; to prevent the wasting of assets, or other property, pending litigation; to prevent a trustee from assigning the legal estate; to restrain waste to houses and to mines, timber, and other parts of the inheritance; to prevent the infringement of patents or the violation of copyrights; to suppress the continuance of public or private nuisances; and by the various modes of interpleader to restrain vexatious and multifarious suits, and to quiet possession before the hearing, to stop the progress of vexatious litigation. These are a few of the many purposes for which this writ is used. The object of this particular writ is to *prevent injuries*.

3763. Remedial injunctions are divided into two kinds; the common and the special.

1. An injunction is *common* when it prays to stay proceedings at law, and will be granted of course; as, upon an attachment for want of an appearance, or of an answer; or upon a *dedimus* obtained by the defendant to obtain his answer in the country; or upon his praying for time to answer, and in similar cases.<sup>(a)</sup>

2. A *special* injunction is obtained only on motion and petition, with notice to the other party, and is applied for, sometimes on affidavit before answer, but more frequently upon the merits disclosed in the defendant's answer. Injunctions before answer are granted in cases of waste, and other injuries of so urgent a nature, that mischief would ensue to the plaintiff were he to wait until the answer should be put in; but the court will not grant an injunction during the pendency or demurrer to the bill, for, until that be argued, it does not appear whether or not the court has jurisdiction of the cause. The injunction granted

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(a) Newl. Pr. 92; 13 Ves. 323; Eden on Inj. 95.

at this stage of the suit, is temporary only, and is to continue until answer, or further order, and no longer; the injunction obtained upon the merits confessed in the answer, continues generally till the hearing of the cause.

2. *Of the judicial writ of injunction.*

3764. The object of this writ is to *enforce a decree* for a specific performance, being in the nature of an execution, containing a direction to yield up, to quit, or to continue possession of houses and lands, followed by a writ to the sheriff, commanding him to deliver the possession.

3. *Of temporary injunctions.*

3765. An injunction is sometimes granted before answer, to continue till an answer is put in, or after the answer, and to last until the hearing; injunctions of this kind, which may be removed upon the happening of a future event, and which are not perpetual, are called *temporary injunctions*.

4. *Of perpetual injunctions.*

3766. A *perpetual* injunction is one which is final, and enjoins the party from doing certain things at any future time. This is granted when the court is of opinion at the hearing, that the plaintiff has established a case which entitles him to an injunction; or if a bill praying for an injunction is taken *pro confesso*, a perpetual injunction will be decreed.<sup>(a)</sup>

Although it is not easy to say in what cases a perpetual injunction will be granted, yet, it may be stated as a general rule, that it will be granted only in those cases where the defendant has no equitable or legal right.

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(a) Gilb. For. Rom. 194; Harr. Ch. Pr. 551; Knight v. Adamson, 2 Freem. 106.

The cases in which an injunction will be granted are so very numerous, that a statement of them all would be entering into greater detail than would be warranted by the plan of this work. A few of them will be noticed as instances when the power will be exercised.

3767.—1. A perpetual injunction will be granted upon the sentence of a foreign court, when such sentence is conclusive; as, where an action was brought against a person who had accepted a bill of exchange drawn upon him at Leghorn, and according to the law there, a suit having been instituted against him the acceptance had been vacated.*(a)*

3768.—2. Such an injunction will be granted to restrain proceedings on a satisfied judgment;*(b)* for the same reason that the plaintiff has no just claim, a perpetual injunction is granted to restrain a plaintiff who has a void judgment;*(c)* or to stay proceedings at law on a judgment bond obtained by fraud.*(d)*

3769.—3. When there have been repeated trials at law upon mere legal titles, perpetual injunctions have been granted to restrain repeated and vexatious litigation.*(e)*

3770.—4. Perpetual injunctions will be granted to prevent a multiplicity of suits; in a case where eight actions were instituted for the same cause, the chancellor, Lord Ellesmere, stayed them all by injunction, saying that it was barratry.

These examples are sufficient to show the nature of the cases where perpetual injunctions will be granted. Others will readily occur to the reader, and many more will be suggested when we come to consider the causes for which injunctions will be granted.

*(a)* Burrows *v.* Jemineau, Sel. Cas. 69; S. C. 2 Str. 733.

*(b)* Binkerhoof *v.* Lansing, 4 John. Ch. R. 69.

*(c)* Caruthers *v.* Hartsfield, 3 Yerg. 366.

*(d)* Kruson *v.* Kruson, 1 Bibb, 184.

*(e)* Mitf. Pl. 116; Earl of Bath *v.* Sherwin, Pr. in Ch. 261; Gilb. Eq. Rep. 2; 1 Bro. P. C. 266; Barefoot *v.* Fry, Bunb. 158.

*Art. 2.—Of the parties upon whom an injunction will operate.*

3771. All parties who reside within the jurisdiction of the court are the subject of an injunction, because the proceeding is *in personam*, and it is not material that the proceedings to be stayed have been instituted in another country. It is true that the courts of one country have no jurisdiction to regulate the proceedings of the courts of another country, because each is independent of the other, but the courts having jurisdiction over all persons and things within their own limits, they may act *in personam* upon those parties, and direct *them*, by injunction, to proceed no further in such suit. Without regard to the situation of the subject matter of the dispute, a court of equity will consider the equities between the parties, and decree *in personam* as to those equities, and enforce obedience to their decrees by process *in personam*.(a) Such a court will relieve in cases of contracts and other matters respecting lands in foreign countries, when the parties are within their jurisdiction.(b)

3772. In the United States, owing to the peculiar constitutional jurisdiction of the federal courts, they do not possess power to grant injunctions against proceedings, in actions instituted in the state courts; nor can the state courts grant injunctions against proceedings in the federal courts.(c) The latter may grant injunctions against suitors in the courts of the United States, and the state courts against those who have instituted proceedings in them; and each may do complete justice, without exercising the powers usually

(a) *Eden on Inj.* 176; *Archer v. Preston*, 1 Eq. Ab. 133; *Penn v. Lord Baltimore*, 1 Ves. 444; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Harrison v. Gurney*, 2 Jac. & Walk. 562; *Mead v. Merritt*, 2 Paige, 404; *Mitchell v. Bunch*, 2 Paige, 606; *Massie v. Watts*, 6 Cranch, 148. In this respect the interdict of the Roman law corresponds with the injunction, that both are personal in their effects. Dig. 43, 1, 1, § 3 et 4.

(b) *Eden on Inj.* 176; 2 Story, Eq. Jur. § 899.

(c) *Diggs v. Wolcott*, 4 Cranch. 179; *McKim v. Voorhes*, 7 Cranch, 279.

inherent in a court of equity, to compel persons within its jurisdiction to obey its mandates by a writ of injunction, when the proceeding is in a foreign court.

*Art. 3.—For what causes an injunction will be granted.*

3773. As a general rule it may be stated that a court of equity has no jurisdiction to grant an injunction to prevent a crime,<sup>(a)</sup> excepting to restrain a libel upon an infant, because he is under the protection of the court,<sup>(b)</sup> and excepting such cases of *public* nuisances as are more particularly injurious to particular individuals in the neighborhood, and also constitute *private* injuries.<sup>(c)</sup>

The principal injuries which may be prevented by injunction, relate, 1, to the person; 2, to personal property; or 3, to real property. These will be separately considered.

1. *Of injuries relating to the person.*

3774. The cases where an injunction will lie for a direct injury to the absolute rights of persons are not numerous. An injunction may be obtained to prevent a libel, on the ground of copyright, or to protect an infant, but it will not be granted on the ground that the libel is a crime.

But the court of chancery is more liberal in the grant of injunctions for injuries to the relative rights of persons; as between husband and wife, parent and child, and guardian and ward. It is particularly desirable, in those cases, to apply to that court for an immediate injunction. An injunction has been granted to a parent to prevent the marriage of his son, aged

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<sup>(a)</sup> *Holderstaffe v. Saunders*, 6 Mod. 12; *Lord Montague v. Dudman*, 2 Ves. sen. 396; 1 Madd. Ch. Pr. 126, note (*l*); *Eden on Inj.* 66; *Atty. Gen. v. Utica Ins. Co.*, 2 John. Ch. R. 378.

<sup>(b)</sup> *Gee v. Pritchard*, 2 Swanst. 413.

<sup>(c)</sup> *Mayor of London v. Bolt*, 2 Ves. jr. 129; *Atty. Gen. v. Cleaver*, 18 Ves. 211.

eighteen, and restraining communication with him until further orders.(a)

2. *For what injuries to personal property an injunction will be granted.*

3775. It has already been stated in general terms for what injuries to personal property injunctions will be granted. It will now be proper to consider for what particular cause they will be decreed. These are, 1, to prevent a partner from fraudulently issuing bills or circulating them; 2, to prevent attorneys from disclosing secrets; 3, to prevent the circulation of a note or bill; 4, to order deeds or other instruments to be delivered up; 5, to prevent breaches of a contract; 6, to prevent improper sale of property, or payment of a debt; 7, to prevent waste of personal property; 8, to restrain the sailing of a ship; 9, to forbid the infringement of copyrights and patents; 10, to stay proceedings in a court of law.

1° *Injunctions to restrain a partner from making and circulating bills.*

3776. When there is just ground to believe that a partner is about unjustly and fraudulently to make, issue, or circulate bills or notes, or to enter into contracts in the name of the firm, or that he will receive or misapply the assets, then, upon a bill being filed, charging these matters, and a proper affidavit being made, an injunction to prevent the same may be immediately obtained.(b)

2° *Injunctions against agents for breaches of duty.*

3777. Attorneys and agents may be restrained by injunction from issuing, circulating, or misapplying

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(a) 1 Mad. Ch. Pr. 348; *Pearce v. Crutchfield*, 14 Ves. 206; *Sherwood v. Sanderson*, 19 Ves. 282. But the infant must be a ward of chancery, 2 Atk. 535. He becomes such, however, by filing a bill as on his behalf, 1 Madd. Ch. Pr. 332.

(b) Story on Partn. § 259; *Collyer on Partn.* 234; *Hood v. Aston*, 1 Russ. 416; 1 Story, Eq. Jur. § 669; 1 Madd. Ch. Pr. 160.

bills or notes to the injury of their principals; and if the retainer of an attorney has been determined on account of his misconduct, an injunction may be obtained to restrain him from communicating to others the confidential secrets he learned in his official intercourse with his client.(a) But he will not be restrained from giving testimony respecting such matter, this being left to the court before whom he is called as a witness. An agent will also be enjoined from disclosing secrets he has learned in the course of his official employment.(b) And where a party had obtained a knowledge of certain recipes and remedies in confidence, he was restrained by injunction from communicating them and vending them, on the ground that he had obtained the knowledge of preparing them by a breach of trust.(c)

3° *Injunction to prevent the circulation of bills.*

3778. When a bill or note has been obtained fraudulently, or upon an illegal transaction, as at play, upon a bill filed charging these facts, supported by an affidavit, an injunction to *prevent the negotiating* or parting with the bill or note will be granted immediately upon filing the bill, and even before the service of the subpoena to appear;(d) or if a note be given by one immediately on his coming of age, for extravagant supplies made to him during his infancy, the negotiation may be restrained by injunction, and relief afforded.(e)

4° *Injunctions ordering deeds or other instruments to be delivered up.*

3779. A court of equity will order a party to *deliver*

(a) *Bear v. Ward*, 1 Jac. 77; 1 Madd. Ch. Pr. 160; *Earl Cholmondeley v. Clinton*, 19 Ves. 261; S. C. Coop. 89.

(b) *Evitt v. Price*, 1 Sim. 483; *Yoral v. Winyard*, 1 Jac. & Walk. 394; *Williams v. Williams*, 3 Mer. 157.

(c) *Yoral v. Winyard*, 1 Jac. & Walk. 394. But see 3 Meriv. 157.

(d) *Newman v. Franco*, 2 Anst. 519; — *v. Blackwood*, 3 Anst. 851; 1 Fonbl. Eq. 43; 1 Madd. Ch. Pr. 154; *Lloyd v. Gordon*, 2 Swanst. 180.

(e) *Brook v. Galby*, 2 Atk. 34.

up any deed or instrument which is void at law, or by statute, or when it has been satisfied.(a) The reason of this is, that leaving the deed or instrument in the hands of its possessor, would enable him at a future time, when the evidence of their invalidity had been lost, to set them up, or to cast a cloud upon a title.(b) But no such order or interference by chancery will be made, when the party affected by the deed or instrument has the power to revoke it.(c)

5° *Injunctions to prevent breaches of contract.*

3780. In some instances a court of equity will prevent the completion of the breach of a contract by *commission*, by an injunction; and an injunction will sometimes be granted to prevent its breach, by an act of *omission*, by decreeing a specific performance. But equity will not interfere when an adequate remedy may be had at law. When, however, the breach of *personal* contract is of considerable importance, and it would be productive of very considerable continuing or permanent loss, which could not be adequately compensated at law, then equity will interfere.(d) For example, where an author sold his copyright in a work, and covenanted not to publish any other to its prejudice, he was restrained by injunction from so doing.(e)

3781. When the contract relates to *real property*, and the breach might be permanently injurious, an injunction may be obtained; as when a lease contains a covenant to leave a certain amount of stock at the expiration of the lease, there may be an injunction to

(a) See *Mayor of Colchester v. Lawton*, 1 Ves. & Bea. 244; *St. John v. St. John*, 11 Ves. 535; 1 Madd. Ch. P. 225 to 233.

(b) 11 Ves. 535; 2 V. & Bea. 244

(c) *Coleman v. Sarrel*, 1 Ves. sen. 50; *Bromley v. Bromley*, 7 Ves. 28.

(d) Madd. Ch. Pr. 403; Newl. on Contr. 93; 1 Chit. Gen. Pr. 712.

(e) *Barfield v. Nicholson*, 2 Sim. & Stu. 1. See *Morris v. Colman*, 18 Ves. 437; *Clarke v. Price*, 2 Wils. Ch. R. 157; *Martin v. Nutkin*, 2 P. Wms. 266.

compel the observance, and such a remedy may be had also to prevent the pulling down of buildings and removing materials.(a)

6° *Injunctions to prevent an improper sale of property, or the payment of a debt.*

3782. An injunction to prevent the improper sale of property, or the payment of a debt, the right of which is in dispute, when it is threatened, or a sale is about to be precipitately made, may be obtained *ex parte*.(b)

7° *Injunctions to prevent waste of personal property.*

3783. A bill may be filed, and an injunction obtained, to prevent an executor or administrator from wasting, and sometimes from suing for, or receiving assets; and if persons are about to pay money to an insolvent executor, the court will restrain him from receiving it, and when the debtor colludes with him, he may be made a party to the bill.(c) In general, the courts are fully authorized by statute to remove executors or administrators, and compel them to give security.

8° *Injunctions to restrain the sailing of ships.*

3784. When a vessel is owned by several persons, and a majority of the part owners are desirous of employing her upon a particular voyage or adventure, they have a right to do so, upon giving security, in the admiralty, by stipulation to the minority, if required, to bring back and restore the ship to them, or in case of her loss, to pay them the value of their respective shares.(d) If this be not done, an injunction may be

(a) *Nutbrown v. Thornton*, 10 Ves. 161; *Mayor of London v. Hedger*, 18 Ves. 355.

(b) 1 Chit. Gen. Pr. 715.

(c) *Ullerson v. Mann*, 4 Bro. C. C. 277; *Elmslie v. Macaulay*, 3 Bro. C. C. 624.

(d) *Abbott on Shipp.* 70; 3 Kent, Com. 151, 4th ed.; 2 Bro. Civ. Law, 131; *Molloy*, B. 2, c. 1, § 3; 11 Pet. 175; *Story on Partn.* § 489.

obtained to restrain the *sailing of the ship*, until such security be given to the part owners.(a)

9° *Injunctions to prevent the infringement of copy and patent rights, and the publication of manuscripts and private letters.*

3785. Copyrights and patents for inventions are granted by the national government, and the remedies sought for their invasion must be found in the federal courts. These are given by the acts of the national legislature.

The act of congress(b) has provided for their security. It enacts that “all actions, suits, controversies and cases arising under any laws of the United States granting or confirming to inventors the exclusive right of their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit court of the United States, or any district court, having the powers and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed, by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity to prevent the violation of the rights of any inventor, as secured to him by the laws of the United States, on such terms and conditions as the said courts shall deem reasonable.” The courts of the United States have jurisdiction in equity to prevent, by injunction, the invasion of the rights of authors, or the unlawful publication of their manuscripts.

Courts of equity, having jurisdiction in these cases, will grant injunctions to prevent the violation of the rights of authors and inventors. Without this prompt and effective remedy, they would be liable to perpetual litigation and ruin, without ever being able to establish, finally, their undoubted rights.

An injunction will not, however, be granted in every case of a copyright or patent; for, when the copy-

(a) 1 Chit. Gen. Pr. 717; 2 Story, Eq. Jur. § 957.

(b) Act of July 4, 1836, s. 17.

right or the patent is new, and the claims of the complainant are denied, a court of equity will require the right to be ascertained by a trial in a court of law. But if, on the contrary, the patent has been granted for a considerable length of time, and the patentee has put the invention in public use, and has had such an exclusive possession as fairly raises a just presumption of an exclusive right, the court will grant an injunction pending the preliminary proceedings, and will give its ultimate decision on the final disposition of the cause. A similar rule is adopted in cases of copyright.(a)

3786. In the case of a copyright, an injunction will not be granted when the work is inconsistent with public policy, and of a *clearly* immoral, irreligious, libellous, or obscene description.

3787. Difficulties frequently arise in the case of piracy of books or the infringement of the copyright, as to what will have that effect. A fair abridgment of a work, and making use of the materials in the composition of a new work, which another has employed in writing, will not in general amount to such an infringement as to authorize the grant of an injunction.(b)

3788. The act of congress,(c) regulating copyrights, protects the rights of authors, citizens of the United States, to their manuscripts, and authorizes the courts of the United States to grant injunctions to prevent the violation of such rights, and to restrain the publication of such manuscripts. But, not only by virtue of this act of congress, but on equitable principles generally, courts of equity will restrain the publication of unpublished manuscripts; and numerous instances of such

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(a) *Hill v. Thompson*, 3 Meriv. 622; Jer. Eq. Jur. 316; 1 Madd. Ch. Pr. 113; *Eden on Inj.* 306; *Coop. Eq. Pl.* 154; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 705; 1 Chit. Gen. Pr. 718.

(b) 2 Story, Eq. Jur. § 940—942; Jer. Eq. Jur. 322.

(c) Act of Feb. 3, 1831, s. 9.

interference, where the court restrained the publication of such manuscripts, may be found.(a)

3789. Private unpublished letters, forming literary compositions, have been protected from publication, by injunction, upon the same principles which protect unpublished manuscripts;(b) the receiver of such letters is considered as having only a qualified right in them, and no authority to publish them without the writer's consent;(c) and there is no distinction between private letters of one nature, and private letters of another.(d)

10° *Injunctions to stay proceedings in a court of law.*

3790. When a plaintiff at law is proceeding against equity and conscience, an injunction will be granted to restrain him from further pursuing his legal remedy. He may be enjoined at any stage of his action. If the application be made in time, the injunction will restrain him from going to trial; if, after verdict, it will stay the judgment; if, after judgment, it will stay the execution; if an execution has been issued and the money has been made, the money will be stayed in the hands of the sheriff; or, if after a part has been made, any further proceeding will be enjoined.(e)

The injunction does not interfere with the court of law, nor prevent it in any manner from carrying out its judgment, or exercising in the fullest manner its jurisdiction. The writ is directed against the plaintiff, and the party against whom it is issued is alone liable

(a) See *Eden on Inj.* 322; *Webb v. Rose*, 2 Bro. P. C. 138, Toml. ed.; *Knaplock v. Curl*, 4 Vin. Ab. 278; 2 Ves. & Bea. 23; *Duke of Queensbury v. Shebbeare*, 2 Eden's R. 329; *Southey v. Sherwood*, 2 Meriv. 434; *Pope v. Curl*, 2 Atk. 342; 3 Swanst. 674; *Thompson v. Stanhope*, Ambl. 737.

(b) *Pope v. Curl*, 2 Atk. 342.

(c) *Lord Perceval v. Phipps*, 2 Ves. & Bea. 19; *Gee v. Pritchard*, 2 Swanst. 403.

(d) 2 Swanst. 418, 426, 427.

(e) *Albritton v. Bird*, R. M. Charl. 93. See *Lyles v. Hatton*, 6 Gill & John. 122; *Bell v. Cunningham*, 1 Sumn. 89.

to be punished for contempt in disobeying it. It is granted, not because the court of law has not jurisdiction, or that it will not lawfully exercise it, but because of certain equitable circumstances, of which the court of equity, granting the process, has cognizance, and it is against conscience that the party enjoined should further proceed in the cause.<sup>(a)</sup>

3791. The cases for which an injunction will be granted to stay proceedings at law are very numerous, the principal of which are to give relief in cases of accident, mistake or fraud. An instance or two under each of these heads, will illustrate the nature of these cases.

1. There are many cases where courts of law relieve from *accidents*; as the loss of deeds, mistakes in receipts and accounts, wrong payments, death, which renders it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be redressed even in a court of equity, as, if by accident a recovery is ill suffered, a contingent remainder destroyed, or a power of leasing omitted in a final settlement, equity can grant no relief.<sup>(b)</sup> Upon the ground of accident, an administrator who had committed a *devastavit* at law, by paying legacies, was relieved against a bond which had unexpectedly started up, the assets having been originally sufficient, but the greater part of them, which consisted of houses, were consumed by the great fire of London.<sup>(c)</sup> In a case of this kind, where the administrator was not in fault in the least, justice would require that the plaintiff should be enjoined.

2. When, owing to a *mistake*, a party loses an advantage at law, and he afterward can establish the fact in equity, the court will grant an injunction to prevent

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<sup>(a)</sup> Jer. on Jur. 338; 2 Story, Eq. Jur. § 875; Eden on Inj. ch. 2, p. 14.

<sup>(b)</sup> 3 Bl. Com. 431.

<sup>(c)</sup> Croft v. Lindsay, 1 Freem. R. 1. See Crosse v. Smith, 7 East, 246.

the injustice which the mistake has occasioned; as, where a party is sued upon a bond, after having paid it in full; and, in consequence of being unable to find the receipt for the money, the plaintiff obtains a judgment. Afterward, the receipt is unexpectedly found. In this case, at law, there is no remedy, but equity will give relief, upon a proper bill being filed, supported by proof, by granting a perpetual injunction.(a)

3. An injunction will be granted for *fraud*, because fraud vitiates every thing. If, for example, a judgment should be obtained at law, by the fraud of the plaintiff, for a larger sum than is justly due to him, upon a mutual agreement of the parties, that afterward a certain set off should be allowed, and deducted from the amount of the judgment; there would be no remedy at law, because the set off ought to have been made before the judgment was rendered; but upon a proper bill being filed, and proof made, a court of equity would give relief by granting an injunction to the extent of the set off.

3792. But there are cases where a court of equity will restrain the parties from proceeding at law, where there has been neither accident, fraud nor mistake, when the court acts upon grounds of a purely equitable and conscientious nature. The case of *marshalling securities* is of this kind. A court of equity will for this purpose control the rights and proceeding of creditors, and others at law, by an injunction. It is a rule that where one creditor has his debt secured upon two funds, and another only upon one fund, the latter has a right to restrain the former from proceeding against that fund which is alone liable for his debt, and compel him to resort to the other fund.(b)

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(a) Gainborough v. Gifford, 2 P. Wms. 424.

(b) Dorr v. Shaw, 4 John. Ch. R. 17; Lanoy v. The Duke of Athol, 2 Atk. 446; Aldrich v. Cooper, 8 Ves. 388; Wright v. Nutt, 1 H. Bl. 136; Foliott v. Ogden, 1 H. Bl. 123; S. C. in error, 3 T. R. 726; and in the House of Lords, 1 Bro. P. C. 111, Toml. ed. .

3793. The cases where a court will grant injunctions to stay proceedings at law are very numerous, and are almost infinite in the nature of their circumstances. In all such cases where by accident, mistake, fraud, or otherwise, a party has *an unfair advantage* in proceeding in a court of law, which must, of necessity, make such a court the unwilling instrument of injustice, a court of equity will grant an injunction to stay the unconscionable proceedings of the plaintiff at law.

3794. Not only will courts of equity grant an injunction to stay proceedings at law, but when the party is proceeding at law and in equity at the same time, for the same matter, chancery will compel him to make an election of the suit, in which he will proceed, and will stay proceedings in the other court.(a) An exception to this rule has been made in the case of a mortgagee, who has a right to proceed on his mortgage in equity, and upon his bond at law, at the same time.(b)

3795. The plaintiff will also be enjoined and restrained from proceeding at law, where the court of equity *has made a decree* for the same matter, even without a bill being filed by the defendant for that purpose, it being a contempt to proceed at law, after the subject of the cause has been attached in a court of equity.(c)

3. *For what injuries to real estate an injunction will be granted.*

3796. An injunction will be granted, to prevent, 1, an irreparable trespass; 2, waste; 3, nuisances and purpresture; 4, to compel the performance of lawful works in a lawful manner.

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(a) *Vaughan v. Welch*, Mosel. 210; *Anon.* Mosel. 304; *Mosher v. Reed*, 2 B. & B. 318; *Schoole v. Sall*, 1 Scho. & Lef. 176; *Rogers v. Vosburgh*, 4 John. Ch. R. 84; *Rees v. Parkinson*, 2 Anstr. 497.

(b) *Schoole v. Sall*, 1 Scho. & Lef. 176; *Eden on Inj.* 59.

(c) *Mosher v. Reed*, 1 B. & B. 318. See *Bill v. Body, Cary*, 70.

1° *Injunctions to prevent irreparable injuries by trespasses.*

3797. A court of equity will grant an injunction to prevent a party from committing *wasteful trespasses and irreparable damages*, as when a person either forcibly or wrongfully gets into and retains possession of land, or other tenements, and is digging mines, or committing other permanent injury.<sup>(a)</sup> For example, where a rail road company was authorized, by an act of the legislature, after certain acts were done by the company, to enter upon the lands of individuals, and appropriate such parts of the same as might be necessary for the road; and, before performing these acts, according to law, the agents of the company entered on the lands of the complainant, and commenced making the rail road through the same, the court granted an injunction restraining the company from further proceeding.<sup>(b)</sup>

2° *Injunctions to prevent waste.*

3798. One of the most useful concurrent remedies by a court of equity, exercised as a peculiar remedy, is the injunction to *prevent waste*. The remedy at common law was by obtaining a *writ of prohibition* from the court of chancery, which was considered as the foundation of a suit, between the party suffering the waste and the party committing it; and, after various proceedings and the case was put at issue, if, on trial, the defendant was found guilty, the plaintiff recovered single damages for the waste committed.<sup>(c)</sup> This proceeding originally could be instituted only against tenant in dower, tenant by the curtesy, and

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<sup>(a)</sup> *Livingston v. Livingston*, 6 John. Ch. R. 497; *Thomas v. Oakley*, 18 Ves. 184; *Field v. Beaumont*, 1 Swanst. 208; *Norway v. Rowe*, 19 Ves. 147.

<sup>(b)</sup> *Bonaparte v. The Camden and Amboy Rail Road Compay*, Bald. C. C. Rep. 231.

<sup>(c)</sup> *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120.

guardian in chivalry. It was extended by several statutes<sup>(a)</sup> to farmers, tenants for life, tenants for years, and some others. This remedy was very ineffectual. By the statute of Westminster second, the writ of prohibition was taken away, and the writ of summons was substituted in its place.

By another statute<sup>(b)</sup> a new remedy was given in the writ of waste or estrepement, pending the suit. This writ lay after judgment obtained in real action, before possession was delivered by the sheriff, to prevent the tenant from committing waste in the lands recovered.<sup>(c)</sup> This remedy by estrepement was applicable only to real actions, and when the mixed action of ejectment became the usual mode of trying title to lands, the writ of estrepement did not apply.

In this state of the case, where there was no effectual remedy to protect the land from waste, courts of equity, acting upon the principle of preserving the property *pendente lite*, supplied the defect, as they do in other cases, by the effective writ of injunction.<sup>(d)</sup> Nor did they limit their protection to cases of this sort, but extended relief on the mere ground of the common law rights of the parties.

An injunction will lie not only to restrain the commission of legal waste, voluntary or permissive, but also to prevent equitable waste, the nature of which will now be explained. By *equitable waste* is meant such acts as, at law, would not be esteemed, under the circumstances of the case, to be waste, but which, in the view of a court of equity, are so considered, from their manifest injury to the inheritance, although not inconsistent with the legal right of the

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(a) Stat. of Marl. c. 24; Stat. of Gloucest. c. 5.

(b) Stat. of Gloucest. c. 13. Vide ante, n. 3691.

(c) Jer. Eq. Jur. 327; Coop. Eq. Pl. 147, 148; Eden on Inj. 198; 2 Story, Eq. Jur. § 909, 910, 911. This writ is given by act of assembly in Pennsylvania.

(d) Cooper's Eq. Pl. 146, 147; Eden on Inj. 198.

party committing them.(a) The following example will illustrate this. A tenant for life without impeachment of waste, may pull down houses, or do other waste wantonly and maliciously, and there is no remedy at law; in equity, on the contrary, this will be considered as waste, for which an injunction will lie. This power is exercised *pro bono publico*, to restrain extravagant or humorous waste.(b)

3° *Injunctions to prevent nuisances and purprestures.*

3799. As in the cases of injunctions for irreparable trespasses and waste, this writ may be obtained to prevent a nuisance on a like necessity, and for a similar purpose. Nuisances are public and private; they may both be remedied by injunction, regulated, however, by different rules, which will be explained.

3800.—1. An injunction will not be granted for every *private* nuisance. The injury caused by it must be such, that from its nature, it is not susceptible of being adequately compensated by damages, to be recovered by an action at law; or if, from its continuance or permanent mischief, it occasions a constantly recurring grievance, which cannot be otherwise prevented, an injunction will be granted. Nor will this writ be granted where the injury is caused by the exercise of his just rights by the defendant; as when a party is making an improvement on his own premises, which may endanger the house of his neighbor.(c)

Although this remedy will not be granted for the mere diminution of the value of property by the nuisance, without irreparable mischief, it is the proper remedy when the injury is irreparable, as where the

(a) 2 Story on Eq. Jur. § 915.

(b) Eden on Inj. 215; Abraham or Abrahall v. Bubb, 2 Eq. Ab. 757; 2 Freem. Ch. R. 53; Aston v. Aston, 1 Ves. 265; 1 Fonbl. Eq. B. 1, c. 1, § 5, note (p); Vane v. Lord Barnard, Prec. Ch. 454; S. C. Guild, Eq. R. 127; S. C. 1 Eq. Ab. 399; S. C. 1 Salk. 161; S. C. 2 Vern. 738.

(c) Losala v. Holbrook, 4 Paige, 169.

loss of health, or trade, or the permanent ruin of property, may be the consequence. The case of building so as to stop or close up, or materially darken the windows of another, who has acquired a clear right either by contract, or by ancient possession,(a) from which a contract may be presumed, and have acquired the character of *ancient windows* or *lights*, is one for which a court of equity will grant an injunction to stay the party until the trial of the right. But in a case of this kind the court will not on motion make an order to pull down what has been done,(b) nor interfere, if the damage be not very material, or it can be adequately compensated by a pecuniary compensation;(c) and if the party injured has delayed applying for relief a considerable time, as three years, an injunction will not be granted before a trial at law.(d)

Injunctions will be granted for numerous acts injurious to the plaintiff, when the remedy at law is inadequate, or there is none at law for injuries by private nuisance; as for obstruction of water courses, the diversions of streams from mills, the pulling down of the banks of rivers or creeks, by which the adjacent lands become liable to inundation, and for similar wrongs.(e)

3801.—2. Courts of equity will also grant injunctions to prevent public nuisances, when an individual is actually injured, or is likely to suffer an irreparable wrong;(f) as where a defendant had taken several old houses, which were empty, as temporary warehouses

(a) See ante, as to the nature of an *ancient window* or *ancient lights*, B. 2, part 2. tit. 1, sec. 2, § 1, art. 2. n. 2, 2°.

(b) *Ryder v. Bentham*, 2 Ves. 533.

(c) *Attorney General v. Nichol*, 16 Ves. 333; *Morris v. Lessees Berkely*, 2 Ves. 453; *Fishmongers' Co. v. East Ind. Co.* Dick. 164.

(d) *Weller v. Smeaton*, 1 Cox's Ch. Cas. 102.

(e) Com. Dig. Action on the case for nuisance; *Eden on Inj.* 268 to 276; *Gardner v. Village of Newburgh*, 2 John. Ch. R. 162; *Van Bergen v. Van Bergen*, 3 John. Ch. 282.

(f) *Wingfold v. Crenstan*, 4 Hen. & Munf. 174.

for stowing sugar, in which he was depositing such quantities of sugar, that two of the houses had actually fallen, and others were in the most imminent danger, Lord Roslyn granted an injunction upon petition and affidavit.(a) Though in a very clear case the court would interfere to restrain the carrying on of a noxious trade, destructive of the health and comfort of the neighborhood,(b) yet there are many manufactories, which have not been considered injurious, and for which an injunction will not be granted *before trial*.

Obstructions to public rivers, or to ports, will be enjoined, and the injunction may be continued until after trial of an indictment for the creation of the nuisance.

3802.—3. *Purpresture*, or more properly *pourpresture*, is derived from the French *pourpris*; an inclosure, is used by Lord Coke in the last sense, namely, “a close or inclosure, that is, when one encroacheth and makes that several to himself which ought to be common to many.”(c) As the term is now understood in England, it signifies an encroachment upon the king, either upon part of the demesne lands, or in the highways, rivers, harbors, or streets.(d)

There are two remedies for an injury by *purpresture*, namely, by information of intrusion at common

(a) *Mayor of London v. Bolt*, 5 Ves. 129.

(b) *Eden*, on Inj. 262; 1 Chit. Gen. Pr. 730.

(c) 2 Inst. 38; Co. Litt. 277 b; Glanville, by Beames, B. 9, c. 11, p. 238, note 2. The word *purpresture* seems to have been understood by the old English lawyers in three senses: 1st, as committed against the king by a subject; 2dly, as committed by a tenant against the lord of whom he held his fee; and 3dly, as committed by one neighbor against another. Spelm. Gloss. ad voc.; Manwood's Forest Laws, 169, 176. This word had the same meaning in some of the ancient customs of France. Ferriere, Dictionnaire de Droit, h. v.; Denisart, h. v.; Traité sur les Coutumes Anglo-Normandes, par Houard, tome i. p. 387. Vide ante, n. 2386.

(d) *Eden on Inj.* 259; 2 Story, Eq. Jur. § 922. See *Commonwealth v. Wright*, 3 Am. Jur. 185; *Watertown v. Cowen*, 4 Paige, 510; *Commissioners v. Long*, 1 Pars. Sel. Cas. 143, 145.

law, or by information at the suit of the attorney general in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was abated; but upon a decree upon an information in equity, if it appeared to be a purpresture, without being at the same time a nuisance, the court might direct an inquiry whether it was beneficial to the crown to abate the purpresture, or to suffer the erections to remain to be arrented.<sup>(a)</sup> But if the purpresture were also a public nuisance it could not be allowed to remain, because the crown could not sanction a nuisance.<sup>(b)</sup>

*4<sup>o</sup> Injunctions to compel the performance of lawful works in a lawful manner.*

3803. When the parties have a legal right to perform some act in relation to real property of an individual, and they are about to execute their powers in a manner that would probably be injurious, or more extensively than is necessary, and the individual can suggest a preferable course of proceeding, a court of equity will enforce the latter by injunction.<sup>(c)</sup>

*Art. 4.—Of the effect of an injunction.*

3804. The writ of injunction is addressed to the party defendant, and it commands him to do or not to do a particular thing. The breach of this command is a contempt of court, for which the defendant may be attached in his person, and committed to prison. The fact that there is a breach must be shown by affidavit.<sup>(d)</sup>

<sup>(a)</sup> Attorney General *v.* Richards, 2 Anstr. 606.

<sup>(b)</sup> Eden on Inj. 260.

<sup>(c)</sup> Coats *v.* Clarence Railway Company, 1 Turn. & Myl. 181.

<sup>(d)</sup> 2 Madd. Ch. Pr. 224, 225; Schoemaker *v.* Gillet, 3 John. Ch. R. 311; Rutherford *v.* Metcalf, 5 Hayw. 60. As to what will be a breach of the common injunction, see Eden on Inj. 96.

For the purpose of effectuating their decrees, courts of equity now in many cases interfere by injunctions in the nature of a judicial writ or execution for possession, as, for example, by injunctions to yield up, deliver quiet, or continue possession, followed up by *writ of assistance*,<sup>(a)</sup> which is in the nature of an execution, commanding the sheriff to deliver possession of the land agreeably to the provisions of the decree.<sup>(b)</sup>

§ 2.—Of bills *quia timet*.

3805. The next remedy in equity to prevent injustice, is the *bill quia timet*, which, as its name imports, is filed *because* the complainant *fears* some future mischief. Bills of this kind are so called in analogy to certain writs of the common law, now seldom used.

There were six writs at common law, which could have been maintained *quia timet*, before any molestation, distress, or impleading. These were,

1. A writ of mesne, which a man could have before he was distrained.

2. A *Warrantia charta*, before he was impleaded.

3. A *Monstraverunt*, before any distress or vexation.

4. An *Audita querela*, before an execution sued.

5. A *Curia claudenda*, before any default of inclosure.

6. A *Ne unjste vexes*, before any distress or molestation.<sup>(c)</sup>

A bill *quia timet* is in the nature of a writ of prevention to accomplish some object of precautionary justice. Bills of this sort are usually filed to prevent wrongs and anticipated mischiefs, and not merely to redress them when done. This may be with regard to the complainant's equitable or legal right to some personal chattel to which he will be entitled. But it

<sup>(a)</sup> Eden on Inj. 425; 1 Chit. Gen. Pr. 701; 2 Story, Eq. Jur. § 959.

<sup>(b)</sup> 2 Madd. Ch. Pr. 469, 470.

<sup>(c)</sup> Co. Litt. 100, a.

must be remembered that in regard to equitable property, the jurisdiction attaches equally to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent.<sup>(a)</sup> At law, the relief afforded almost universally regards the right of possession. One having merely a present right of future enjoyment, may, in many instances, notwithstanding the powers of the courts of law, be damaged by the destruction or injury of the property in the mean time, and when his title of possession accrues may be unable to render it available, or even to obtain a compensation for the loss which may be sustained by him. It is for the purpose of remedying this evil, that equity will interfere to secure property when it is of a perishable nature. The aid which courts of equity give in these cases must depend upon the circumstances of each.

When the plaintiff has established his title to the future enjoyment, or it is admitted, the courts of equity will grant relief in several ways: 1, by the appointment of a receiver of rent or other income; 2, by an order to pay a pecuniary fund into court; 3, by ordering the defendant to give security; and, 4, sometimes by the writ of injunction.

*Art. 1.—Of the appointment of a receiver.*

3806. For the purpose of securing the property in dispute, when it is of the nature already mentioned, after a bill *quia timet* has been filed, the court will in some cases appoint a receiver. A *receiver* is a person appointed by the court, authorized to receive the rents and profits of land, or the profits or produce of other property in dispute.

1. *When a receiver will be appointed.*

3807. Courts of equity exercise a sound discretion

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(a) Jer. on Jur. 356.

in the appointment of a receiver.<sup>(a)</sup> This is made upon principles of justice, for the benefit of all parties concerned. As this power is discretionary, it is not easy to point out its limits, or how far it will be exercised. The object of the court, in making the appointment, is to secure the property for its appropriate uses and ends, and to preserve it from being dissipated when it is in danger of being converted to other purposes, or diminished or lost. In cases of this kind, it will take the fund into its own hands, or secure its due management by its own officers. This will be done in numerous cases, of which the following are examples:

3808.—1. When there is an *equitable property*, a receiver may be appointed to secure it from danger, whether the right of enjoyment be present, or whether it be future or contingent; as where the property is in the hands of a trustee, for a particular purpose, and it is about to be diverted to some other, the court will appoint a receiver; or, if the fund be pecuniary, direct it to be paid into court; or require security for its preservation and appropriation.<sup>(b)</sup> And executors and administrators will, for this purpose, be considered trustees.<sup>(c)</sup>

3809.—2. A receiver will be appointed when there are conflicting legal and equitable debts upon the estate, in order to secure the property for the use of all the claimants who shall establish a right; and he will also be appointed when the estate is held by a party under a title obtained by fraud, actual or constructive.<sup>(d)</sup>

3810.—3. When there are numerous incumbrancers of an estate, the court will not appoint a receiver to

(a) Verplank v. Caines, 1 John. Ch. R. 57.

(b) Jer. Eq. Jur. 248, 254. See Haggarty v. Pittman, 1 Paige, 298.

(c) 1 Fonbl. Eq. B. 1, c. 1, s. 8, note (y).

(d) Stittwell v. Williams, 6 Madd. 48; S. C. Stittwell v. Wilkins, Jac. R. 280.

receive the rents and profits, so as to take them out of the possession of the first incumbrancer, when he is in possession of the estate, or entitled to the possession, unless he does such acts as manifest an abandonment of his right.<sup>(a)</sup> When a receiver is appointed under these circumstances, the court will take care to do complete equity among all the incumbrancers.

3811.—4. When the tenants of a particular estate for life, or in tail, neglect to keep down the interest due upon incumbrances, on the estates so held, a court of equity will appoint a receiver for the purpose of procuring funds to keep down such interest, for, otherwise, the remainder man would be compelled to pay such interest out of his interest in the land.

3812.—5. When a partnership is dissolved by one or more of the partners, who have a power so to dissolve it, and there is no provision in the articles of association, or the agreement for a dissolution, providing for the settlement of the affairs of the firm, and the partners cannot agree, the appointment of a receiver is a matter of course.<sup>(b)</sup>

2. *For whose benefit the receiver will be appointed.*

3813. It is a maxim that equality is equity. The appointment of a receiver is therefore made for the benefit and on behalf of all the parties in interest, and not for the benefit of one plaintiff or one defendant only.<sup>(c)</sup> Where a receiver has been appointed to receive the assets of a partnership, the court will direct him to apply the partnership funds to the payment of all the debts of the firm, rateably, without giving any preference to the favorite creditors of either partner.<sup>(d)</sup> But when among a class there are some

<sup>(a)</sup> *Thomas v. Brigstocke*, 4 Russ. 64; *Jer. Eq. Jur.* 250; *Bryan v. Cormick*, 1 Coxe, R. 422; *Norway v. Rowe*, 19 Ves. 153.

<sup>(b)</sup> *Law v. Ford*, 2 Paige, 310; *Martin v. Van Shaik*, 4 Paige, 479; *Henn v. Walsh*, 2 Edw. 129.

<sup>(c)</sup> *Davis v. Marlborough*, 1 Swanst. 83; *S. C.* 2 Swanst. 125.

<sup>(d)</sup> *Law v. Ford*, 2 Paige, 310.

who have prior legal rights or equities, these will be protected.(a)

3. *Of the power, duties and liabilities of a receiver.*

3814.—1. By his appointment, a receiver becomes an officer of the court.(b) He is invested with the *power* to receive the rents and profits of the real estate; if there are tenants in possession of the premises, they are compellable to attorn, and the court thus becomes, *pro hoc vice*, the landlord.(c) In general the receiver is entitled to the possession of the premises, but his possession does not affect the rights of third persons, when they are ultimately established. He is considered as holding for the true owner.

3815.—2. When he is in possession he has but little discretion allowed him, in the performance of his *duties*; and in bringing and defending suits and performing most acts, he should consult and receive the sanction of the court.(d) Before he enters into the performance of the duties of his appointment, he will be required to give bond with surety in such sum as the court may direct.(e)

3816.—3. The receiver is bound to act in good faith and with a proper degree of diligence, and if property is lost through his fault or neglect, he may be made *liable* for it. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages, but he is not of course responsible, because there has been, without his fault, any embezzlement or theft. He is bound to such ordinary diligence, as belongs to a prudent and honest discharge of his duties, and such as is required

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(a) Jer. Eq. Jur. 249, 250; 1 Swanst. 83; 2 Swanst. 125.

(b) See *Angel v. Smith*, 9 Ves. 335; *Hutchinson v. Lord Massarene*, 2 Ball & B. 55.

(c) 9 Ves. 335; Jer. Eq. Jur. 249.

(d) Jer. Eq. Jur. 252, 253.

(e) 2 Madd. Ch. Pr. 240.

from all persons who receive compensation for their services.(a)

*Art. 2.—Of the order to pay money into court.*

3817. Another remedy, under a bill *quia timet*, is to require the payment of money into court, upon this principle, that he who is entitled to the money, is entitled to have it secured. To authorize the court to apply this remedy, the plaintiff must have an interest in the fund.

In some cases, the court will require money to be paid into court, without any ground being laid to show that the party holding it has been guilty of abuse, or that the fund is in danger; in such case it is only requisite to show that the plaintiff is solely entitled, or has such an interest jointly with others, as to justify him, on behalf of himself and his companions, to have the fund secured.(b) Thus, in the case of bills brought by creditors, or legatees, or distributees, against an executor or administrator for a settlement of the estate, if, by his answer, the executor or administrator admits assets in his hands, and the court takes upon itself the settlement of the estate, it will direct the money to be paid into court.(c)

*Art. 3.—When security will be required under a bill quia timet.*

3818. Property is sometimes so situated that the party ultimately entitled to it may be in danger of losing it, unless security is given for its preservation. A party has a right to call for the interference of the court when he has an equitable property in the thing to be secured, whether his right of enjoyment be present, future or contingent. When his property is

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(a) Story, Bailm. § 621.

(b) Freeman v. Fairlie, 3 Meriv. 29; Cruikshanks v. Roberts, 6 Madd. 104; Orok v. Binney, 1 Jac. R. 523; Rothwell v. Rothwell, 2 Sim. & Stu. 217.

(c) Blake v. Blake, 2 Sch. & Lef. 26; Yare v. Harrison, 2 Cox, R. 377; Strange v. Harris, 3 Bro. C. C. 365.

merely legal, with a present right of enjoyment, the remedies at law are, in general, sufficient to protect such rights; but when the enjoyment is to be future or contingent, the party entitled is frequently without an adequate remedy at law, for the injury which, in the mean time, he may be subject to bear, by the loss, destruction or deterioration of the property in the hands of the person entitled to present possession. (a) A familiar example is the case where personal property is given by will to one for life, and afterward to another; formerly the latter, or his personal representatives, might in all cases have obtained a decree to compel the former to secure the same to him after his death; (b) but in modern times, in ordinary cases, when property consists of specific chattels, the defendant is not required to give security, unless there is a well-founded apprehension of danger of their loss; (c) in such case he who has the life estate is required merely to make out, sign, and deliver to the plaintiff, or put in possession of the court, an inventory of such property. (d)

*Art. 4.—Of the remedy by injunctions under bills quia timet.*

3819. When a proper case is made out in a bill *quia timet*, supported by proof, the court will compel the party to perform its decree by injunction.

§ 3.—Of bills of peace.

3820. We come now to consider the third kind of peculiar remedies to prevent injustice; this is commenced by a *bill of peace*. These bills, as their name

(a) Jer. on Jur. 349, 350.

(b) See *Bracken v. Bentley*, 1 Ch. R. 110.

(c) *Foley v. Burnell*, 1 Bro. C. C. 279. It seems the courts in Pennsylvania cannot demand security in such cases, *Lippincott v. Warder*, 14 S. & R. 118; *Bitzer v. Hahn*, 14 S. & R. 238; unless perhaps in very special cases. *Kinnard v. Kinnard*, 5 Watts, 109; but this is now regulated by the act of assembly of 1834. *Brinton's estate*, 7 Watts, 203.

(d) 3 P. Wms. 336; *Leeke v. Bennett*, 1 Atk. 470; *Bill v. Kinnaston*, 2 Atk. 82; 1 Story, Eq. Jur. § 603, 604.

imports, are used to prevent repeated and reiterated litigation.(a)

The object of bringing a bill of peace, is to establish and perpetuate a right which the plaintiff claims, and which, from its nature, may be controverted by different persons, at different times, and by different actions; or where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in his right, when it has been sufficiently established, or if it should be established satisfactorily, under the direction of the court.(b)

3821. There are several classes of cases where these bills are the proper remedy.

1. When there is one general right to be established against a great number of persons; as where one person claims or defends against many; or where many claim or defend a right against one. Chancery in such cases interferes for the purpose of avoiding a multiplicity of suits; but, as the plaintiff's claim is founded upon a legal right, that must first be tried at law, in an individual case, and a verdict obtained by the plaintiff, in order to induce a court of equity to grant a perpetual injunction; and this being ascertained, the courts of equity will call all the parties before them, and make a final decree binding upon all the parties.(c) An example to illustrate this, may be found in the case of a party who has possession and

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(a) The learned Story, in his Commentaries on Equity Jurisprudence, vol. ii. § 852, says: "These bills sometimes bear a resemblance to *bills quia timet*, which latter seems to have been founded upon analogy to certain proceedings at common law, *quia timet*. Bills *quia timet*, however, are quite distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted; whereas bills of peace, though sometimes brought before suit is instituted to try the right, are more generally brought after the right has been established at law."

(b) Jer. on Jur. 344; 1 Madd. Ch. Pr. 166; 1 Harr. Ch. Pr. 104; Blake's Ch. Pr. 84; 2 Story, Eq. Jur. § 853; Alexander v. Pendleton, 8 Cranch. 462, 468; Eldridge v. Hill, 2 John. Ch. R. 281.

(c) Jer. Eq. Jur. 343.

claims a right of fishery for a considerable distance on a river, and the riparian owners set up several adverse rights; he may have a bill of peace against them all, for the purpose of quieting his right and establishing his possession.(a)

2. The second class, in which bills of peace may be brought, is, when the plaintiff has, after repeated trials, established his right at law. When the disuse of real actions, which were final, became general, and ejectments became common, as this last action was not final, it was usual to bring one action after another, and by that means harass the defendant. To remedy this evil, after the right had been repeatedly tried in ejectment, and the result had been the same, the courts of equity, upon a bill of peace being filed, would grant a perpetual injunction.(b)

§ 4.—Bills of interpleader.

3822. Bills of interpleader form the fourth or last class of peculiar remedies administered by courts of equity. A *bill of interpleader* may be defined to be one by which the complainant claims no relief against either of the plaintiffs or defendants, but solicits to pay the money or deliver the property to the one to whom it justly, legally, or equitably belongs, and that he may be protected from the danger of loss or damage from the claim of both or either of them.(c)

It is a remedy concurrent with the interpleader at law, and is formed in some measure upon it, but it is extended, in equity, to cases in which it is not afforded at law. At law, parties are made to interplead only in favor of a defendant, who is sued in two different actions; as, upon a bailment of goods to such defend-

(a) *Mayor of York v. Pilkinton*, 1 Atk. 382.

(b) *Earl of Bath v. Sherwin*, 4 Bro. P. C. 373; S. C. Prec. in Chan. 261. See *Dalton v. Dalton*, Sel. Cas. in Chan. 13; *Trustees of Huntingdon v. Nicoll*, 3 John. R. 566; *Leighton v. Leighton*, 1 P. Wms. 671; Jer. on Jur. 346.

(c) *Bedell v. Hoffman*, 2 Paige, 199.

ant, in respect of which the plaintiff in one action brings detinue, and the plaintiff in the other action brings trover; but the bailment must have been made by consent of both claimants.(a) In equity, where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him. The bill exhibited for this purpose, is termed a bill of interpleader, its object is to compel the claimant to interplead, so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified. The courts of equity extend the remedy beyond that given at law, and let it embrace all cases to which, in conscience, it ought to extend; and having the means of bringing all parties before them, and investigating their respective claims, they will give to the parties that measure of justice, which they ought severally to attain, when they have legal claims, as if by circuity of action they were to proceed at law.(b)

3823. Bills of interpleader are, in general, brought by agents, auctioneers, factors, and the like, who have no interest in the matter in controversy, and where they have no adequate remedy to defend themselves at law, from the vexatious suits of different claimants. The object of this bill is to discharge the plaintiff from paying what he owes more than once, and for the purpose of ascertaining who is the true creditor, or person entitled to the subject matter in dispute. If the party praying for an interpleader, himself claims an interest in the subject matter, as well as the other parties, the bill will not be entertained, for then he has other appropriate remedies.(c)

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(a) 2 Dany. Ab. 779, 782; 3 Reeves' Hist. 448.

(b) Jer. Eq. Jur. 346, 347; Mitf. Pl. 125. See 2 Story, Eq. Jur. § 800 to 824.

(c) Angel v. Hadden, 15 Ves. 244; Langston v. Boylston, 2 Ves. jr. 108; Atkinson v. Manks, 1 Cowen, 691; Bedall v. Hoffman, 2 Paige, 209. The

But this must be understood with this qualification, that the party applying for an interpleader must have no interest in the matter in dispute, yet he may have an interest connected with it; a bill in the nature of a bill of interpleader will lie where he has some interest distinct from that of the contending claimants. For example, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims of different persons as to the title to the mortgage money, he may bring them before the court to ascertain their rights, for the purpose of having a decree of redemption, and be made safe in his payment. In such case, it is true, the plaintiff seeks relief for himself, but he has no interest in the matter in dispute between the several claimants.(a)

3824. A bill of interpleader will only lie where the claims are legal, or where at least one is of that nature; and, in such case, it is not necessary that a suit or action should have been commenced upon it, a claim being a sufficient ground for such an application, although it is requisite that the plaintiff should admit the right in each party to institute proceeding against him.(b)

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practice of interpleader in equity has been compared to the *intervention* of the civil law, Gilb. For. Rom. 47 There is this marked difference between them: The party to an interpleader, who claims to be relieved from vexatious litigation, and from liability to pay the debt or perform his obligation more than once, in consequence of the uncertainty of the rights of the several claimants, differs materially from the *tertius inter veniens*, or inter-venor of the civil law, who is one claiming an interest in the subject matter or thing in dispute, and claims to act with the plaintiff, and to be joined with him, and to recover the matter in dispute because he has an interest in it; or to join the defendant, and with him, to oppose the claim of the plaintiff, which it is his interest to defeat. Domat, Lois Civiles, tome 2, liv. 4, tit. 3; Poth. Procédure Civile, prèm. partie, c. 2, s. 6, § 3. See Eden on Inj. 394, note (a); 2 Story, Eq. Jur. § 806, note 1; Merl. Répert. Intervention; Code of Pract. of Louisiana, art. 389; Brown v. Saul, 4 N. S. 437; Gasquet v. Johnson, 1 Lo. Rep. 431; Thompson v. Chauveaux, 7 N. S. 334; Dalloz, Dict. de Jur. h. t.

(a) See Bedell v. Hoffman, 2 Paige, 199; Mitchell v. Hayne, 2 Sim. & Stu. 63; Goodrick v. Shotbolt, Prec. in Ch. 333; Jer. Eq. Jur. 348.

(b) Morgan v. Marsack, 2 Meriv. 110; Stevenson v. Anderson, 2 Ves. & Bea. 407; Langston v. Boylston, 2 Ves. jr. 107.

## CHAPTER II.—OF THE GENERAL REMEDIES.

3825. In the preceding chapter having considered the peculiar means employed by courts of equity, first, to secure justice; and, secondly, to prevent injustice, we naturally come to the general remedies, which are not peculiar to courts of equity, and concurrent with remedies in courts of law of administering justice. These relate, 1, to accidents; 2, mistakes; 3, frauds; 4, to remedies peculiarly appropriate in equity and inappropriate at law.

## SECTION 1.—OF ACCIDENTS.

3826. In the course of human affairs accidents are constantly happening, and the courts are required to supply a remedy to relieve those who may be subject to them as far as it is in their power. Many of these accidents are remedied in the courts of law; as, the loss of deeds; mistakes in receipts and accounts; wrong payments; death, which makes it impossible to perform conditions literally; and a multitude of other contingencies.<sup>(a)</sup> Courts of equity having more extensive powers, and a more enlarged jurisdiction, relieve from accidents in many cases where the courts of law cannot afford an adequate remedy. Possessing these means of investigation, when a court of equity can satisfy itself that natural justice requires its interference, it will, in some instances, exert its means of distributing equity where subsequent accident would render the applications of the rules of law injurious or oppressive. It will perform this equitable task by dispensing with the observance of formalities, or by presuming that they have been complied with, and then give redress, or relieve the party from responsibility or loss, as justice and equity require.

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(a) 3 Black. Com. 431.

But there are some accidents which are not relievable even in courts of equity, as if by accident a recovery be ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement.(a)

The general meaning of the term *accident* is the happening of an event without the concurrence of the will of the person by whose agency it is caused, or the happening of an event without any human agency. The burning of a house in consequence of a fire being made for the ordinary purpose of cooking or of warming a house, is an accident of the first kind; the burning of a house by lightning is an accident of the second kind.(b) The term accident in chancery practice has a different meaning; it signifies such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct of the party.(c) The cases of accident may be classed as follows: 1, when relief will be granted; 2, when it will not be granted.

§ 1.—When courts of equity will relieve from accidents.

3827. These cases, where courts of equity will relieve from accidents, may themselves be divided into two classes; included in the first are those cases in which a party seeking the establishment of a legal right, is unable to produce evidence of his title; and, secondly, those in which by a mere casualty, not affecting the proof of the plaintiff's title, he would unquestionably be subjected to injury.

*Art. 1.—Of relief from the accidental loss of proof of title.*

3828. The jurisdiction of courts of law and courts of equity being concurrent, the latter courts will enter-

(a) 3 Bl. Com. 431.

(b) 1 Story Eq. Jur. § 78.

(c) 1 Fonb. Eq. 374, 375, note.

tain jurisdiction only, first, when a court of law cannot grant suitable relief; and secondly, when the party has a conscientious or equitable title of relief; both must concur in a given case, for otherwise a court of equity cannot grant the relief.

Formerly courts of law did not interfere to grant relief in many cases where now such relief may be obtained at law. At that time courts of equity interfered to prevent injustice, and although the courts of law, with more liberality, now afford relief in such cases, yet courts of equity having once obtained jurisdiction, now retain it as a concurrent remedy with the courts of law; it being considered that the latter courts are not competent, by their own act, to oust or repeal a jurisdiction already rightfully attached in equity.(a)

When an action is brought upon a deed in a court of law, it is requisite that profert should be made of it in the declaration, unless it can be proved that the same is lost, or that it is in the hands of the opposite party, or that it has been destroyed by him.(b) In chancery, on the contrary, it is held that in a case in which a profert of a deed would be required at law, if the party who claims upon it will make an affidavit of its loss, and that he knows not where it is, unless it be in the custody of the defendant, he will be assisted by its compelling a discovery of its execution from the defendant, and giving him relief also, if it shall appear that, in case the plaintiff could have made a profert at law, he would then have been entitled to a remedy. This affidavit is not required as evidence of the loss, but as a security for the propriety of the court exercising a jurisdiction.(c)

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(a) Mitf. Eq. Pl. 104—106; 1 Fonbl. Eq. B. 1, c. 1, s. 3, note (f); Cooper's Eq. Pl. 129; Jer. Eq. Jur. 359, 360; 1 Story, Eq. Jur. § 80; Ex parte, Greenway, 6 Ves. 812; E. I. Company v. Boddam, 9 Ves. 466; Ludlow v. Simmond, 2 Cain. Cas. Err. 1; King v. Baldwin, 17 John. 384.

(b) Rand v. Brookman, 3 T. R. 151.

(c) Bromley v. Holland, 7 Ves. 19; Ex parte Greenway, 6 Ves. 812; 1 Story, Eq. Jur. § 82; 9 Ves. 466.

Formerly these remarks would have applied to the case of bonds or other instruments under seal, and a want of profert of the instrument would have been a fatal defect; but in modern times the rule has changed, the courts of law now entertain jurisdiction, and dispense with a profert, if the loss by time or accident be stated in the declaration.<sup>(a)</sup> This instance is one in which the courts of equity now entertain jurisdiction, because they once possessed it when courts of law would give no relief, though now the latter courts will give relief for the accident.<sup>(b)</sup>

The reasons for interfering in the case of a lost bond, never applied to that of a promissory note or unsealed security, because no supposed inability to recover at law exists in the case of such note or unsealed agreement, which is lost, as exists for want of a profert of a bond at law. No profert being required, and no oyer allowed at law of such note or security, a recovery can be had there upon mere proof of loss.<sup>(c)</sup>

*Art. 2.—Of relief from accidents not affecting the proof of plaintiff's title.*

3829. Courts of equity will relieve from another class of accidents, which, though not affecting the proof of the plaintiff's title, are nevertheless very injurious to him. From many of these accidents, a court of equity will grant both discovery and relief. Of this numerous class a few examples will be cited.

1. One of the earliest exercises of the jurisdiction of the court, was to relieve from the forfeiture of a bond, or of a mortgage, when it was not paid at the day appointed for payment, on the ground that it was unjust for the creditor to avail himself of the penalty, when an offer of full indemnity was tendered.

<sup>(a)</sup> Read *v.* Brockman, 3 T. R. 151; Totty *v.* Nesbitt, 3 T. R. 153, note.

<sup>(b)</sup> Jer. Eq. Jur. 361.

<sup>(c)</sup> Glynn *v.* Bank of England, 2 Ves. 38, 41.

2. Equity will relieve when an inequitable loss or injury will otherwise fall upon the plaintiff from circumstances beyond his control, or from his own acts done in good faith, and in the performance of a supposed duty, without negligence. *(a)*

3. In the execution of mere powers, a court of equity will grant relief on account of accident, as well as mistake, when, in consequence of the accident, there is a defective execution of powers. The exercise of this jurisdiction will take place, unless there be some countervailing equity to prevent it, for the relief of purchasers, a wife, a child, or a charity. *(b)* But equity will not aid defects which are of the very essence or substance of the power; if, for example, the power be executed without the consent of the parties who are required to it, to give it validity; or if it be required to be executed by will, and it is executed by a deed; the defect cannot, in either case, be relieved from in equity.

§ 2.—When courts of equity will not relieve from accidents.

3830. In the cases we have been considering under the two preceding heads, it must have been perceived that they all proceed upon the same common ground, that there is no adequate or complete remedy at law under all the circumstances, that the party has rights which ought to be protected and enforced, and, for want of such protection, he would sustain injury, loss, or detriment, which it would be against equity to make him bear. But there is another class of accidents for which no relief will be granted by a court of equity. A few of these will now demand our attention.

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*(a)* This may happen where executors make payments under certain circumstances. *Edwards v. Freeman*, 2 P. Wms. 447; *Johnson v. Johnson*, 3 B. & P. 162; *Crosse v. Smith*, 7 East, 246; *Croft's Executors v. Lyndsey*, 2 Freem. 1; or where a large premium is given to teach an apprentice, and the master becomes bankrupt. *Hale v. Webb*, 2 Bro. C. C. 78.

*(b)* Chance on Powers, ch. 23 § 1, art. 2830.

1. Courts of equity will not relieve a party where he has entered into a positive contract or obligation, and he has been prevented from fulfilling it by accident; or he has been in default, or he has been prevented by accident from deriving the full benefit of the contract on his own side. Take, for example, the case of a lessee when he covenants to keep the demised estate in repair, he will not be relieved in equity from his covenant because the premises have been destroyed or injured by an inevitable accident, or by the public enemies, or by any other overwhelming force; because, by his contract, he might have provided for the contingency. The same rule applies in like cases where there is an express covenant, without exception, to pay the rent during the term; in such cases, the tenant must pay the rent; each loses what he holds in the estate when the property is destroyed by fire, or such accident; the landlord his estate, the tenant the rent, the rule *res perit domino* being applicable in such cases.(a)

2. A party will not be relieved in equity upon the ground of accident, when the accident has arisen from his own gross negligence or fault.(b)

3. When an accident happens, and both parties stand equally innocent, or when they have equal equities, courts of chancery will not interfere to grant relief to either,(c)

4. Equity will not relieve from an accident where the party has not a clear vested right, but his claim rests in mere expectancy, and is not a matter of trust; for example, where a person intending to make a will is prevented from doing so by accident, the intended legatees can have no relief.

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(a) 1 Story, Eq. Jur. § 102.

(b) Marine Ins. Co. v. Hodgson, 7 Cranch, 336.

(c) Blundell v. Brettaugh, 17 Ves. 232, 240; Com. Dig. Chancery 3 F 6, 7, 8.

## SECTION 2.—OF MISTAKES.

3831. The subject of mistakes from which courts of equity, in the exercise of the administration of general remedies, in concurrence with courts of law, will relieve, will now claim our attention. By *mistake* is understood an error committed in relation to some matter of fact or of law, affecting the rights of the parties to the contract. Mistakes are divided into two kinds: 1, mistakes in matters of law; 2, mistakes in matters of fact.

## § 1.—Of mistakes in matters of law.

3832. The law presumes every one to be acquainted with it, and that no man can plead ignorance of it, *ignorantia legis neminem excusat*. This maxim has equal force in equity that it has at law. Ignorance of law consists in the want of knowledge of those laws which it is our duty to understand, and which every one is presumed to know; and a man, therefore, is not in general excused, when fully informed of the facts, for errors of law he has committed in making his contracts, if otherwise competent.(a) If there are any exceptions to this rule, they are not numerous, and they will be found, when fully examined, to have something peculiar in their character, and that the cases involve in them some particular facts.(b)

A very common example of a mistake in law may be found in the case of an obligee who releases one of two joint obligors, under a mistaken idea that the other would remain bound to him. In such case the obligee will not be relieved in equity on the mere

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(a) 1 Fonbl. Eq. B. 1, c. 2, s. 7, note (v); Doct. & Stud. Dial. 2 c. 46; Lyon v. Richmond, 2 John. Ch. 51; Shotwell v. Murray, 1 John. Ch. 512; Storrs v. Barker, 6 John. Ch. R. 169; East v. Thornbury, 3 P. Wms. 127.

(b) Hunt v. Rousmaniere, 1 Pet. S. C. Rep. 15; S. C. 8 Wheat. 211; 1 Story, Eq. Jur. § 137.

ground of mistake of the law; for there is nothing inequitable in the coöbligor, who is not formally released, in availing himself of his legal rights, nor upon the other obligor insisting upon his release, if they both acted *bonâ fide*; indeed it would be against equity to compel one of two joint obligors to pay the whole debt, without having any recourse for contribution against the other; and a release to one of them would have that effect if the other alone remained bound.(a)

The same rule that mistakes of law will not be relieved from, in equity, generally exists where both parties to a contract commit the mistake, both acting in good faith, when not liable to other objections;(b) thus, where a clause containing a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties, because being mistaken on the law, they believed it would have rendered the contract usurious, the court refused relief. The reason for this is obvious, the parties had deliberately agreed upon one contract, and excluded that provision, and the court could not make another, by restoring it.(c)

(a) Com. Dig. Chancery, 3 F 8.

(b) In one case, which cannot be reconciled with the authorities generally, it was laid down that the maxim of law, *ignorantia juris non excusat* was to be considered as applying to crimes, in which the public had a concern, and not to civil cases. *Lansdowne v. Lansdowne*, Moseley's R. 364. See a well written article in 23 Am. Jurist. 146 to 166, and 371 to 412, as to the misapplication of the maxim *ignorantia juris non excusat*, in preventing the recovery by an action of assumpsit for money had and received, which had been paid by mistake in consequence of ignorance of law. Indeed there are some cases, where it has been considered very doubtful whether relief in equity ought not to be granted, where the parties acted under a mistake of law. *Clifton v. Cockburn*, 3 Mylne & Keen, 76; *McCarthy v. Decaix*, 2 Russ. & Myl. 614. See, also, *Eden on Injunctions*, 22, note (c); *Dig. 22, 6; Code, 1, 16.*

(c) *Irnham v. Child*, 1 Bro. Ch. R. 92; *Marquis of Townsend v. Stangroom*, 6 Ves. 332. See *Mildmay v. Hungerford*, 2 Vern. 243; *Hunt v. Rousmaniere*, 8 Wheat. 174; S. C. 1 Pet Sup. C. Rep. 1; S. C. 2 Mason, 244; *Storrs v. Barker*, 6 John. Ch. R. 169; *Pusey v. Desbouverie*, 3 P. Wms. 315; *U. S. Bank v. Daniel*, 12 Pet. 32; *Shotwell v. Murray*, 1 John. Ch. R. 512.

There is a class of cases sometimes considered as an exception to the general rule, that equity will not relieve for mere mistake of law. These relate to the misconception or ignorance of title, under which the parties acted. If the ignorance of title was ignorance of a fact, then the rule does not apply; if not, then those cases will be found to be not clear mistakes upon a point of law, but that the circumstances establish some imposition, undue influence or confidence, the fact of mental imbecility, which show that there was some surprise, from which courts of equity relieve.

3833. By *surprise* is meant the act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper for a court of equity to relieve the party so surprised. In some cases by surprise is meant a species of fraud.(a)

It not unfrequently happens that cases of surprise are mixed up with law. From the effects of contracts made under such circumstances, courts of equity will relieve, because the agreements or acts are unadvised, improvident, and without due deliberation; it being a rule with those courts, to protect those who are unable to protect themselves, and of whom some undue advantage has been taken.(b) In these cases it is not for the mistake in law, but for the circumstances which have caused the error, that the contract is set aside. The reason for setting aside a contract when both parties have been taken by surprise is still stronger, because neither party gave a valid consent.

§ 2.—Of mistakes in matters of fact.

3834. We have just seen, that every one is pre-

(a) See *Twining v. Morrice*, 2 Bro. Ch. R. 326; *Willan v. Willan*, 16 Ves. 81; *Earl of Bath and Montague's case*, 3 Ch. Cas. 56.

(b) 16 Ves. 81; 3 Ch. Cas. 56; *Evans v. Llewellyn*, 1 Cox's R. 333; S. C. 2 Bro. Ch. 150; 6 Ves. 333.

sumed to know the law, and that ignorance of it is no excuse, *ignorantia legis non excusat*. The rule is not the same with regard to facts; no man, however learned, can possibly know all facts, and therefore, the law does not presume him acquainted with all matters of fact, and an ignorance of them will not be charged upon him as culpable ignorance. But the ignorance must be involuntary, as that which is either invincible and cannot by any exertion or by using a due degree of care and attention be overcome; for it is a maxim that the law aids those who are vigilant, and not those who slumber over their rights, *vigilantibus non dormientibus jura subveniunt*. This maxim is consonant with common sense, and is probably ingrafted into all the systems of the laws of civilized nations.(a)

But it is not the ignorance of every kind of facts that will so far vitiate a contract on the ground of mistake, that a court of equity will grant relief. The facts respecting which the mistake is made must be *essential* as elements of the agreement; for example, if Peter were to buy a tract of land of Paul, and it was found afterward, that Paul had no title to it, Peter would be relieved in equity from the payment of the purchase money; but if both the parties believed the land well fitted for one particular kind of agriculture, and, owing to the nature of the soil it was found not to be adapted to it, no fraud being apparent, or if the tract was sold containing a certain number of acres, say four hundred acres, and it fell short six or eight acres, relief would not be granted in equity. In the first case the fact is an essential one, in the second, it is unessential.(b)

(a) Domat, liv. 1, tit. 18, § 1; Doct. & Stud. Dial. 2, c. 47; 1 Fonbl. Eq. B. 1, c. 2, § 7, note (v); Ayliffe's Pand. 116; Merl. Répert. verbo Ignorance.

(b) See *Mason v. Pearson*, 2 John. 37; *Bingham v. Bingham*, 1 Ves. 126; *Smith v. Evans*, 6 Binn. 102; *McLelland v. Cheswell*, 13; S. & R. 143;

3835. On the contrary, when the mistake falls on some essential fact, the knowledge of which would have prevented the parties from entering into the contract, courts of equity will often relieve, even when there is *no fraud*, and the parties are both perfectly innocent; as if Peter and Paul, being in Philadelphia, the former sell to the latter his house situate in Cincinnati, both parties believing the house to be in the same condition as it was when they last saw it together, and, at the time of the sale, it had been burned down, or swept away by a flood, the purchaser would be relieved, although both parties were innocent of any fraud; (a) as illustrative of this rule the following case may be mentioned. Peter purchased of Paul a tract of land on the banks of the Ohio river, Paul represented it, and believed it to contain a coal mine; Peter paid for it four thousand four hundred dollars, and covenanted to pay to the vendor an annuity of one thousand dollars for twenty years, which annuity was to cease, if, after the mine was faithfully worked by Peter, it should not yield a certain quantity of coal; the land was conveyed to the buyer. It turned out there was no such mine as was represented by Paul. On a bill filed by the purchaser, a perpetual injunction was granted to restrain Paul from proceeding at law to recover the annuity, although it did not appear that the latter had been guilty of any fraud. (b)

The unknown fact must not only be essential, but it must be such as could not by reasonable diligence be ascertained when the party has been put upon inquiry. (c)

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S. C. 14 S. & R. 296; *Large v. Penn.*, 6 S. & R. 488; *Farmers' & Mechanics' Bank v. Galbraith*, 10 Penn. St. R. 490; 1 Fonbl. Eq. B. 1, c. 2, s. 7; *Roosevelt v. Fulton*, 2 Cowen, 129.

(a) See *Hitchcock v. Geddings*, 4 Price, 135; *Poth. Vente*, n. 4.

(b) *Roosevelt v. Fulton*, 2 Cowen, 129.

(c) 1 Fonbl. Eq. B. 1, ch. 3, § 3; Dig. 22, 6, 9, 2; *Penny v. Martin*, 4 John. Ch. 566.

When the fact is known to one party, and he is bound to communicate it to the other, and he fails to do so, the party aggrieved will generally be relieved on the ground of surprise, because there has been an unconscionable advantage taken of him by the concealment of the facts.(a) But the obligation must not be a mere duty, but a legal obligation, and bring the case within the definition of surprise or fraud.(b)

When both parties have the same opportunities of knowing the facts, and each is presumed to exercise his own judgment, skill and diligence, in regard to all extrinsic circumstances, in the absence of all fraud, the courts of equity will not relieve from the consequences of a mistake.(c)

3836. Mistakes are frequently made in *agreements reduced to writing*; sometimes the written agreement contains less than the parties intended; sometimes more; sometimes the intent is not expressed in the terms intended by the parties. To let such an agreement stand would be doing injustice. Courts of equity, in these cases, when the mistake is clearly made out by proof, will reform the contract, so as make it conformable to the intent of the parties;(d) for, as a general rule, the agreements of the parties, when reduced to writing, are to be considered binding upon them.(e)

3837. In another class of cases courts of equity will relieve from mistakes. When there has been a *defective attempt to execute a power*, equity will, in general, interpose and supply the defect, particularly in favor of parties for whom the person intrusted with

(a) Jer. Eq. Jur. 366, 387; E. I. Co. v. Donald, 9 Ves. 275.

(b) Earl of Bath and Montague's case, 3 Ch. Cas. 56; 74, 103.

(c) Laidlaw v. Organ, 2 Wheat. 178.

(d) Shelburn v. Inchiquin, 1 Bro. Ch. R. 341; Lyman v. U. S. Ins. Co. 2 John. Ch. R. 630; Graves v. Boston Mar. Ins. Co. 2 Cranch, 442; Gillespie v. Moon, 2 John. Ch. 585.

(e) 1 Story, Eq. Jur. § 152 to 168.

the execution of the power is under a moral or legal obligation to provide, by the execution of the power; such as a *bonâ fide* purchaser for a valuable consideration, a creditor, a wife, and a legitimate child; but as a court of equity is bound to do justice to all, it will not interfere when there are counter equities in other persons.(a) A distinction must be observed between a defective execution and a non-execution of a power; in the former case relief is frequently granted, in the latter, never, when such a power is distinguishable from a trust.(b)

In all cases when equity will interfere for a defective execution of a power, there must be a clear mistake or a clear omission, manifest from the structure and scope of the will.(c)

#### SECTION 3.—OF FRAUD.

3838. The third class of cases where a court of equity will, in the administration of general remedies, in concurrence with courts of law, grant relief, are those of frauds. The courts of law afford a very effectual remedy, in many cases, by declaring contracts and wills of real estate to be absolutely null and void. But there are many cases where those courts cannot afford any adequate remedies, and, in these cases, courts of equity will relieve the parties injured by such frauds.

It is extremely difficult to define fraud, or to set up any rule by which it may be distinguished, because every new rule may be made the origin of a new

(a) 1 Fonbl. Eq. B. 1, c. 1, § 7, note (v); *Holmes v. Coghill*, 7 Ves. 506; Com. Dig. Chancery. 4 H 1, 4 H 4, 4 H 6; Jer. Eq. Jur. 372; *Sinclair v. Jackson*, 8 Cowen, 543; *Barr v. Hatch*, 3 Ham. 529; *Hume v. Rundell*, 6 Madd. R. 331.

(b) 1 Fonbl. Eq. B. 1, c. 1, § 7, note (v).

(c) *Del Mare v. Rebello*, 3 Bro. C. C. 446; *Mellish v. Mellish*, 4 Ves. 49; *Holmes v. Constance*, 12 Ves. 279; *Milner v. Milner*, 1 Ves. 206.

evasion ; it would be limited only by setting bounds to human ingenuity.(a)

*Fraud* has, however, been defined to be any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. The fraud consists either, first, in a misrepresentation ; or, secondly, in the concealment of a material fact. It has been defined, in other words, to be any cunning, deception or artifice, used to circumvent, cheat, or deceive another : *Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam.*(b) But fraud, in the sense in which it is understood in a court of equity, includes not only all the class of positive frauds such as the definition includes, but many others. In equity all acts, omissions, and concealments, which involve a breach of legal or equitable obligation or duty, trust or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscious advantage is taken of another, are considered fraudulent.(c)

3839. The frauds for which a court of equity will grant relief have been classified as follows:

1. Fraud, which is *dolus malus*, may be actual, arising from the facts and circumstances of imposition ; which is the plainest case.

2. It may be apparent from the intrinsic nature and subject of the bargain itself ; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscionable

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(a) 1 Fonbl. Eq. B. 1, c. 2, § 12 ; 1 Madd. Ch. Pr. 89 ; Jer. Eq. Jur. 383 ; 2 Sch. & Lef. 666.

(b) Dig. 4, 3, 1, 2 ; Poth. Obl. n. 28.

(c) *Chesterfield v. Janssen*, 2 Ves. sen. 155, 156.

bargains, and of such even the common law has taken notice.<sup>(a)</sup>

3. A third kind of fraud is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is, that it must be proved not presumed; but it is wisely established in the court of chancery that it will be presumed from circumstances, to prevent surreptitious advantages of the weakness or necessity of another, which, knowingly to do, is equally against conscience, as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

4. A fourth kind of fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons, not parties to the fraudulent agreement.<sup>(b)</sup> Of this last class are marriage-brokage contracts, when parents and others may be deceived; compositions with creditors, where, unknown to the others, one procures a promise from the debtor, or his friends, to be paid in full, contrary to the agreement of composition.

Fraud is actual or constructive.

§ 1.—Of actual frauds.

3840. Actual fraud is an *intentional artifice*, employed by one person to induce another to fall into or remain in an error, and make a bargain contrary to his own interest. When a man enters into a contract with another, by supposing certain facts to be true, which are either misrepresented or concealed, it is clear he would not have entered into it, had he known the truth; and when the opposite party has been guilty of this

<sup>(a)</sup> Lord Hardwick cites *James v. Morgan*, 1 Lev. 3.

<sup>(b)</sup> *Chesterfield v. Janssen*, 2 Ves. sen. 155, 156.

fraudulent misrepresentation or concealment, justice requires that the latter should not receive any advantage from his own wrongful act. In such case the contract is not absolutely void,<sup>(a)</sup> because though the consent of the party has been obtained by surprise, yet still there is a consent, and a court of equity will forbid its execution to prevent injustice. This kind of injury and wrong may arise in a variety of ways.

*Art. 1.—By suggestio falsi, or misrepresentation.*

3841. Misrepresentation is the statement made, by one party to a contract to the other, that an essential matter relating to it is in fact in a particular way, when it is not so; it is the suggestion of a falsehood, *suggestio falsi*. To induce a court of equity to rescind a contract on the ground of misrepresentation, the representation must have been essential or material and false, and the opposite party must have had a right to rely upon it.

1. *The misrepresentation must have been respecting something material to the contract.*

3842. It is not the misrepresentation of every thing which will vitiate a contract otherwise fair. To authorize a court of equity to rescind a contract on the ground of misrepresentation, it is not only necessary to establish the fact that a misrepresentation was made, but it relates to some *matter of substance*, or important to the interests of the other party, and that it has actually misled him.<sup>(b)</sup>

This may be illustrated by the following examples :

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(a) The rigor of the common law would admit no averment by a man against his own deed. But in equity, when there is a *suppressio veri* or *suggestio falsi*, the release, or other deed, shall be avoided. 1 Fonbl. Eq. B. 1, c. 2, s. 8.

(b) 1 Fonbl. Eq. B. 1, c. 2, s. 8; *Neville v. Wilkinson*, 1 Bro. Ch. R., 546; *Turner v. Harvey*, Jac. R. 178.

If a person owning a piece of real property, should represent it to another as containing a mine, which constituted its principal value, and the purchaser, relying on the statement of the seller, buy it, and the representation was utterly false, the contract for the sale, or the sale itself, if completed, might be avoided for fraud, because the representation of the mine would be considered as fraudulent.<sup>(a)</sup> But should the seller represent a tract of land as containing one hundred acres of meadow, when, in fact, it contained only ninety and nine and three-quarters, if the difference would not have essentially affected the purchaser in price and value, or otherwise, this immateriality would not have affected the contract, and equity would not set it aside.

Not only must there have been a material misrepresentation, but the party must have been *mised* by it; for if he knew what was represented not to be true, he acted with his eyes open, and therefore was not influenced by it. There may have been great indiscretion on his part, but he cannot complain of fraud or surprise, which, in fact, did not exist. And, even if he was not aware that the representation was false, if he was not misled to his *prejudice* or *injury*, by which he lost a legal right, a court of equity will not set aside the contract. To entitle the complainant to relief, there must be an injury and damages coupled together, in equity as well as at law.<sup>(b)</sup>

2. *The representation must have been false.*

3843. The representation which vitiates a contract in equity, must have been material, and must have misled the other party to enter into the contract to his damage and injury; but this is not the only

<sup>(a)</sup> *Roosevelt v. Fulton*, 2 Cowen, 129; See *Lowndes v. Lane*, 2 Cox, R. 363.

<sup>(b)</sup> *Bacon v. Bronson*, 7 John. Ch. 201; *Fellows v. Gwydyr*, 1 Sim. 63.

ingredient required, it must have been false. It is immaterial, however, whether the party representing the fact knew it to be false, or whether he made the assertion without knowing whether it were true or false. If the representation were made without a knowledge of its truth, it is the same as if made knowingly against the truth, and, whatever may have been the intention of him who made it, even when made by mistake, it had the effect of taking the other party by surprise, and of operating upon him as an imposition.<sup>(a)</sup>

3. *The party deceived must have had a right to rely upon the representation.*

3844. Another ingredient to avoid a contract in equity on account of a wilful fraudulent misrepresentation, is, that the other party must have a right to put reliance upon it; for example, if a man, wanting to buy an article, should say to the seller, that he did not believe it to be worth more than one hundred dollars, because it was damaged, and that he has resolved to give no more; when, in fact, it could be proved that, five minutes before, he said the article was worth two hundred dollars, and that it was not damaged; and on this representation, the seller sold it to him, and in truth, it was worth two hundred dollars, and it was sound. No relief could be had, either at law or in equity, in such a case; courts do not aid parties who will not use their own senses and discretion in such matters.

Again, if a party, on a treaty for the purchase of an article, should represent to the seller that his partners had limited him as to the price he should give, when that was not the fact, and the seller sold it one-third less than the partners had authorized the buyer to pay for it, he could not recover the difference either at law or in equity.<sup>(b)</sup>

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<sup>(a)</sup> *Pearson v. Morgan*, 2 Bro. C. C. 389.

<sup>(b)</sup> *Vernon v. Keys*, 12 East, 637.

Nor ought the recommendation of puffers of goods, or the commendations of the qualities of property offered for sale, to be relied upon, for such false representations are not considered as legal or equitable frauds, however immoral they may be: *simplex commendatio non obligat*.

*Art. 2.—By suppressio veri, or concealment of the truth.*

3845. An unlawful concealment of the truth, or *suppressio veri*, when, from it, an injury arises to the opposite party, is a just cause for setting aside a contract in equity. But the concealment must be such, to render it unlawful, that the party concealing is bound to disclose the fact to the other. For, however immoral it may be to take advantage of knowledge, which, if communicated to the opposite party, would have induced him not to deal as he did, yet there are many cases where a man may lawfully do so, without vitiating the contract entered into in ignorance of such facts. There are many duties which are imperfect, and which human laws cannot enforce, although the dictates of humanity, conscience, and morality require their performance; but there are some cases where equity will not aid a party by a decree for a specific performance, where a purchase is made with a superior knowledge, which has been concealed from the opposite party. It is a rule in equity, that all the material facts should be known to both parties, and if one of them has concealed such facts from the other, he will not be aided, when he comes to ask for assistance in a court of equity.<sup>(a)</sup>

The following case will illustrate the rule that the concealment of a fact does not, of itself, vitiate a contract. If Peter, knowing of a mine on the land of

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(a) *Parker v. Grant*, 1 John. Ch. 630; *Ellard v. Llandaff*, 1 Ball & Beaty, 250; *Jer. Eq. Jur.* 388. See Verplanck on Contracts, passim.

Paul, of which the latter was ignorant, should, without disclosing the fact, buy it for a price which the estate would be worth, without the mine, the contract would be good, because the buyer was not bound to disclose the fact.

But when a party is bound to disclose the facts, and he either does not make them known, or does any act to prevent the opposite party from acquiring a knowledge of them, the concealment is fraudulent, and a court of equity will grant relief by making a decree to rescind the contract, or to enjoin the party who has been guilty of the concealment, from prosecuting any claim under it.

3846. There are certain intrinsic circumstances which form the very ingredient of the contract, such as belong to its nature, character, condition, title, and the like. These are of the essence of the contract; as that a horse you are selling is alive, that a house in a distant town, which you sell to another, is not burned down. If, knowing the fact, that at the time of the sale, the horse was dead or the house destroyed by fire, the seller should conceal such important fact, the sale could be avoided.<sup>(a)</sup>

3847. On the other hand, there are certain other circumstances, which are extrinsic in their nature, and are accidentally connected with the subject matter of the contract, or bear upon, and may enhance or diminish its value or price; such as facts relating to peace or war, the rise and fall of goods, the increase or diminution of duties and imposts, and the like. In these cases the rule of the common law is *caveat emptor*; the purchaser is bound to look to these matters, and he has no right to rely upon the seller for any information whatever; and courts of equity as well as courts of law observe this rule. It is founded, however, upon

<sup>(a)</sup> *Hitchcock v. Geddings*, 4 Price, 135; *Arnot v. Briscoe*, 1 Ves. 95; *Poth. Contrat de Vente*, h. 4, 240; *Pillage v. Armitage*, 12 Ves. 78.

a doubtful morality, and is contrary to that of the Roman or civil law, which requires a more perfect good faith.

There are some contracts in the common law, where the more equitable rule of the civil law has been adopted, where the parties are bound to disclose all the facts, intrinsic or extrinsic, which may operate on the minds of the contracting parties; cases of insurance are of this kind. If the insured does not disclose all the material facts within his knowledge which may affect the contract, and which the opposite party is entitled to know, the policy may be avoided. *(a)*

3848. Cases where a man takes a guarantee from a surety, and conceals from him facts which go to increase his risk, and suffers him to enter into a contract, under such ignorance and false impressions, as to the real state of the facts, such a concealment will amount to a fraud; because, by the common law, the party is bound to make such disclosure, and his silence is equivalent to an affirmation that the facts are not so. *(b)*

3849. When the parties stand in a fiduciary relation to each other, the utmost degree of good faith is required in making contracts with each other, and the misrepresentation or concealment of any material fact, will induce the courts of equity to pronounce such transactions void, and to make a decree restoring the parties to their original rights, as far as it can be done.

*Art. 3.—Of frauds arising from other causes.*

3850. Having examined those cases where actual fraud takes place in consequence of misrepresentation,

*(a)* 2 Caines, R. 57; 1 Marsh. on Ins. 468; Vasse v. Ball, 2 Dall. 270; Vale v. Phoenix Ins. Co., 1 Wash. C. C. 283; Biass v. Union Ins. Co., 1 Wash. C. C. 506; Susquehanna Ins. Co. v. Perrine, 7 Watts & Serg. 348.

*(b)* Pidlock v. Bishop, 3 B. & Cr. 605; Martin v. Morgan, 1 Brod. & Bing. 289; Etting v. Bank of the U. S. 11 Wheat. 59.

or the *suggestio falsi*, and of concealment, or the *suppressio veri*, our next object will be to consider, 1, cases which arise in consequence of the incapacity of the parties; 2, those which are manifest, and are perceived from the nature and subject of the bargain.

1. *Of frauds arising from the incapacity of the parties.*

3851. Though every one is allowed to dispose of his property as he pleases, when he has the free use of his understanding, and, in this respect, courts of equity have no right to interfere, yet, when from the state of mind, or other particular circumstance, in which the party is placed, he is induced to act contrary to his own interest or that of his representatives, he will be protected from those who thus have circumvented him. When examining the capacities of persons to enter into contracts, we considered what frauds would vitiate agreements entered into by parties to them, in consequence of their incapacity, on account of lunacy, idiocy, weakness of intellect, or because, having wills, they were under the power of others. In all such cases, when such incapable persons have been overreached, equity will set aside the contract, on the ground of fraud.(a)

2. *Of unconscionable bargains.*

3852. By *unconscionable bargains* are meant those contracts which no man in his senses, not under delusion, would make on the one hand, and which no honest and fair man would accept on the other.(b)

A bargain will not be considered unconscionable for the mere inadequacy of price, or any other inequality in the bargain, because whether the price is inadequate

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(a) Jer. Eq. Jur. 390, 395; 1 Story, Eq. Jur. § 221 to 242.

(b) *Chesterfield v. Janssen*, 2 Ves. 155; 1 Fonbl. Eq. B. 1, c. 2, § 9, note (e).

depends upon numerous circumstances, which cannot be considered by the courts, without setting afloat all contracts, and rendering every thing uncertain.(a) But the inadequacy may be so unconscionable as to shock the conscience, and be evidence sufficient to demonstrate some gross imposition or undue and unfair influence, which may be considered a fraud.(b) Still, there are cases in which equity will not relieve even where there has been gross inadequacy, unless the parties can be placed *in statu quo*. In cases of marriage settlements, for example, the courts cannot unmarry the parties, and therefore they will not interfere.(c)

§ 2.—Of constructive frauds.

3853. After having examined the effects of actual frauds upon contracts and the acts of parties, we come, next, to consider *constructive frauds*, or such contracts or acts, which, though not originating in evil design or contrivance to perpetuate fraud or injury upon other persons, yet, by their necessary tendency to deceive and mislead them, or to violate public or private confidence, or to impair or injure public interests, are deemed equally reprehensible, in a legal and equitable point of view, as actual frauds, and, therefore, prohibited by law, as within the same reason and mischief as contracts and acts with a premeditated intention to commit a wrong, done *malo animo*.(d)

This subject will be treated of under three separate articles: 1, of frauds against public policy; 2, of frauds in violation of trusts and fiduciary relations; 3, of frauds against third persons.

(a) Griffith *v.* Spratley, 1 Cox, R. 383; 1 Madd. Ch. Pr. 267; 1 Story, Eq. Jur. § 245.

(b) 1 Cox, R. 383; Gartside *v.* Isherwood, 1 Bro. C. R. App. 558; 1 Madd. Ch. Pr. 267; Coles *v.* Trecothick, 9 Ves. 246. See Clarkson *v.* Hanway, 2 P. Wms. 203; Gibson *v.* Jeyes, 6 Ves. 273.

(c) 1 Madd. Ch. Pr. 271.

(d) 1 Story, Eq. Jur. § 258.

*Art. 1.—Of contracts against public policy.*

3854. *Contracts against public policy* are quite numerous, and are so denominated because they are considered as subversive of, or injurious to public interests, on account of their being contrary to some general public policy of the law. They may be thus classified: 1, contracts founded upon corrupt considerations or moral turpitude; 2, contracts in violation of a public trust; 3, contracts in restraint of trade; 4, contracts in restraint of marriage; 5, contracts to influence persons in authority.

*1. Of contracts founded upon a corrupt consideration or moral turpitude.*

3855. Though courts of equity cannot undertake to enforce imperfect obligations which are of a moral character only, yet, when the law enjoins the discharge of certain duties, or forbids the performance of certain acts, any agreement not to perform what is enjoined, or to do what is forbidden, is considered as unlawful, and an agreement made upon such corrupt consideration or moral turpitude, cannot be enforced in equity. All agreements, bonds, or other securities, given as the price of future illicit intercourse,<sup>(a)</sup> or for the commission of a crime, or the violation of a public law, or for the omission of a duty enjoined by law, are, therefore, deemed to be unlawful, and cannot be enforced in a court of law or equity.

3856. Numerous examples might be given of such contracts, which neither courts of law nor courts of equity will enforce. When a bond was given to the obligee, as an indemnity for a note entered into by him, for the purpose of inducing the prosecutor of an indictment for perjury to withhold his evidence, it was held at law that he could not recover; for the courts would look beyond the form of the contract, and expose

(a) *Collins v. Blantern*, 2 Wils. 341.

the transaction in its true light. Courts of equity will set aside agreements and acts in fraud of the policy of the law ; as if a conveyance be made to a person under a secret trust for himself, for the purpose of defeating creditors, or to prevent a forfeiture for felony or treason, the conveyance will be set aside in favor of the government or of the creditors, but not in favor of the grantor, it being a rule in equity, that when two persons are equally guilty, the condition of the defendant or possessor is the better : *in pari delicto potior est conditio defendentis et possidentis*.

3857. It is a rule in equity, that when two persons are equally guilty, in making a contract in violation of law, neither shall be heard in equity, or have relief there. The court will leave them where it finds them, and, in that situation, the condition of the possessor or defendant is to be preferred. But a contract is not considered as in violation of law, or *turpis contractus*, which is to repair an injury done, as where a bond is given to a woman for *past* cohabitation, though it may be avoided if it is for future illicit cohabitation, or a *præmium pudicitia*; this, it is true, may be avoided by creditors of the obligor, or as a voluntary bond, but not on account of its illegality between the parties.<sup>(a)</sup>

There are cases, however, that although both parties are in the wrong, they may not stand as equally in the wrong ; they may be *in delicto*, but not *in pari delicto*; for there are often very different degrees of guilt. The courts of equity may, therefore, grant relief to one of the parties who is *in delicto*, and refuse it to the other; and sometimes this is done for the purpose of supporting the public interests or public policy. Where contracts are declared void, as being against the statutes of usury, if the usurer or lender of money seeks to enforce the contract, equity will grant him no assist-

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<sup>(a)</sup> *Turner v. Vaughan*, 2 Wils. 339 ; *Hill v. Spencer*, Amb. 641 ; *Shenk v. Mingle*, 13 S. & R. 29 ; *Maurer v. Mitchell*, 9 Watts & Serg. 69.

ance, because the contract is void or voidable ; on the contrary, if the borrower seeks for relief against the usurious contract, it will be granted to him upon condition that he will pay the defendant what is really due him, *bonâ fide*, deducting the usurious interest ; and if the plaintiff do not make such offer in his bill, the defendant may demur to it, and, for this reason, his bill will be dismissed.

2. *Of contracts in violation of public trust and public justice.*

3858. Contracts made in violation of public trust and confidence, or of rules of law made in furtherance of the administration of public justice, are void ; an agreement made in consideration of suppressing a public prosecution, for some criminal charge, has a manifest tendency to subvert public justice ; (a) so a promissory note given to the payee in consideration that he would withdraw his opposition to the discharge of the maker as an insolvent debtor, is contrary to the policy of the law and void. (b) And upon the same principles, as being opposed to public policy, are contracts having a tendency to encourage champerty, (c) or wagers contrary to sound morals, or injurious to the feelings or interests of third persons. (d) So an agreement made with a commissioner appointed to take testimony, and bound to secrecy by the nature of his appointment, to pay him for disclosing the testimony taken, is void. (e)

3. *Of contracts in restraint of trade.* (f)

3859. It is the policy of law that trade should be encouraged as much as possible, and every restraint

(a) *Johnson v. Ogilby*, 3 P. Wms. 276, and note (1) ; *Newland on Contr.* 158.

(b) *Baker v. Matlack*, 1 Ashm. 68.

(c) *Power v. Knowler*, 2 Atk. 224.

(d) *Phillips v. Ives*, 1 Rawle, 36.

(e) *Cooth v. Jackson*, 6 Ves. 12, 31.

(f) See ante, n. 774.

upon it having the effect of shackling its operations is void, as being against public policy. An agreement that a man shall not trade at all is void, but an agreement that he shall not trade in a particular place may be enforced. The reason for this distinction is this: in the former case, the public would lose the advantage of the talents and the productive industry of the trader, as he could not be employed any where;<sup>(a)</sup> but, in the latter case, although he would not give his active industry in one place, he would bestow it in another, and the public would still receive the benefit of his talents and industry. If a man were to buy the stock in trade of another, and the good will of his stand in Philadelphia, he might lawfully require of the seller a covenant that he would not follow the same business in that city, leaving him at liberty to pursue it elsewhere.<sup>(b)</sup>

4. *Of contracts in restraint of marriage.*

3860. Marriage is the very foundation of society, and therefore, all unlawful restraints upon it will be declared void in equity.<sup>(c)</sup> An agreement made by a person that he will never marry, or that he will marry none but a particular person, is void, unless, in the latter case, that person has made a reciprocal engagement to marry him. When there is a mutual agreement between a man and a woman that they will marry each other, the contract is lawful, although each is restrained from marrying any other, because, as far as society is concerned, no injury can arise; it is of no consequence to the public whether Paul marry

<sup>(a)</sup> Nobles *v.* Bates, 7 Cowen, 207.

<sup>(b)</sup> Mitchell *v.* Reynolds, 1 P. Wms. 181; 7 Cowen, 207. See Pierce *v.* Fuller, 8 Mass. 223; Perkins *v.* Lyman, 9 Mass. 522; Stearns *v.* Barrett, 1 Pick. 460; Palmer *v.* Stebbins, 3 Pick. 188; Pyke *v.* Thomas, 4 Bibb, 486; Pierce *v.* Woodward, 6 Pick. 206.

<sup>(c)</sup> Dig. 35, l. 62; 1 Fonb. Eq. B. 1, c. 4, § 10; Key *v.* Bradshaw, 2 Vern. 102.

Sarah or Mary, but it is considered detrimental if he be restrained from marrying any one.(a)

*5. Of contracts, the consideration of which is to influence persons in authority.*

3861. Persons in authority are required to exercise their power for the public good; every attempt to influence them, unduly, is against public policy, and a contract with another to use such undue influence, is void. All contracts, made for the buying, or selling, or procuring public offices, or for procuring a pardon for a convict, or for the passage of a law through the legislature, is void.(b) It is evident that all such contracts have a tendency to injure the public interests, and are calculated to fill our offices with the weak, the cunning and the profligate; to procure pardons for unrepenting convicts; and to cause the enactment of laws destructive of the public good. These contracts will be declared null by a court of equity, on the ground that they are opposed to public policy.

*Art 2.—Of frauds in violation of trusts and fiduciary relations.*

3862. The second class of constructive frauds are those in violation of trusts and the fiduciary situation of the parties. In many instances owing to their position, agents, attorneys, guardians, trustees, parents, children, and many others who stand in relations of confidence with others, may take advantage of those with whom they stand in this relation; a rule has, therefore, been established that courts of equity will grant relief in such cases, where, but for the relation which subsisted at the time of the transaction, they

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(a) 1 Fonbl. Eq. B. 1, c. 4, s. 10; *Lowe v. Peers*, 4 Burr. 2225; *Cork v. Richards*, 10 Ves. 429; *Woodhouse v. Shipley*, 2 Atk. 595.

(b) *Clippinger v. Hepbaugh*, 5 W. & S. 315; *Filson's Trustees v. Himes*, 5 Penn. St. R. 452; *Hatzfield v. Gulden*, 7 Watts, 152.

would not have interfered. They afford relief in such cases upon motives of general public policy. But courts of equity will interfere only where confidence has been reposed, and that confidence has been abused.(a)

The cases which fall within this rule may be classed into those which refer, 1, to parents and children; 2, guardian and ward; 3, trustee and *cestui que trust*; 4, client and attorney; 5, principal and agent; 6, principal and surety.

1. *Of fraud between parent and child.*

3863. When contracts have been made between a parent and child, by which the latter has made conveyances or contracts against his interest, the courts of equity will often set them aside, upon the ground that the just confidence and influence which a parent has over a child has been perverted;(b) but such contract must have been obtained by *undue influence*, otherwise it will not be set aside; a mere fear of *displeasing* a parent will not have that effect. In a case where a son was tenant in tail and the father tenant for life, and the son agreed to something for the benefit of younger children, and afterward he complained that he had been induced to do this by parental authority, the court refused to set aside the agreement, though it would not be denied there was something of the sort.(c) Even when there has been some improper conduct on the part of the father, the application for relief must be made in a reasonable time, for a long delay, and acquiescence on the part of the child, will deprive him of the remedy to which he might otherwise be entitled.(d)

(a) *Gartside v. Isherwood*, 1 Bro. C. R. App. 560; *Osmond v. Fitzroy*, 3 P. Wms. 129, note.

(b) 1 Madd. Ch. Pr. 309.

(c) *Cory v. Cory*, 1 Ves. 19.

(d) 1 Madd. Ch. Pr. 310.

2. *Of fraud between guardian and ward.*

3864. The guardian, standing *in loco parentis*, is presumed to have the same kind of influence over his ward that a parent has over a child. Indeed there is a greater reason for jealousy, for the guardian cannot be supposed to have those natural feelings which restrain the father from imposing upon his child.

During the guardianship, the acts of the guardian are under the constant supervision of the court, and all contracts made by him in relation to the property of his ward, will not be binding upon the latter, if they are to his disadvantage; and, during that period, the relative situation of the parties renders them generally unable to deal with each other.

But the superintending protection of courts of equity goes further, it protects the ward from all bargains which the guardian may have obtained from him by surprise, after he became of age; and if the intermediate period be short, the contract will be declared void, unless it has been made under circumstances which show, in the clearest manner, that such contract has been made with full and mature deliberation, in the absence of all fraud and surprise, because the ward may be easily imposed upon by flattery or harshness.

3. *Of fraud between the trustee and cestui que trust.*

3865. The rules which govern in the cases of guardian are in full force with regard to trustees, and contracts between them and the *cestui que trust*, which would not be good between a guardian and his ward, will be invalid; a trustee can never partake of the bounty of the party for whom he acts, except under circumstances which would render valid similar acts between guardian and ward. In general a trustee cannot purchase of his *cestui que trust*, but when there is a distinct and clear contract, which will bear a jealous and scrupulous examination of all the circumstances

attending it, by which the *cestui que trust* intended that the trustee should buy, and there had been neither fraud, concealment on the part of the trustee, nor advantage taken by him in consequence of the knowledge he had acquired as trustee, it will not be disturbed by a court of equity; for men have a right to do what they please with their own property. If, on the contrary, there has been any overreaching, inadequacy of price, or inequality in the bargain, the contract will be set aside.(a)

Nor can a trustee buy an estate, although sold at auction, which he sells for the benefit of the *cestui que trust*, and, in these cases he will be considered still as a trustee, although he may have acted in good faith, and remain accountable for the estate, at the choice of the *cestui que trust*, as if no sale had been made.(b)

Not only technical trustees, but other persons standing in similar situations, as assignees, solicitors of a bankrupt or insolvent estate, executors or administrators, will be restrained from buying the property they represent, and all purchases made by them may be set aside on this account.(c)

In these, and all other cases, where confidence is reposed, and one party, in consequence of such confidence, has it in his power to sacrifice the interests he is bound to protect, he will not be allowed to take advantage of such contracts, and the court will set them all aside.(d)

#### 4. *Of frauds between client and attorney.*

3866. In consequence of the advantage and imposi-

(a) *Gibson v. Jeyes*, 6 Ves. 277; *Coles v. Trecothick*, 9 Ves. 246; *Fox v. Mackreth*, 2 Bro. C. R. 400; *Prevost v. Gratz*, 1 Pet. C. C. 367.

(b) *Davoue v. Fanning*, 2 John. Ch. R. 252; *Ex parte Bennett*, 10 Ves. 381; *Moore v. Royal*, 12 Ves. 355.

(c) *Ex parte Lacey*, 6 Ves. 625; *Farnam v. Brooks*, 9 Pick. 202; *Davoue v. Fanning*, 2 John. Ch. R. 252.

(d) *Jer. Eq. Jur.* 395; *Bank of U. S. v. Etting*, 11 Wheat. 59.

tion which it is in the power of an attorney to take of his client, a court of equity will sometimes interpose and set aside a contract, which, between other persons, would be unimpeachable. Although it is not necessary to establish fraud or imposition upon the client, to authorize the court to set aside the contract, yet it is not necessarily void throughout, *ipso facto*; in these cases the burden of establishing the fairness and equity of the transaction is thrown upon the attorney; and, unless this be shown, the contract may be invalidated.(a)

3867. A distinction has been made between the cases of attorney and client, and of trustee and *cestui que trust*, which should not be forgotten. When a contract has been made between an attorney and his client, while the connection subsisted, it may be set aside, unless he can show the transaction to have been perfectly fair; the law requires him to do no more, it simply throws upon him the *onus* of proving that no unjust or unfair advantage has been taken of the client, and when this is proved, the agreement must stand. With regard to a contract between a trustee and *cestui que trust*, on the contrary, the fairness of the transaction is altogether immaterial; it is not sufficient to show that no advantage has been taken, the contract will stand or be set aside at the option of the *cestui que trust*.(b)

5. *Of frauds between principal and agent.*

3868. There are not many relations in social life, where one man depends upon the judgment and integrity of another, more than in the connection which subsists between principal and agent. The courts of equity, therefore, look upon contracts made between

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(a) *Gibson v. Jeyes*, 6 Ves. 278; *Bellew v. Russell*, 1 B. & Beat. 104; *Harris v. Tremeneere*, 15 Ves. 34; *Wood v. Downes*, 18 Ves. 120.

(b) *Cane v. Lord Allen*, 2 Dow, 289.

these parties with the same jealous care with which they watch the contracts made between other persons standing in a fiduciary situation. Secret agreements by which agents become sellers or buyers of property, which they are to buy or sell for their principals, and by which they are to derive any benefit, unknown to the principal, will be declared void, as being opposed to justice and sound policy. If an agent, employed to purchase a piece of land for another, buys it for himself, the courts of equity will turn him into a trustee for his principal.(a)

In the bargains openly made between them, respecting the property which is the object of the agency, the utmost good faith is required. The agent must disclose all facts within his knowledge, which might in any degree influence the judgment of his principal as to the price or value; for, when he does not, the parties do not deal upon equal terms, and the agent obtains an unjust advantage for which the contract will be set aside.(b)

Indeed, any unreasonable gifts from the principal, or advantages obtained by the agent, when procured by an abuse of confidence, will be set aside.(c)

*6. Of frauds between creditor and surety.*

3869. In entering into the contract of suretyship, the surety has a right to rely with entire and full confidence, on the representations of all the material facts upon the statements of the creditor, and any statements made to him, either by the creditor himself, or by the debtor, with his knowledge, which are material and false, will avoid his contract. The creditor is bound in all things to act in good faith, not

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(a) *Leés v. Nuttall*, 1 Russ. & M. 58.

(b) *Farnam v. Brooks*, 9 Pick. 212.

(c) *Crowe v. Ballard*, 3 Bro. C. R. 120; *Massey v. Davies*, 2 Ves. jun. 318; *Church v. Mar. Ins. Co.* 1 Mason, 341; *Barker v. Mar. Ins. Co.* 2 Mason, 369.

only in making the contract, but in all subsequent transactions with the debtor; he is also bound to act with good faith toward the surety.(a)

*Art. 3.—Of frauds against third persons.*

3870. Whenever the contracts of individuals operate substantially upon the rights and interests of third persons, or unconscientiously compromise the rights and injuriously affect the interests of the parties themselves, they will be considered as fraudulent, and for these reasons a court of equity will set them aside. Fraud assumes every shape, so that it is extremely difficult to classify those cases which affect third persons. This third kind of constructive frauds will be examined as they relate, 1, to catching bargains; 2, to bargains with sailors for their wages; 3, to agreements to delay or defraud creditors; 4, to contracts where a person purchases with full notice of the legal or equitable title of another.

1. *Of catching bargains, and contracts with reversioners and remaindermen.*

3871.—1. The first kind of constructive frauds against the rights of third persons is a *catching bargain*. This is an agreement made with an heir expectant, for the purchase of his expectancy, at an inadequate price. A sale of an expectancy is considered fraudulent as regards third persons, and, if such a right subsisted, it would be destructive of parental or quasi-parental authority. Such a contract may be clear of actual fraud, but it is always tinged with constructive fraud, as being an imposition on persons not parties to it.

To support such contract, the purchaser is called upon to establish, not merely that there is no fraud,

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(a) This matter has been fully considered under the head of suretyship, B. 2, part 2, tit. 5, c. 11, vol. 2, p. 52.

but that a full and adequate consideration has been paid, for a mere inadequacy of price, is alone, in cases of this kind, a sufficient ground to set aside such a contract.(a)

3872.—2. The same rule applies to the case of a reversioner or remainder man, who has an estate, but no right of present enjoyment, and who, through necessity, or from mere giddiness and improvidence, sells his rights much below an adequate price. In cases of sale by such reversioners or remainder men, or other persons similarly situated, the courts of equity assume that the party is defenceless, exposed to the demand of the opposite party, under the pressure of necessity; also, that there is an actual or implied fraud upon the parent or other ancestor, who is misled, in consequence of his ignorance, and induced to repose with a false confidence in the disposition of his property.(b)

3873. To constitute this constructive fraud, there must be, first, ignorance of the transaction by the parent or person standing *in loco parentis*; and secondly, the contract must have been made under some pressing necessity.

1st. When the transaction has been made fully known to the parent or other person standing *in loco parentis*, the contract will not be fraudulent, and, *à fortiori*, it will be good, when knowing it, he approves of it;(c) or,

2dly. The contract must have been made under a pressure of necessity; because the pressure and distress of the party dealing is the true ground of the court's interference. It is not requisite that both ignorance on the part of the ancestor and pressure

(a) 1 Madd. Ch. Pr. 117, 118; *Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ves. 20; *Chesterfield v. Janssen*, 2 Ves. 149,

(b) *Shelly v. Nash*, 3 Madd. R. 232; 1 Fonbl. Eq. B. 1, c. 2, § 12, note (k); *Jer. Eq. Jur.* 398, 399.

(c) *King v. Hamlet*, 2 Mylne & Keene, 473.

should exist at the same time; to entitle the party to relief, the presence of one of them forms an essential ingredient in a case to give rise to a just presumption of constructive fraud.<sup>(a)</sup>

3874.—3. There is another species of contracts made with heirs expectant, secured by an instrument called a *post obit bond*. A *post obit bond* is a written agreement by which the obligor binds himself to pay a sum of money, which is lent to him, with greater interest than the rate fixed by law, to be paid upon the death of a person from whom he has some expectation.<sup>(b)</sup>

Equity will, in general, relieve from these unequal contracts, not only because they are unfair with regard to the parties, but also, because they are fraudulent toward the ancestor, by disappointing his intentions. But, as it is a rule that he who seeks equity must do equity, relief will be granted to such an obligor only upon equitable terms.<sup>(c)</sup>

2. *Of bargains with sailors for their wages.*

3875. It is known that sailors, that is, common mariners, in the mercantile or naval service, are extravagant and heedless, and apt to part with their rights to receive wages and prize money, without sufficient reflection. Courts of equity, therefore, watch

<sup>(a)</sup> *Postmore v. Taylor*, 4 Sim. R. 182; *Davis v. Marlborough*, 2 Swanst. 139. It is highly probable the rules adopted by courts of equity in cases of this kind, are borrowed from the Roman law. A decree called Macedonian, from Macedo, a noted usurer at Rome, was made by the senate, which forbid the loan upon a ruinous interest, as had been the case under that usurer. Before the passage of this decree, a loan was frequently made to children who were under paternal power, upon condition that they should pay exorbitant interest. This decree deprived the usurer of any action for such a loan. Dig. 14, 6, 1 to 7; Inst. 4, 7, 7; Code 4, 28. See Domat, Lois Civ. liv. 1, t. 6, s. 4; Fonbl. Eq. B. 1, c. 2, § 12, note (l); *Chesterfield v. Janssen*, 2 Ves. sen. 158. But, if the father, or person standing *in loco parentis*, consented to the loan, it might be recovered. Inst. 4, 7, 8.

<sup>(b)</sup> *Chesterfield v. Janssen*, 2 Ves. sen. 157; *Boynton v. Hubbard*, 7 Mass. 119.

<sup>(c)</sup> Fonbl. Eq. B. 1, c. 2, § 13, note (p).

with a jealous care over their interests, and consider them in the same light that young heirs and expectants are looked upon. Contracts made by them for the transfer of their wages and prize money will be set aside, whenever any inequality appears in the bargain, or any undue advantage has been taken of them.(a)

3. *Of agreements to delay or defraud creditors.*

3876. A third class of constructive frauds against the rights, duties, or interests of third persons, includes those agreements and contracts of parties, which tend to delay, deceive, or defraud creditors. Courts of equity will relieve in all such cases, as being fraudulent, and within statutes passed in different reigns,(b) the principles of which have been reënacted or adopted in this country. The effects of these statutes having been considered when we were treating of contracts, it will not be requisite to do any thing further than to refer to what was then said.(c)

4. *Of contracts where the purchaser buys, with notice of prior title in another.*

3877. There is a fourth class of constructive frauds, which consists of cases where a party buys with full notice that another has a legal or equitable title to the same property. By this means he becomes a *particeps criminis* with the fraudulent grantor, and both at law and in equity, he will be postponed, in the assertion of his rights to the true owner. In such cases, courts of equity will treat the purchaser as a trustee for the person whom he intended to defraud. If, for example, a mortgagee, with a notice of a trust, should get a conveyance from a trustee, in order to protect his

(a) Jer. Eq. Jur. 401; 1 Story, Eq. Jur. § 332; *How v. Weldon*. 2 Ves. 516, 518; 3 P. Wms. 131, Cox's note (1); *The Juliana*, 2 Hagg. Adm. R. 504.

(b) 50 Edw. III., c. 6; 3 Henry VII., c. 4; 13 Eliz. c. 5; 27 Eliz. c. 4.

(c) *Ante*, n. 2014.

mortgage, he would be considered a trustee, and made responsible as such.<sup>(a)</sup>

In the sale of land, the recording of the deed is a sufficient notice to all the world.<sup>(b)</sup> The object of the recording acts is to prevent impositions upon purchasers and mortgagees against prior secret conveyances and incumbrances, and those who would be affected by them are notified by the registry. If a party having obtained a mortgage or a conveyance, neglect to put it upon record, he is, for his neglect, postponed to another who has procured his to be registered.

3878. The notice which affects a man's contracts, may be *actual* or express, by which the knowledge is brought home to him directly. It may also be *constructive*, that is, there may exist such facts from which the presumption of notice arises with such force, that the contrary cannot be proved, or even controverted.<sup>(c)</sup> As a general rule, whatever facts have a reasonable certainty as to time, place, circumstances and persons, are considered as sufficient notice in equity; and the person knowing those facts, is bound to inquire into all other circumstances of which they are evidence, by which he may be affected in his interest; for example, notice of a lease is notice of its contents; notice that an estate which a man has purchased is in the possession of tenants, is notice that they have some rights, of which he ought to inquire.<sup>(d)</sup> But vague rumors, and mere suspicions, will not be sufficient notice; still, it is very difficult to say what extent of information will be such a notice as will affect a party.

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<sup>(a)</sup> Fonbl. Eq. B. 2, c. 6, s. 2; Saunders v. Dehew, 2 Vern. 271.

<sup>(b)</sup> Parkhurst v. Alexander, 1 John. Ch. 394. See Wilt v. Franklin, 1 Binn. 522.

<sup>(c)</sup> Plum v. Fluit, 2 Anstr. R. 438.

<sup>(d)</sup> Fonbl. Eq. B. 2, c. 6, § 3, note (m); Smith v. Low, 1 Atk. 490; Mertins v. Jolliffe, Ambl. 313; Meux v Maltby, 2 Swans. 281; Chesterman v. Gardner, 5 John. Ch. 29; Daniels v. Davidson, 16 Ves. 249.

SECTION 4.—OF REMEDIES PECULIARLY APPROPRIATE IN  
EQUITY AND INAPPROPRIATE AT LAW.

3879. Having shown the concurrent jurisdiction of courts of equity with the courts of law, in relation to accidents, mistakes and frauds, which are the causes why courts of equity interfere; under the present section will be considered those which apply to the manner of relief. In a court of law, when a contract has been broken, the remedy is to recover damages for the non-performance; in equity the courts will decree a specific performance. For the recovery of chattels, detinue and replevin may be had at law; in equity a specific delivery of the chattels will be awarded. In some cases of forfeiture, equity will give a remedy, when there is none at law; and, in many cases, when courts of law cannot bestow an adequate remedy, courts of equity will afford one.

The matters of this section will be distributed into those which relate, 1, to the specific performance of agreements; 2, to the relief against forfeitures and penalties; 3, to the cancellation and delivery of instruments; 4, to the confusion of boundaries.

§ 1.—Of the specific performance of agreements.

3880. The remedy given at law for the breach of a contract is, in general, by giving damages to the party injured, commensurate with the loss he has sustained. In many cases, it was early found, this was very inadequate. To remove this inconvenience and to prevent injustice, courts of equity interfered, *after* the plaintiff had established his claim at law, by making a decree, upon a bill filed, ordering the defendant to make a specific performance of his agreement, and he was compelled to do so when it was in his power.<sup>(a)</sup>

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<sup>(a)</sup> *Dodsley v. Kinnersley*, Ambl. 406; *Hollis v. Edwards*, 1 Vern. 159; 11 Ves. 592; *Wiseman v. Roper*, 1 Chan. R. 158; 2 Freem. 217.

In the course of time courts of equity began to enforce the specific performance of agreements *without sending the parties to law*, on the ground that a court of law could not grant adequate relief, and, indeed, there were many cases where a court of equity would grant a specific performance, which, at law, could not be relieved at all; the agreement to assign a *chose in action* is of this kind. At law a *chose in action* is not assignable, and of course a suit to compel the assignment could not be there maintained; but in equity it is assignable, and a court of equity could therefore entertain a suit to compel a specific performance of such an agreement.(a)

The rule for granting relief in equity is, that where a party is entitled to the thing in specie, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance.(b) But this remedy extends only to contracts of which a specific performance is essential to justice; for if damages for non-performance are all that justice requires, as in the case of contracts for stock in the public funds, or the sale of goods, a court of equity will not interfere.(c)

As the remedy for the breach of a contract is concurrent, and both courts of law and courts of equity have jurisdiction, there seems to be no reasonable objection to permit a person who has been injured, by a breach of a contract, to select the remedy which will do him the most ample justice.(d)

In the discussion of this subject it will be necessary to examine, 1, the nature of the contract; 2, its object; 3, the party in whose favor a specific performance will be decreed; 4, against whom; 5, when a specific performance will be refused.

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(a) 1 Madd. Ch. Pr. 362.

(b) 1 Fonbl. Eq. B. 1, c. 1, § 5, note (o); Mitford's Eq. Pl. 109; Halsey v. Grant, 13 Ves. 76; Harnett v. Yielding, 2 Sch. & Lef. 553.

(c) 1 Story, Eq. Jur. § 717; 1 Fonbl. Eq. B. 1, c. 1, § 6, note (r).

(d) 1 Fonbl. Eq. B. 1, c. 1, § 5, b.

*Art. 1.—Of the nature of the contract upon which a specific performance will be decreed.*

3881. A court of equity will not enforce a contract by decreeing a specific performance, unless there be proper equitable grounds for the court to act upon, and even when there are such grounds, if there are countervailing equitable considerations the contract will not be enforced, because the court has a discretion in all cases, to grant or refuse its decree for a specific performance. This discretion, however, is not arbitrary, but is exercised in a judicial manner, according to established rules; and when the contract and the facts come within those rules, it is as much of course in a court of equity to decree a specific performance, as it is to give damages at law.*(a)* There may be cases where the plaintiff might recover damages at law, in which a court of equity would not decree a specific performance; where, for example, the plaintiff's title is involved in difficulties, which cannot be immediately removed, equity will not compel the defendant to take a conveyance, though, perhaps at law, he might be subjected to damages for not completing his purchase.*(b)*

To entitle the plaintiff to a specific performance, he must be able to show, 1, that the contract has been made in a proper form; 2, that it is fair; 3, certain; 4, upon a sufficient consideration; 5, lawful; 6, to do a thing possible; 7, that there is no adequate remedy at law.

1. *Of the form of the agreement, the specific performance of which will be decreed.*

3882. Although courts of equity acknowledge the

*(a)* Hall v. Warren, 9 Ves. 608; White v. Damon, 7 Ves. 35; Buckle v. Mitchell, 18 Ves. 111; Revell v. Hussey, 2 Ball & B. 288.

*(b)* Davis v. Symonds, 1 Cox's R. 402; Day v. Newman, 2 Cox's R. 77. See Stapylton v. Scott, 16 Ves. 272; Hepburn v. Auld, 5 Cranch, 262, 278; Simmons v. Hill, 3 H. & McH. 258; Butler v. O'Hear, 1 Desaus. 392.

marked difference which exists between contracts under seal, and those which are not under seal, yet as the relief appears to be the same upon each of them, it will be unnecessary to distinguish between them here, except so far as may be requisite in relation to the question of the consideration upon which they are founded.(a) The only distinction, in other respects, in which they are viewed in courts of equity, is that they are contracts *in writing* and *not in writing*.

3883. The statutes of frauds require certain contracts to be reduced to *writing* in order to give them validity. When such contracts are reduced to writing, and, in other respects, the plaintiff is entitled to a specific performance, they will be enforced in equity. But there are some cases where a court of equity will enforce the specific performance of an agreement, although such contract may not have been reduced to writing; these may be considered as exceptions.

1. A *parol* agreement, understood in the sense of a verbal agreement, not reduced to writing,(b) will be enforced in equity, notwithstanding the statute of frauds requiring such agreements to be reduced to writing, and signed by the party to be bound, when it has been partly carried into execution.(c) The reason why courts of equity interfere in such cases is, that it would be iniquitous to permit a fraud upon the other, by receiving a partial execution of the contract, and then refusing to carry it out because it was not in proper form.(d)

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(a) 2 Story, Eq. Jur. § 715; Jer. Eq. Jur. 423.

(b) Agreements are sometimes divided into those by specialty and those by parol, in which latter class are included all contracts not under seal, whether written or verbal; but another division may be made by classing them into specialties, agreements in writing not under seal, and agreements by parol, that is, verbally. It is in the last sense that the word is here used.

(c) 1 Fonbl. Eq. B. 1, c. 3, § 8, note (e); Thompson v. Scott, 1 McCord's Ch. R. 39.

(d) Newl. on Contr. 179, 181; 3 Woodes. Lect. 433; 2 Story, Eq. Jur. § 759.

The question of what is a *part performance* has frequently embarrassed the courts,<sup>(a)</sup> but, as a general rule, it may be observed that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement be performed.<sup>(b)</sup> But a payment of the purchase money will not be considered as a part performance, so as to take the case out of the statute of frauds.<sup>(c)</sup> Nor will the mere possession of the land contracted for be deemed a part performance if it be obtained wrongfully by the party, or if it be entirely independent of the contract.<sup>(d)</sup>

It is essential that the acts which are to be considered as a specific performance shall have been done solely with a view to the performance of the contract; for if they have been done with other intentions, they will not take the case out of the statute. It is for this reason that acts merely introductory or ancillary to an agreement are not considered as part performance, although they may be attended with expense.<sup>(e)</sup>

In cases where a part performance is sufficient to take them out of the statute, no decree for a specific performance will be made, unless the whole terms of the contract are clear and definitely ascertained.

2. When the agreement intended by the parties to be reduced to writing, according to the statute, has not been so reduced in consequence of *the fraud of the opposite party*, if it can be substantially proved, it will be enforced in equity by a decree for a specific per-

(a) *Clinan v. Cooke*, 1 Scho. & Lef. 40; *Jackson's Assignees v. Cutright*, 5 Munf. 318; Newl. on Contr. 187.

(b) 1 Scho. & Lef. 40; *Savage v. Foster*, 9 Mod. 37; *Lee v. Lee*, 9 Penn. St. Rep. 178; *Brinker v. Brinker*, 7 Penn. St. R. 53; *McKee v. Phillips*, 9 Watts, 85; *Young v. Glendenning*, 6 Watts, 509; *Johnston v. Johnston*, 6 Watts, 370.

(c) *Parker v. Wells*, 6 Whart. 153; 1 Story, Eq. Jur. § 760; 1 Fonbl. Eq. B. 1, c. 3, § 8, note (e).

(d) *Savage v. Carroll*, 1 B. & B. 265; *O'Reilly v. Thompson*, 2 Cox's R. 271.

(e) 1 Story, Eq. Jur. § 762; 1 Fonbl. Eq. B. 1, c. 3, § 8, note (e).

formance. It is very evident, that if the fraudulent party could interpose the statute of frauds to defeat the plaintiff, the statute would, in such case, be the very means to produce that which its enactment was intended to defend and suppress.<sup>(a)</sup> For example, if one agreement in writing was prepared and read, and another should be fraudulently and secretly brought in and executed, in the place of the former, and the fact could be clearly proved, in this and the like case, equity would relieve.<sup>(b)</sup>

2. *Of the fairness of the contract.*

3884. It is a principle in equity that he who asks the aid of the court, must come with clean hands, and must himself do equity. In all such cases, the party seeking relief must have fairly and fully performed his part of the agreement.<sup>(c)</sup> The party who claims a specific performance must show that the contract is fair and just in all its parts; for when the contract has been obtained by fraud, or in cases of hard and unconscionable bargains; or when the decree would produce injustice, or compel the party to an illegal act; or when, under all the circumstances, it would be inequitable, a specific performance will not be decreed.<sup>(d)</sup>

3. *Of the certainty of the contract.*

3885. When the contract is by *parol*, in order to take it out of the statute of frauds, it is important that the acts which prove it should be clear and definite, and that it be established by competent proof, clear,

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<sup>(a)</sup> *Montacute v. Maxwell*, 1 P. Wms. 618; S. C. 1 Eq. Cas. Ab. 19.

<sup>(b)</sup> 1 Fonb. Eq. B. 1, c. 3, § 11, (o).

<sup>(c)</sup> *Smith v. Fromont*, 2 Swanst. 330.

<sup>(d)</sup> *Jer. Eq. Jur.* 443; *Harnett v. Yielding*, 2 Scho. & Lef. 554; *Marquis of Townsend v. Stangroom*, 6 Ves. 328; *Garrard v. Grinling*, 2 Swanst. 244.

definite, and unequivocal in its terms; for if it be uncertain, or ambiguous, or not made out by satisfactory evidence, a specific performance will not be decreed.(a)

The same certainty is required *in written contracts*; for if they are not certain in themselves, so as to enable the court to arrive at a clear result of what the terms are, they will not be specifically enforced. First, because it would be inequitable to carry a contract into effect, when the court is left uncertain, and can only gather the intentions of the parties from mere conjectures;(b) secondly, if the terms be supplied, it must be by parol evidence, and in general this is not admissible, either at law or in equity, to explain, contradict, or vary a written agreement.(c)

When a contract is evidenced *partly by writing and partly by parol*, the writing is the higher evidence, and does away the necessity and effect of the parol evidence, when the latter contradicts, alters, varies or changes the former.(d)

#### 4. *Of the consideration of the contract.*

3886. Unless the contract has been founded upon a valuable or other meritorious consideration, or what is so considered in a court of equity, as the payment of debts, a specific performance will not be decreed.(e) In general a court of equity will not decree a specific performance in favor of a mere volunteer,(f) although

(a) See *Parkhurst v. Van Cortlandt*, 1 John. Ch. R. 283; *Clinan v. Cooke*, 1 Scho. & Lef. 22.

(b) *Colson v. Thompson*, 2 Wheat. 336; *Lindsay v. Lynch*, 2 Scho. & Lef. 7; *Harnett v. Yielding*, 2 Scho. & Lef. 555.

(c) 1 Greenl. Ev. § 275; 1 Phil. & Amos, Ev. 753; 2 Phil. Ev. 350; 2 Stark. Ev. 544.

(d) *Parkhurst v. Van Cortlandt*, 1 John. Ch. R. 283; S. C. 14 John. R. 15.

(e) *McFadden v. Jenkins*, 1 Hare, 460; *Edwards v. Jones*, 1 My. & Cr. 226; *Searle v. Law*, 15 Sim. 99.

(f) *Banker v. May*, 3 Marsh. 436.

the contract may have been entered into between father and son.(a)

The consideration must be lawful, for equity will not relieve upon an agreement founded on an illegal consideration,(b) though a contract as a *præmium pudicitiae* will be enforced.(c)

Cases of imperfect obligations, however strong, are not sufficient to authorize a decree for a specific performance.(d)

5. *Of the lawfulness of the contract.*

3887. Courts of equity cannot enforce a contract which is unlawful. A decree for specific performance of a contract entered into in fraud of the laws and policy of the country, can never be obtained; for in such case it is not necessary that the objections should be set up by the defendant, the court will *ex officio* set it up, as soon as the fraud appears, or it is manifest that the contract is against public policy.(e)

6. *Of the contract to do an impossible thing.*

3888. When the contract is to do an impossible thing, the court will not do so useless a thing as to decree a specific performance of what it is impossible to perform.(f) But if the agreement itself were pos-

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(a) *Holloway v. Headington*, 8 Sim. 324; *Jeffreys v. Jeffreys*, 1 Cr. & Phil. 138, 141. See *Minturn v. Seymour*, 4 John. Ch. R. 500; *Woodcock v. Bennett*, 1 Cowen, 733; *McIntyre v. Hughes*, 4 Bibb, 186; *Hickman v. Grimes*, 1 Marsh. 87.

(b) *Priest v. Parrot*, 2 Ves. sen. 160, 161.

(c) *Annandale v. Harris*, 2 P. Wms. 432; S. C. 3 Bro. P. C. 445.

(d) 1 Madd. R. 564.

(e) *Evans v. Richardson*, 3 Meriv. 470; *Thompson v. Thompson*, 7 Ves. 473; *McCarthy v. Goold*. 1 Ball & B. 389.

(f) See *Buxton v. Lister*, 1 Atk. 383; *Adderley v. Dixon*, 1 Sim. & Stu. 607.

sible, and it contained a condition which was impossible, the condition only would be void, and the agreement would, upon principle, be enforced.(a) If, at the time of the agreement, it was agreed to do an act, then possible, and it afterward became impracticable without the fault of either of the parties, if it were a condition precedent, the court would not interfere, and compel a specific execution of the contract; but if it were a condition subsequent, it might give relief.(b)

7. *Of the want of an adequate remedy at law.*

3889. The reason why a court of equity interferes and decrees a specific performance of a contract, is because there is no adequate remedy at law, for when such remedy exists, equity will not interfere. When justice requires that the contract should be specifically performed, and where a breach of it would be productive of irreparable injury, equity interferes.(c) But when such injury can be fully repaired at law, by awarding damages, the court will not make a decree for specific performance. For example, it will generally refuse to decree a performance of a contract for the sale of stocks or goods, not on account of their personal nature, but because damages may be recovered at law, calculated upon the market price of goods or stocks, which will afford as complete a remedy to the purchaser as the delivery of the stocks or goods contracted for, because, with the money paid him as damages, he may buy such stock or goods.(d)

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(a) Co. Litt. 206 a.

(b) 1 Vern. 83; 2 Vern. 339.

(c) Errington v. Aynesly, 2 Bro. C. C. 343; Weale v. West Middlesex W. Co. 1 Jac. & W. 370.

(d) Adderley v. Dixon, 1 Sim. & Stu. 610; Cud v. Rutter, 1 P. Wms. 570; Harnett v. Yielding, 2 Scho. & Lef. 553.

*Art. 2.—Of the subject matter of the contract on which a specific performance will be decreed.*

3890. The subject matter of contracts upon which specific performance will be decreed, relates either to, 1, personal property; 2, personal acts; or 3, real property, each of which will be examined separately.

*1. Of contracts relating to personal property.*

3891. The ground upon which courts of equity exercise their jurisdiction in relation to making decrees for specific performance, is, that at law, no complete or adequate remedy can be had, and it is to prevent a failure of justice that equity interferes. The reason for granting this relief does not apply to real estate any more than to personal property.

In general the rule is not to entertain jurisdiction in equity for a specific performance of agreements respecting the goods and chattels, stocks, choses in action, and other things of a personal nature; but this, like most other rules, is not unbending, and is subject to some exceptions, for, as has just been observed, it does not apply where a compensation in damages does not afford a complete remedy. A few cases will exemplify this.

3892.—1. A contract was made for the sale of eight hundred tons of iron, to be paid for by instalments in a certain number of years; on a bill being filed, a specific performance was decreed.<sup>(a)</sup> It is manifest that damages would be no adequate remedy in such case, because the profits depended upon future events, which could not be correctly estimated, and the calculation must therefore be made upon conjecture.

3893.—2. In the case of a sale of a considerable quantity of timber for ship building, on account of its vicinity, or where it was the only timber of the kind accessible, if the buyer could not have a specific per-

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<sup>(a)</sup> Taylor v. Neville, cited in 3 Atk. 384. See Adderly v. Dixon, 1 Sim. & Stu. 607.

formance, complete justice could scarcely be done to him, or if the seller had sold the timber for the purpose of clearing his land, in order to apply it to a course of husbandry, complete justice could not be done without a specific performance.(a)

2. *Of contracts relating to the performance of personal acts.*

3894. Where the contract relates, not alone to the sale or enjoyment of personal chattels, but principally to personal acts, courts of equity will sometimes interfere and compel the specific performance of such agreements, upon the ground that no adequate remedy can be had at law. The following cases will exemplify the rule.

3895.—1. A specific performance will be decreed to fulfil the covenant for a lease, or to renew a lease ;(b) or to keep the banks of a river in repair ;(c) or to settle the boundaries between two estates.(d)

3896.—2. Covenants to build or to repair a building, will not in general be enforced by a decree for a specific performance, though the opinions and judgments, on this subject, are not in perfect unison.(e)

3897.—3. When a party has agreed not to do a thing, he will be required to keep his agreement ; for example, where a man covenants not to build upon a contiguous estate ; not to build houses of a different height from those adjoining his property ; not to erect any noisome or injurious manufacturing establishment, adjacent to that of the covenantee ; not to cut down timber trees, which are ornamental or useful to the mansion of the covenantee ; not to carry on trade or business in the same street with the plaintiff ; and a variety

(a) *Buxton v. Lister*, 3 Atk. 384 ; *Adderly v. Dixon*, 1 Sim. & Stu. 607.

(b) *Newl. on Contr.* 95 ; *Tritton v. Foote*, 2 Bro. C. R. 636 ; S. C. 2 Cox, R. 174.

(c) *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

(d) *Newl on Contr.* 109 ; *Penn v. Baltimore*, 1 Ves. sen. 444.

(e) 1 Story, Eq. Jur. § 725—728 ; *Jer. on Jur.* 442.

of similar instances, the covenantor will be enjoined for a violation or attempted violation of such covenants.

3898.—4. Sometimes a party engages or contracts to do certain acts which at the time he has himself the power of doing, but which he may not be able to perform before the period shall arrive for fulfilling his agreement. In some cases courts of equity will compel him to procure the necessary acts to be done.*(a)* Perhaps the most remarkable example of this kind, and one about which there has been much diversity of opinion, is that of a husband binding himself that his wife shall execute a conveyance of a property in which she has an interest.*(b)* Instances have occurred where courts of equity have decreed a specific performance in these cases; but if the wife, having capacity to concur in the agreement, should positively refuse, or not manifest her consent, it is doubtful whether the court would interfere.*(c)* When the defence is put upon other grounds, and not on the refusal of the wife, to give her consent, the principal objections to a decree for specific performance will be removed;*(d)* in other cases the purchaser is bound to regard the policy of the law, which is not to encourage the husband to take advantage of his influence over his wife,*(e)* and he has no right to complain if she should take the benefit of the *locus penitentiae*, particularly as he has his remedy at law for damages against the husband.*(f)*

3. *Of contracts relating to real property.*

3899. The most numerous class of cases, where courts of equity will decree a specific performance, relate to land. For the non-performance of contracts

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*(a)* Costigan v. Hastler, 2 Sch. & Lef. 166.

*(b)* Morris v. Stephenson, 7 Ves. 474; Hall v. Hardy, 3 P. Wms. 189; Barrington v. Horn, 2 Eq. Ab. 17, pl. 8; S. C. 5 Vin. Ab. 547, pl. 35.

*(c)* Ortreed v. Round, 2 Eq. Cas. Ab. 145; S. C. 4 Vin. Ab. 203, pl. 4.

*(d)* Morris v. Stephenson, 7 Ves. 474.

*(e)* Wheeler v. Newton, Gilb. Eq. R. 245.

*(f)* Emery v. Wase, 8 Ves. 515.

respecting personal property, a ready remedy may, in general, be obtained by an action at law for damages ; if a man buy goods or merchandise of a particular description, common and usual in the market, the money he recovers for his damages will enable him to purchase other property of the same kind. On the contrary, when a man purchases a farm, or a dwelling house in a city, he cannot replace it, if the seller refuses to comply with his agreement. The locality, the construction of the house, the soil of the farm, its vicinity to a town, or to friends, the accommodations of the land, and numerous other circumstances, give them a value which cannot be compensated in damages, because with the money the plaintiff could not attain the advantages he had purchased. It is for this reason, that bills praying for a specific performance of contracts, relating to land, are generally entertained ; and that those respecting chattels are limited to special circumstances, as we have just seen.

Much of what might have been introduced here has been anticipated, and was examined, when we were treating of the form of contracts of which a specific performance will be decreed. The cases of contracts respecting lands within the reach of the statute of frauds, and what cases are taken out of the statute by part performance, have already occupied our attention. There are other cases, within the reach of other clauses of the statute of frauds, in which courts of equity have decreed a specific performance, one or two of which will now be considered, by way of illustration.

It has been considered that where a man, in consequence of a parol promise made by another to him, that he would perform an intended act, omits to make certain provisions, gifts, or arrangements for other persons, and the promissor afterward refuses to comply with his promise, he is guilty of a fraud, to prevent which a court of equity will decree a specific

performance of such promise.(a) For example, where a testator gave an annuity to his nephew, and was about to alter his will, and charge it on his land, but was prevented from doing so by his brother, who was his executor and devisee of the real estate, who promised that he would pay the annuity, but after the death of the testator refused; on a bill filed by the nephew, the brother was compelled to a specific performance.(b) For the same reason that it would be a fraud, a specific performance was decreed when a testator, in England, was prevented from altering his will so as to direct the timber on his estate to be felled to make provision for younger children, because his son, who was his heir, objected to it, as it would deface the estate, and promised that he would answer for the value of it to his brothers and sisters, and after the testator's death refused.(c)

Many other cases might be cited to show the extent to which courts of equity will go to decree a specific performance, but details of this kind are incompatible with the plan of this work.(d)

3900. In conclusion, it is only requisite to observe that equity acts upon the person, and, generally, not upon things; *æquitas agit in personam*. It is not therefore necessary, that the estate relating to which the decree for a specific performance is made, should be within the jurisdiction of the court. The primary decree is *in personam* and not *in rem*, so that if the person be within the jurisdiction, the incapacity to

(a) 3 Woodes. Lect. 436.

(b) *Oldham v. Litchfield*, 2 Vern. R. 506; S. C. 2 Freem. 284; *Chamberlain v. Chamberlain*, 2 Freem. 34; *Reech v. Kennigate*, Ambl. 67; S. C. 1 Ves. 123; *Mestaer v. Gillespie*, 11 Ves. 638; *Chamberlain v. Agar*, 2 V. & B. 262; 2 Spen. Eq. Jur. 279 note (a).

(c) *Dullon v. Poole*, 2 Lev. 211; S. C. cited in 2 Freem. 285.

(d) Those who desire to examine the cases in detail are referred to 2 Story, Eq. Jur. § 743 to 793; Jer. Eq. Jur. 421; 2 Hov. on Frauds, 1 to 64; 1 Chit. Gen. Pr. 787 to 872; Sugd. on Vend. 145 to 164; Madd. Ch. Pr. Index, h. t.

enforce a decree *in rem* will not prevent the court from entertaining suits.(a) When the land lies within the jurisdiction of the court, if, after a decree *in personam*, the defendant remains obstinate, the court will put the successful party in possession of the land.(b)

*Art. 3.—Of the party in whose favor a specific performance will be decreed.*

3901. This subject will be considered by taking a view, 1, of those cases when a specific performance is sought by the original party; 2, when it is sought by a stranger.

1. *When specific performance is sought by an original party.*

3902. To entitle himself to a specific performance, a party must show that he has been in *no default* in not having performed the agreement on his part; and such performance will not be compelled unless the case is clear of all imputation of deception; for unless the party seeking it is free from all blame, or misrepresentation, even as to a small part of the subject only, he will be entitled to no relief in equity.(c)

But, although the plaintiff may not have strictly complied with the terms of his agreement, if the non-compliance does not go to the *essence of the contract*, notwithstanding courts of equity do not approve of laches, relief will be granted; and, therefore, where a man has performed a valuable part of his contract, and he is in no default for not performing the residue, he is entitled to a specific execution of the other part, or at least to recover back what he has paid.(d)

(a) *Penn v. Baltimore*, 1 Ves. sen. 444, 447, 454; *Archer v. Preston*, 1 Vern. 77, and Raithby's note.

(b) *Earl of Arglasse v. Muschamp*, 1 Vern. 135; *Earl of Kildare v. Eustache*, 1 Vern. 431; *Newl. on Contr.* 305; 1 Fonbl. Eq. B. 1, c. 1, § 5, note (g).

(c) *Cadman v. Horner*, 18 Ves. 11.

(d) 1 Fonbl. Eq. B. 1, c. 6, § 3.

3903. A distinction which reconciles cases, which otherwise seem to clash, has been suggested by Chief Baron Gilbert, namely, that when the plaintiff is in *statu quo*, as to all that part of the agreement which he has performed, he stands in a different position from those cases in which he is not in *statu quo*. When he is in *statu quo*, equity will not enforce the agreement, if the plaintiff cannot completely perform the whole of his part of it; but if the plaintiff has performed so much of it that he cannot be placed in *statu quo*, equity will, notwithstanding his incapacity of performing the remainder by a subsequent accident, compel the other to perform his part of the agreement.(a)

3904. Sometimes equity will interfere where the terms of the agreement have not been strictly complied with, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed. In such cases, if *compensation* can be made for the injury occasioned for the non-compliance with the strict terms, equity will interfere, and decree a specific performance.(b)

3905. The most usual case of non-compliance strictly to perform a contract, is that which relates to the *time* when it ought to have been performed. In general, time is not deemed in equity to be of the essence of the contract, unless the parties have so agreed to consider it, or it necessarily follows from the nature of the engagement, though time is deemed important in equity so far as good faith and the diligence of the parties are concerned.

3906. When the plaintiff has been disabled by circumstances which he could not reasonably control, from a strict compliance; or he comes, shortly after

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(a) *Earl of Feversham v. Watson*, Rep. temp. Finch, 445; S. C. 2 Freem. R. 35; *Merdith v. Wynn*, Pre. Ch. 312; Gilb. Lex Pretoria, 240; Newl. on Contr. 249.

(b) *Davis v. Hone*, 2 Sch. & Lef. 347; Jer. Eq. Jur. 460, 461; 2 Story, Eq. Jur. § 775.

he ought to have performed his contract, to ask for a specific performance, his non-compliance will be no objection to his relief, if he is in condition to perform his part of the agreement, and he manifested a steady readiness, promptitude, and desire to fulfil his engagement.(a)

2. *When specific performance is sought by a stranger to the contract.*

3907. It is a general rule that strangers in blood, and strangers to the contract, cannot ask for a specific performance of an agreement; but many exceptions have been made to it, and, of late, the courts have laid hold of any circumstances to distinguish the cases out of it, still preserving the general rule. Thus, where there was any consideration the court will support it,(b) or because an action might be brought in the names of the trustees, though then clearly the persons claiming, were not within the consideration.(c)

Though the parties to the contract may at their pleasure abandon it, and mutually release each other from its performance, still, when one of them has contracted for something in favor of a collateral, and that has not been released, it is a question whether he, in whose favor it was made, may not claim a specific performance, especially when to secure the interests of all the contemplated objects, there is a covenant with trustees that the act shall be done which, if enforced, would inure to the benefit of all persons who are the objects of the covenant, and who may therefore be considered in the light of *cestuis que trust*.(d)

(a) *Morgan v. Morgan*, 2 Wheat. 290; *Milward v. Thanet*, 5 Ves. 720; *Newl. on Contr.* 242.

(b) *Osgoode v. Strode*, 2 P. Wms. 245. See *Stephens v. Trueman*, 1 Ves. sen. 73, 74; *Nunn v. Wilsmore*, 8 T. R. 529.

(c) 1 Ves. sen. 74. See *Vernon v. Vernon*, 2 P. Wms. 599.

(d) It has lately been held that where there are a series of limitations, some of which are in favor of persons who are parties to the contract or the consideration, and others in favor of strangers to both; and any one of the parties who is within the consideration, files a bill to have the articles carried into execution, the court will not carry into effect those pro-

With greater reason may a stipulation in an agreement be enforced by a stranger, when in consequence of the expectations held out to him under the contract, his condition in life has been changed, to the knowledge and by the instrumentality of the parties; not so much, however, by virtue of the original efficacy of the contract, between the stranger and the contracting parties, as because the stranger would suffer a positive injury if the contract were not performed, so that a direct equity arises as between the two contracting parties and the stranger, by reason of their acts in regard to him.(a)

Courts of equity are ever anxious to preserve the peace of families; for this reason an agreement entered into for that purpose, will be supported and enforced at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed any portion of the consideration.(b)

A distinction has been made between agreements relating to marriage, and other agreements. Common agreements are considered as entire, and if either of the parties fail in the performance of the contract, it cannot at the instance of such party be decreed in specie; but in *marriage agreements* it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet children may compel a performance. If, for instance, the mother's father agreed to give a portion, and the husband's father agreed to make a settlement, though the

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visions which are in favor of the parties to the contract, or consideration, and stop there, but it will carry them into execution *in toto*, whatever it might do if a stranger sought to have the contract enforced. *Davenport v. Bishop*, 2 Y. & Coll. C. C. 456; S. C. 1 Phillips, R. 698.

(a) See *Hill v. Gomme*, 1 Beav. 540, and 5 Mylne & Cr. 255; *Colyear v. Mulgrave*, 2 Keen, 98.

(b) *Stapelton v. Stapelton*, 1 Atk. 10.

mother's father should fail to give the portion, yet the children may compel a settlement; for in such case the children are considered as purchasers, and entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on the other side.(a)

*Art. 4.—Of the party against whom a specific performance is sought.*

3908. This article will be divided by taking a view, 1, of the original party against whom a specific performance will be decreed; and 2, when a specific performance will be decreed against a stranger to the contract.

1. *When a specific performance will be decreed against an original party.*

3909. No specific performance of a contract will be decreed if it is not based on equity, for if it is inequitable, under all the circumstances, no relief will be granted; as where there has been fraud, or a hard, unconscionable bargain, or where the decree would do injustice, or compel the performance of an illegal act, or where the performance has become impossible.(b)

In resisting a bill for a specific performance of a contract, it requires less strength in the case than is necessary to entitle the plaintiff to a decree, and, therefore, the plaintiff will fail if the defendant can cast a doubt upon his right, or show that it would be inequitable to grant him a decree. For example, the defendant may show that, by fraud, mistake, or accident, material terms have been omitted in the written agreement; or that there has been a variation by parol; or that there has been a parol discharge of a written contract.(c)

(a) *Harvey v. Ashley*, 3 Atk. 610; *Perkins v. Thornton*, Amb. 502.

(b) *Jer. Eq. Jur.* 432; *Sugd. on Vend.* 125, 7th ed.; *Brashear v. Gratz*, 6 Wheat. 528; *Harnett v. Yielding*, 2 Sch. & Lef. 554; *Seymour v. Delancey*, 6 John. Ch. 222.

(c) 1 *Fonbl. Eq. B.* 1, c. 6, § 2, note (e); 3 *Woodes. Lect.* 428; *Jer. Eq. Jur.* 432.

The purchaser, as well as the vendor, may ask for a specific performance, under circumstances where the latter is incapable of making a complete title to the property sold, or when there has been a substantial misdescription of it in important particulars, or the terms, as to the time of execution, have not been complied with by the vendor, agreeably to his contract. The vendor being in the wrong in all these cases, to let him take advantage of such mistakes or neglect would be to give him a benefit for doing an injury. To prevent this, courts of equity permit a purchaser to have an election to proceed with the purchase *pro tanto*, or to abandon it altogether. In such cases, the purchaser may, in general, demand a specific performance, as far as the contract can be performed, and a compensation, by an abatement of the purchase money, for any deficiency in the title of the estate, or in the quality, quantity, description, or other matter relating to it.<sup>(a)</sup>

2. *When a specific performance will be decreed against a stranger.*

3910. When a man contracts with another for land, and the purchaser agrees to pay the purchase money, and the vendor to convey the title, at law the estate remains vested in the seller until he has divested himself by the conveyance of his title, and the buyer remains the owner of the money; but in equity the seller is considered a trustee of the land for the purchaser, and the purchaser a trustee of the money for the seller. If the purchaser dies, the land descends to his heirs, or, before his death, he may sell it; if, on the contrary, the vendor dies, his executors will be entitled to the purchase money. If the vendor should sell to another, who had notice of the sale, he would become a trustee for the purchaser. A bill for a

<sup>(a)</sup> *Tod v. Gee*, 17 Ves. 278; *Patton v. Rogers*, 1 Ves. & B. 351; *Waters v. Travis*, 9 John. 465.

specific performance might be maintained against such second purchaser.(a) In case of the death of the vendor, his heir, on whom the legal title had descended, might be decreed to make a specific performance; on the other side, if the buyer should die, his executors might be compelled to execute the contract. The purchase money is treated as the personal estate of the vendor, and the land as the real estate of the purchaser.(b)

As a general rule it may be observed, that where a specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between the parties claiming under them who stand in privity of estate, or representation, or title, unless there are equities which control and prevent a decree.(c)

*Art. 5.—When a specific performance will be refused.*

3911. Having considered upon what contracts a specific performance might be decreed, and the subject matter of such contracts, and examined by whom and against whom a decree might be obtained, it remains to be ascertained in what cases courts of equity will refuse to interfere. These cases may be classified into those, 1, where there is no equity; 2, where there is an adequate remedy at law; 3, where the plaintiff is in default; 4, where the plaintiff is guilty of laches.

1. *Where there is no equity.*

3912. It is a maxim that *he who has committed inequity shall not have equity*. To a bill for a specific performance, the defendant may therefore resist by

(a) See Bubb's case, 2 Freem. 38; 7 Ves. 345.

(b) Newl. on Contr. 48, 109; Fonbl. Eq. B. 1. ch. 6, § 9, notes; 3 Woodes. Lect. 466; 2 Story, Eq. Jur. § 790; *Champion v. Brown*, 6 John. Ch. R. 402.

(c) Jer. Eq. Jur. 445; Fonbl. Eq. B. 1, c. 1, § 7, note (x); *Ex parte Pye*, 18 Ves. 149.

showing that under the circumstances the plaintiff is not entitled to the prayer of his bill. Proof that there has been an omission or mistake in the agreement; or fraud, or surprise, or concealment; misrepresentation, whether intentional or not, patent or latent; or any unfairness, as where the defendant was made drunk at the time of the contract, or became intoxicated without the agency of the plaintiff; or where the contract is, itself, unconscious or unreasonable; proof of either of these facts will defeat the plaintiff.

This want of equity in the plaintiff may be shown by parol evidence, although in general such evidence is not competent to explain, add to, or vary a written agreement, except in cases of fraud; yet it is admissible on the part of a defendant to a bill for a specific performance, to show circumstances *dehors* and independent of the writing, which render it inequitable, and when so shown, courts of equity will grant no relief.(a)

If the parties have so dealt with each other, in making the contract, that the object of one party is defeated, while the other party is at liberty to do as he pleases in relation to the contract; or if the property has so altered that the restrictions or conditions of it are no longer applicable to the state of things, it is evident that it would be against equity that a specific execution should be decreed. In such case the parties will be allowed to seek their remedy at law.(b)

2. *When there is an adequate remedy at law.*

3913. It has already been mentioned that where there was no adequate remedy at law, courts of equity assumed jurisdiction to prevent a failure of justice. On the other hand, when there is a full, complete and adequate remedy at law, courts of equity seldom if

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(a) *Davis v. Symonds*, 1 Cox, R. 402. See *Stokes v. Moore*, 1 Cox, R. 221; *Ramsbottom v. Gosden*, 1 V. & Bea. 165.

(b) *Hall v. Warren*, 9 Ves. 608; *Greenway v. Adams*, 12 Ves. 395.

ever interfere; as when the contract is for the sale of stocks or goods, which have a regular price in the market, and can be purchased with the money which would be given for the breach of a contract as damages.

3. *When the plaintiff is in default.*

3914. When the plaintiff is in default, as when he has not fulfilled his part of the agreement<sup>1</sup>, which he was bound to perform, and he comes to ask for a specific performance, he will in general be refused relief. Sometimes, however, equity will interfere where the plaintiff can make compensation, and the strict performance of his agreement has not arisen in consequence of his gross negligence.<sup>(a)</sup>

4. *When the plaintiff has been guilty of laches.*

3915. The negligence of a party in bringing suit, or doing some other act required of him, in order to entitle himself to relief, is called *laches*. When the plaintiff has neglected for a long time to file a bill for a specific performance, that will be a strong ground for refusing relief, for such party, if not prevented by circumstances beyond his control,<sup>(b)</sup> cannot claim relief, unless he has shown himself "ready, desirous, prompt, and eager."<sup>(c)</sup> But a party resting and remaining in possession, passive and contented upon an *equitable* title, without clothing himself with the legal title, has never been considered to be guilty of such laches as to preclude relief, or the right to enforce a specific performance of an express or implied contract to convey the *legal* title.<sup>(d)</sup>

<sup>(a)</sup> 1 Story, Eq. Jur. § 775; Jer. Eq. Jur. 460; 13 Ves. 77; 1 Fonbl. Eq. B. 1, c. 6, § 2, note (e).

<sup>(b)</sup> In cases not within the positive enactment of the statute of limitations, courts of equity will consider the absence of the claimant while serving in the army, a reasonable excuse for the delay. *Mullens v. Townsend*, 2 Dow, Rep. N. S. 430.

<sup>(c)</sup> *Milward v. Earl Thanet*, 5 Ves. 720; *Alley v. Deschamps*, 13 Ves. 228; *Moore v. Blake*, 1 Ball & B. 68.

<sup>(d)</sup> *Crofton v. Ormsley*, 2 Sch. & Lef. 604.

## § 2.—Of relief against forfeitures and penalties.

3916. The second class of remedies which are peculiarly appropriate in equity and inappropriate at law, relate to the relief which courts of equity grant against forfeitures and penalties.

In strictness, when a forfeiture or penalty has taken place, at law there is no remedy, and the party is liable to the forfeiture or the penalty, and, in general, he cannot be relieved; though courts of law, following in the footsteps of a court of equity, grant relief in some cases; as, where the condition of a bond, for the payment of a sum of money, has been broken, the courts of law will not permit the obligee to recover more than the amount due by the condition, together with interest from the time of the breach.

But there are many cases, where at law there is no remedy when there has been a forfeiture; then the courts enforce, literally, that species of redress which has been provided; a course which, were there no power to prevent it, would frequently be productive of great hardship. A court of equity, regarding the substance of the transaction, and having the means of exercising such an authority as will relieve against the forfeiture or penalty, will sanction the performance of the contract, if it can be done with perfect justice to the parties, and relieve the obligor from the forfeiture or penalty he has incurred.

3917. The origin of the doctrine of granting this relief arose, probably, in those cases where the forfeiture was in consequence of the non-payment of money at a specified time; but it has since been extended to other cases with great advantage. For example, where a lessee covenanted to pay rent, with a proviso for re-entry on non-payment, equity will relieve the tenant upon his satisfying the amount, and all expenses consequent upon the neglect.<sup>(a)</sup>

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<sup>(a)</sup> *Saunders v. Pope*, 12 Ves. 289; *Hill v. Barclay*, 18 Ves. 60.

We must be careful to distinguish between a *penalty* and *liquidated damages*. A penal clause in a contract supposes two agreements, one of which is the primitive or principal, and the other conditional or accessory. In general, when a penal clause is inserted in an agreement, merely to secure the enjoyment of a collateral object, the latter is considered the principal, and the clause a *penalty*, only as accessory to the contract; this being to secure the principal agreement, is relievable against, provided justice can be done to the creditor. (a) In general, the test is, whether compensation can be made or not. When it cannot, courts of equity will not interfere; when it can be made, if the penalty is to secure the payment of money, relief will be granted upon payment of the principal and interest. In some cases, where the penalty is to secure the performance of some collateral undertaking, courts of equity will retain the bill, and direct an issue of *quantum damnificatus*, to be tried in a court of law, where the amount of damages will be ascertained by a trial before a jury; and when such damages have thus been ascertained, the court will grant relief upon their payment. (b)

The grounds upon which courts of equity grant relief against penalties, is, that by the agreement the obligee became bound to pay the amount actually owing, and if he obtains his money, or his damages, he gets all that he expected, or that justice requires. (c)

3918. It is is very difficult to distinguish penalties from *liquidated damages*. By this term is understood the fixed amount which a party to an agreement promises to pay to the other, in case he shall not fulfil the primary or principal engagement into which he has entered by the same agreement. The amount

(a) *Sloman v. Walter*, 1 Bro. C. C. 419; *Skinner v. Drayton*, 2 John. Ch. 535.

(b) *Jer. on Jur.* 447.

(c) *Fonbl. Eq. B. 1, c. 6, § 4*, note (b); *Peashy v. Somerset*, 1 Str. 447; *Skinner v. Drayton*, 2 John. Ch. 535.

must be the just and appropriate amount of the damages sustained by the act or omission. As the parties have a right to fix their own measure of damages in such cases, courts of equity will not interfere, because, then the parties standing upon equal grounds, and no undue advantage being taken by the one of the other, they are bound to fulfil their engagements. But if, in fact, there is a penal clause, disguised under the name of liquidated damages, equity will interfere.(a)

3919. A distinction seems to be made in courts of equity between *penalties* and *forfeitures*. A party will always be relieved from a penalty, if compensation can be made, because it is deemed as a mere security; but, although compensation can be made, relief will not always be given against a forfeiture. In cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation.(b) When no just compensation can be decreed for the breach, courts of equity will not interfere in cases of forfeiture for the breach of forfeitures, of covenants and conditions.(c)

There are cases where courts of equity refuse to relieve from forfeitures on the ground of public policy; an example of this may be found in the case of non-compliance by stockholders with the terms of payment of their instalments of stock, at the time prescribed, by which their shares become forfeited.(d)

§ 3.—Of the cancellation and delivery of instruments.

3920. Another class of cases, where the remedy is

(a) *Skinner v. White*, 17 John. 369; *Skinner v. Dayton*, 2 John. Ch. 535; *Lowe v. Peers*, 4 Burr. 22; 2 Poth. Ob. by Evans, 85; Fonbl. Eq. B. 1, c 3, § 3, notes.

(b) *Eden on Inj.* 22; *Hill v. Barclay*, 16 Ves. 403; S. C. 18 Ves. 58; *Eaton v. Lyon*, 3 Ves. 692.

(c) Com. Dig. Chancery, 2 Q, 3, 8, 10: *Wafer v. Mochatto*, 1 Salk. 156.

(d) *Sparks v. Liverpool Water Works*, 13 Ves. 433.

peculiarly applicable in equity, and wholly inadequate at law, consists in those where the courts decree the *rescission*, *cancellation*, or *delivery* of deeds, agreements, or other securities. In this branch of equity jurisdiction, the courts exercise a sound discretion, whether they will make a final decree, and will grant only what is reasonable and proper under all the circumstances.<sup>(a)</sup> The cases in which the court will exercise its power, may be classed into, 1, those where there has been a fraud committed in making the instrument; and, 2, those where there has been no fraud.

*Art. 1.—In cases of fraud.*

3921. When there has been fraud, actual or constructive, in the making of an agreement, the party injured has, in general, a right to apply to a court of equity to cancel the instrument, and to order it to be delivered up. This is obviously a piece of preventive or protective justice. Equity will not allow, as the law does, injustice to be done, and after the blow has been struck, and the wrong committed, step in and repair it by granting damages, which are frequently totally inadequate, but comes forward at once to prevent the wrong, by depriving the fraudulent party from reaping any benefit from his wrongful act. But in all cases, the complainant must come into chancery with clean hands; when, therefore, he stands in *pari delicto*, that is, where he has been equally guilty of fraud with the party against whom he complains, he will be entitled to no relief: *in pari delicto, potior est conditio possidentis*.

3922. When an agreement or other instrument is declared void by statute, and also, when it is so upon principle, or when it is merely voidable, courts will

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<sup>(a)</sup> *Goring v. Nash*, 3 Atk. 188; *Cooke v. Clayton*, 18 Ves. 12. See *Savage v. Brocksopp*, 18 Ves. 335; *Buckle v. Mitchill*, 18 Ves. 111; *Revell v. Hussey*, 2 B. & B. 288.

sometimes impose terms, for their object is to do equitable justice; as in the case of usury, when the debtor applies to have the instrument cancelled, equity will impose terms, by requiring him to pay the money actually due, with lawful interest.(a)

3923. The cases of frauds are extremely numerous, for the ingenuity of mankind, in this respect, is almost unlimited, so that it is scarcely possible to enumerate them all. When the instrument is not wholly void, but merely voidable, a court of equity will grant relief in the following cases:

1. When there is an actual fraud in the defendant, in which the plaintiff has not participated.

2. When there is a constructive fraud against public policy, in which the plaintiff has had no participation.

3. When there has been a fraud against public policy, in which both parties participated; but public policy would be defeated by letting the contract stand.

4. When there is a constructive fraud by both parties, but they are not *in pari delicto*, the plaintiff being more in fault than the defendant.(b)

3924. When the instrument is actually void at law, it will be decreed to be delivered up, even when it has been forged; a trial at law will not be required to establish the forgery.(c)

3925. With regard to the *nature of the instrument*, it is proper to observe that a *will* cannot be set aside in chancery on the ground of fraud. In such case, there must be an issue to try its validity, which must be decided at law. This, perhaps, may be considered as an exception to the general concurrent jurisdiction of a court of equity to grant relief in cases of fraud.(d)

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(a) Jer. Eq. Jur. 484; 2 Swanst. 139, note; Barnardiston v. Lingood, 2 Atk. 133; Lawley v. Hooper, 3 Atk. 278; Groyne v. Heaton, 1 Bro. C. C. 1.

(b) 3 Woodes. Lect. 458; Fanning v. Dunham, 5 John. Ch. 136.

(c) Peake v. Highfield, 1 Russ. R. 559.

(d) Jer. Eq. Jur. 488.

In case of other instruments than wills, it is immaterial whether they create or destroy a right. Equity will, therefore, prevent a *release*, which has been fraudulently or improperly obtained, from being used as a defence in action at law.(a)

*Art. 2.—Of the delivering up of deeds in cases where there has been no fraud.*

3926. Courts of equity have not only power to order deeds and other instruments to be delivered up when they are fraudulent, or against public policy, but they exercise a jurisdiction in compelling the delivering up of such instruments, although they are *altogether unexceptionable*, when a person holds them who is not entitled to them, and the plaintiff has a right to them. But the title to the possession of such instruments depends on the validity of the title of the property to which they relate, and when the claimant is not in possession of the property, and the evidence to it does not depend on the written instrument, or when it is in his power, a trial to establish his right must be first had at law, before a court of equity will order the deed or instrument to be delivered up.(b) When his title is not disputed, a decree will be made in his favor.

Courts of equity will proceed still further, and decree the delivering up of a deed or other instrument which was *valid in its origin, but has become functis officio*, in consequence of a subsequent event, as payment, satisfaction, or other extinguishment. Though a deed of this kind may be perfectly useless, yet, as it may cast a doubt upon the complainant's title, it will be ordered to be delivered up.

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(a) Mitf. Eq. Pl. 118.

(b) *Armitage v. Wadsworth*, 1 Madd. R. 192. See *Papillon v. Voice*, 2 P. Wms. 471; *Newman v. Milner*, 2 Ves. jun. 483.

In making a decree for the delivering up or cancellation of deeds, or other instruments, upon either of the grounds mentioned above, a court of equity will be careful to impose such qualifications and terms, as will secure justice to the defendant.

§ 4.—Of the confusion of boundaries.

3927.—1. The usual disputes arising from a confusion of boundaries may be settled generally by an action at law. But courts of equity will entertain a bill for the settlement of boundaries, when the rights of one of the parties may be established upon equitable grounds. These grounds are various, the principal of which are the following:

1° When the confusion has arisen by the *fraud* of the defendant, that alone will constitute a sufficient ground for the interference of the court.(a)

2° When the defendant is *obliged to preserve and protect the boundaries*, and by his negligence or misconduct the confusion has arisen, and without assistance they cannot be found.(b) This fact, together with a statement of the relation of the parties, must appear in the bill.

3° When, by exercising this jurisdiction in equity, a multiplicity of suits will be prevented.(c)

3928.—2. Sometimes there is another class of cases arising from confusion or entanglement of other rights, when courts of equity will afford a remedy, without which, the mischief would otherwise be irremediable. For example, where rent is chargeable on lands, and the remedy by distress has, in consequence of the

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(a) *Rouse v. Barker*, 3 Bro. Ch. R. 180; *Speer v. Crawter*, 2 Meriv. 418.

(b) *Miller v. Warmington*, 1 Jac. & Walk. 472; *Attorney General v. Fullerton*, 2 Ves. 263; *Willis v. Parkinson*, 2 Meriv. R. 506; *Duke of Leeds v. Strafford*, 1 Ves. jun. 186.

(c) *Wake v. Conyers*, 1 Cox, R. 360; S. C. 1 Eden, R. 331; *Bouverie v. Prentice*, 1 Bro. Ch. R. 200.

confusion of boundaries, become impracticable, a bill in equity for the ascertainment of the boundaries will be entertained.(a)

### CHAPTER III.—OF REMEDIES IN PARTICULAR CASES.

3929.—The cases to which these remedies apply, may be classed into those which relate to, 1, accounts; 2, dower; 3, partitions.

#### SECTION 1.—OF ACCOUNT.

3930. This subject will be considered by taking a view, 1, of the jurisdiction of courts of equity in matters of account; 2, against an agent; 3, of bills praying for contribution; 4, of bills praying for an apportionment; 5, of other cases of a miscellaneous nature.

§ 1.—Of the jurisdiction of the courts in matters of account.

3931. In treating of the different forms of actions we considered, pretty thoroughly, the remedy afforded by an action of account at common law.(b) The proceedings in such action are somewhat inconvenient and difficult, and the remedy in equity is more generally adopted.(c)

The assumption of jurisdiction by courts of equity, in cases of accounts, arose in consequence of the inadequacy of the remedy at law. Equity has means which are not possessed at law, to compel the accountant to a discovery of books and papers on oath;(d) and

(a) *Duke of Leeds v. New Radner*, 2 Bro. Ch. R. 338; 2 Bro. Ch. R. 200; *Duke of Leeds v. Powell*, 1 Ves. 171.

(b) B. 4, t. 9, c. 1, s. 1, n. 3405 to 3423.

(c) Bac. Ab. Accompt; 3 Bl. Com. 164.

(d) Blackstone thinks that "for want of this discovery at law, courts of equity have acquired a concurrent jurisdiction with every other court in matters of account." 3 Com. 437. It is a general rule that where a court

in order to effectuate justice, the defendant may have a decree, if the balance shall be in his favor; for in these cases both parties are actors, when the cause is before the court upon the merits.(a)

The bill for an account must, upon its face, show a sufficient title or right in the plaintiff, and a liability in the defendant to have an account, and pray that the defendant may render an account.

3932. To this bill the defendant may set up a variety of defences; such as that he never was liable; that the defendant has been released by the plaintiff; that an account has been stated between the parties; that an account has been settled; and lapse of time.

3933.—1. When the claimant founds his claim on a contract, the defendant *may deny that such contract ever existed.*

3934.—2. A *release*, whether under seal or not, is conclusive against a bill for an account. But in order to have this conclusive effect, the release must have been given upon a sufficient consideration.(b)

3935.—3. When an account has been *stated in writing*, in which the balance is set forth and acknowledged, it is in general a sufficient ground for refusing to compel a general account. In this case, it is a rule that if the account has been delivered, and the party to whom it is delivered expressly accept the same, or keep it so long as to induce a belief that he has accepted it, without making any objection to its accuracy, he ought to be bound by his conduct.(c) An account has

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of equity has jurisdiction for discovery, and the discovery is effectual, it may grant full relief; for when it has legitimately acquired jurisdiction over a cause, for the purpose of discovery, to prevent a multiplicity of suits it will also entertain a suit for relief. *Armstrong v. Gilchrist*, 2 John. Cas. 424; *Rathbone v. Warren*, 10 John. 587; *Lynch v. Sumrall*, 1 A. K. Marsh. 469; *Handly's Ex'r v. Fitzhugh*, 1 A. K. Marsh. 25; *Cave v. Trabue*, 2 Bibb, 445.

(a) *Done's case*, 1 P. Wms. 263; 1 Story, Eq. Jur. § 522.

(b) *Roche v. Morgell*, 2 Sch. & Lef. 726; *Middleditch v. Sharland*, 5 Ves. 87.

(c) *Willis v. Jernegan*, 2 Atk. 252.

been considered as accepted, in the instance of merchants at home, when no objection has been made within two or three posts;(a) between merchants in different countries, when an account has been transmitted from one to the other, and no objection has been made, after several opportunities of writing have occurred, it is considered as an acquiescence of the correctness of the account transmitted, and it will be treated as a settled account.(b)

3936.—4. *Primâ facie a settled account* will be binding upon the parties, and a court of equity will not allow it to be unravelled, because the vouchers may have been delivered up and discharged. In such case, the utmost allowance which will be granted to the complainant, will be to surcharge and falsify, unless there has been fraud on the part of the defendant.(c)

The terms *surcharge* and *falsify*, are used in contradistinction to each other in courts of equity. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to have been omitted which ought to have been allowed; a falsification applies to some items in the debits, and supposes that the item is wholly false, or in some part erroneous.(d)

(a) *Sherman v. Sherman*, 2 Vern. 276; S. C. 1 Eq. Abrid. 12, pl. 10; *Irving v. Young*, 1 Sim. & Stu. 333. See *Phillips v. Tapper*, 2 Penn. St. R. 323.

(b) *Tickel v. Short*, 2 Ves. 239; *Willis v. Jernegan*, 2 Atk. 252; *Freeland v. Heron*, 7 Cranch, 147; *Murray v. Toland*, 3 John. Ch. 575; *Jer. Eq. Jur.* 547.

(c) *Pitt v. Cholmondeley*, 2 Ves. sen. 565, 566; *Vernon v. Vawdry*, 2 Atk. 119; *Chambers v. Goldwin*, 8 Ves. 266; *Drew v. Power*, 1 Sch. & Lef. 192.

(d) *Pitt v. Cholmondeley*, 2 Ves. sen. 565, 566. In this case Lord Hardwicke has stated the reasons for allowing the surcharge and falsification of accounts, in the following clear and explicit terms. "Some general observations are to be made by way of *postulatum*, I am not now upon a question arising on an open general account, but merely upon a liberty given to the plaintiff to surcharge and falsify. The *onus probandi* is always on the party having that liberty; for the court takes it as a stated account, and establishes it; but if any of the parties show an omission, for which a

3937.—5. Another defence is *lapse of time*. When the demand is of a *legal* nature, and courts of law and equity have a concurrent jurisdiction, the latter, like the former, will allow the full operation of the statutes of limitations. But when the demand is not of a legal nature, and it is strictly equitable, or in cases when the bar of the statute is inapplicable, courts of equity have established another rule, sometimes founded upon the analogies of the law, when such analogies exist, and, at other times, upon its own doctrine not to encourage stale demands and laches of the claimant. For this reason, after a considerable lapse of time, these courts will not interfere because of the difficulty of doing entire justice, in consequence of the original transaction having become uncertain by the probable loss of the evidence; and because public policy requires that the titles to property and the security of the possessor should not be lightly disturbed. These remarks do not wholly apply to cases where the complainant has a justifiable excuse for the delay, for if, in such case, evidence has been lost, it is not by his fault or neglect, and it would be unfair to deprive him of the right of investigating an account, when he had

credit ought to be, that is a surcharge; or if any thing be inserted, that is a wrong charge, he is at liberty to show it, and that is a falsification; but that must be by proof on his side; and that makes a great difference between the general cases of an open account, and where only surcharge and falsify, for such must be made out. Now this is not only after great length of time, but also after a number of accounts settled between the parties, which adds considerable strength on the part of the defendant; because after such variety of accounts stated, and so often under consideration, it must be a strong case laid before the court to falsify. Another thing material in all these cases, is, that this is a liberty to surcharge and falsify these several stated accounts between persons of great ability and capacity, and great experience in that way. It is not like a liberty to surcharge and falsify an account (which the court often does,) stated between guardian and ward, just after the ward has come of age, or between persons, one of whom is conusant of the subject matter of the account, the other not, or not in such a degree; in which the court will take it with a latitude, and make that the ingredient; here the parties were on a par, great and equal skill and knowledge on both sides, and, therefore, the court expects clear evidence, before they will make any variation."

been prevented from doing so by circumstances beyond his control.(a)

§ 2.—Of a bill praying an account against an agent.

3938. In treating of the subject of agency, we have considered the various duties of agents toward their principals, so that here we will have but a limited examination of the subject. The relation of principal and agent seems to comprise all cases in which one person is authorized to act for another; but no one can be called to an account, unless he had the control or management of property belonging to the principal.

When an agent has so had the control or management of such property, he is bound to keep a regular account of his transactions,(b) and to be always ready to settle them.(c)

Courts of equity assume jurisdiction in cases of accounts against agents, on the ground that courts of law cannot do complete justice, because they have no means of compelling the production of books of accounts and vouchers,(d) as the courts of equity have, by means of a bill of discovery;(e) these latter courts having thus got possession of the cause, will proceed to administer the proper relief, to prevent a multiplicity of suits.

There are many cases of implied agencies where the parties may be called to an account by a bill in chancery. This is the case between tenants in common,

(a) *Lopdell v. Creagh*, 1 Bligh. N. S. 255. See *Jer. Eq. Jur.* 549.

(b) *Middleditch v. Sharland*, 5 Ves. 91; *White v. Lady Lincoln*, 8 Ves. 369.

(c) *Law v. E. I. Company*, 4 Ves. 834; *Macdonald v. Macdonald*, 1 Bligh. P. C. 315; *Pearce v. Green*, 1 Jac. & Walk. 135, 140; *Ormond v. Hutchinson*, 13 Ves. 53.

(d) In some of the states the courts of law can compel the production of books of a party upon the application by the opposite party, by virtue of statutory provisions.

(e) *East India Co. v. Henschman*, 1 Ves. jun. 289.

between part owners of goods or of ships, between the owners of ships and the masters, and between joint tenants. In all these cases a bill of discovery may be filed to ascertain the amount of property the defendant has received, and the profits which he has made.

When, in the course of an agency, the agent is guilty of a fraud in relation to property, and then dies, the courts of law have no jurisdiction, if it be a case where the tort dies with the person; but courts of equity will consider the loss sustained as a debt due by his estate.<sup>(a)</sup>

§ 3.—Of bills praying for a contribution.

3939. For the purpose of doing justice to all the parties, courts of equity assume jurisdiction over matters of accounts in the cases of contribution. The payment which is made by one person to another to indemnify him for having paid more than his share of a liability for which they were jointly bound, is called *contribution*.<sup>(b)</sup>

3940. There are many cases of contribution on which the jurisdiction of courts of equity will be exercised for the purposes of justice. A few will here be enumerated.

1. When there is a deficiency of assets for the payment of debts and legacies, and one of the legatees has been paid more than his proportion, he may be compelled, after all the debts have been ascertained, to refund and contribute in favor of the unpaid debts; and he is required to do this, with a view to an equaliza-

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<sup>(a)</sup> Lord Hardwicke *v.* Vernon, 4 Ves. 418. It must be remembered that where a party has committed an injury or a tort, by which his estate has been *benefited*, and then dies, the tort may be waived, and an action for money had and received may be maintained against his personal representatives. *Hambly v. Trott*, Cowp. 374. In equity it is immaterial whether his estate has been benefited or not; if his fraud has caused a loss to the principal, his estate is responsible. *Lord Hardwicke v. Vernon*, 4 Ves. 411, 418.

<sup>(b)</sup> See *Lawrence v. Cornell*, 4 John ch. 545. See ante, n. 1433, 1434.

tion of burdens, either at the instance of creditors, legatees, or the executor himself.<sup>(a)</sup>

2. When land is charged with the payment of a legacy, or an estate with the portion of a posthumous child, every part of the land is bound to make contribution.<sup>(b)</sup>

3. Partners may also be compelled to contribution when one of them has paid more than his share of the partnership debts, and when, upon the winding up of the affairs of the firm, there appears to be a balance in his favor.<sup>(c)</sup>

4. When there are part owners of property, tenants in common, joint tenants, or other persons holding property together, and some of them advance more money than their shares, for expenses or other purposes touching such property, those who are in advance are entitled to contribution from the others, in order to an equalization.

5. When one of several sureties has paid the whole debt for which they were jointly bound, he has a right to contribution from the others.

6. Contribution takes place in another case. When, in order to save a ship, part of the goods on board are thrown into the sea, then there must be an apportionment of the loss among the ship's freight and the goods which have been saved, to indemnify the owner of those lost in a just proportion; this contribution is called *general average*.<sup>(d)</sup> If, in a case of this kind, the unfortunate owner of the goods cast overboard, had no remedy but an action at law, he would be compelled to sue each owner of other goods separately for his

<sup>(a)</sup> Jer. Eq. Jur. 364, 518; 1 Story, Eq. Jur. § 503.

<sup>(b)</sup> *Armistead v. Dangerfield*, 3 Munf. 29; *Stevens v. Cooper*, 1 John. Ch. 425.

<sup>(c)</sup> 2 Story on Eq. Jur. § 504. See *Waring v. Cam*, 1 Pars. Sel. Cas. 516, 523.

<sup>(d)</sup> Marsh. Ins. B. 1, c. 12, s. 7; Abbott on Ship. 342; Bouv. L. D. Average.

contribution, because one decision would not be conclusive on the others. The amount to be recovered would have to depend in every case on the value of all the interests to be affected, which could scarcely be estimated alike by different juries; besides some of the parties liable to contribution might be insolvent and not able to contribute any thing to the general loss.

7. There are cases where the owners of an estate will be required to make contribution; as, where a judgment has been rendered against a man, and it is binding on a tract of land; afterward the owner divides it into four parts, and sells a part to each of four persons; if one of them, to save his own land, pays the whole debt, he will be entitled to contribution from the others.<sup>(a)</sup>

In all these cases a writ of contribution would lie at the common law, or in virtue of the statute of Marlebridge, but the remedy would be very imperfect. On the contrary, a court of equity having the capacity to bring all the parties before it, and to refer the matter to a master, to take an account, and adjust the whole apportionment at once, grants a sure, safe, commodious and expeditious remedy.

§ 4.—Of bills praying for an apportionment.

3941. When treating of divisible and indivisible agreements,<sup>(b)</sup> we may remember that it was stated that when a debt is due and payable by one person to another, although susceptible of division by its nature, it must be executed between the parties as if it could not be divided. In other words, when the contract is entire, it cannot, in general, be apportioned. *Annua nec debitum judex non separat ipsum*, is an applicable maxim in such cases.

Though courts of equity will not, in general, apportion an entire contract, yet, when equitable circum-

(a) Harbert's case, 3 Co. R. 12.

(b) Ante, n. 694, 698.

stances connected with the case give it another aspect, they will grant relief, and redress the wrong which would arise from a strict legal construction; for example, when an apprentice gave a fee to his master to teach him his business, and after a considerable time had elapsed, he was discharged from the indentures of apprenticeship in consequence of the misconduct of the master, it was decreed that the indenture should be given up, and part of the apprentice fee paid back.<sup>(a)</sup>

In another place, the rules with regard to the apportionment of rents among the different owners of the fee, and for various spaces of time, has been considered.<sup>(b)</sup> This will abridge our further examination of the subject.

There are many cases where the liabilities will be apportioned among the owners of an estate, and equity will entertain a bill for that purpose. Take, for example, the case of a mortgage over different parcels of land, afterward sold to different persons, each holding in fee in severalty the portion he has purchased. In this case, each is bound to contribute to the common burden, in the proportion which his land bears to the whole, which is subject to the mortgage.<sup>(c)</sup> A court of equity, in this case, having the power to call all the parties before it, can alone render ample justice.

A court of equity, alone, has the capacity to do complete justice where different persons have an interest in an estate under mortgage; as, for instance, tenants for life, or in tail, remainder men, tenants in dower, tenants by the curtesy, or for a term of years. When the mortgage is to be redeemed or paid, they must contribute in certain proportions, and the interest

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<sup>(a)</sup> *Lockley v. Eldridge*, Rep. temp. Finch, 128; *Savin v. Bowdin*, Rep. temp. Finch, 396. See *Hale v. Webb*, 2 Bro. Ch. 80; *Thurman v. Abell*, 2 Vern. 64, but this is decided on a different principle.

<sup>(b)</sup> Ante, n. 697.

<sup>(c)</sup> *Harbert's case*, 3 Co. 12, 14; *Harris v. Ingledew*, 3 P. Wms. 98; *Cheeseborough v. Millard*, 1 John. Ch. 409; *Stevens v. Cooper*, 1 John. 425.

must also be kept down in the same proportion. The remedy at law would be very imperfect, because all the persons having an interest could not be made parties to the action. In equity, on the contrary, the court can call all the parties before it, and administer exact justice to them all.(a)

§ 5.—Of various cases for which a bill will lie for an account.

3942. In cases of *liens or pledges*, it is not unfrequently necessary to have an account, in order to ascertain what are the rights of the owner and of the creditor; these can be adjusted by a court of equity.

Other cases involving accounts arise either from *privity of contract*, or relation, or from adverse or conflicting interests; such are accounts between landlord and tenant, where there have been receipts and expenditures for a great length of time.

In the case of *waste*, where the wrong doer has made a profit, he may be called to an account in equity; as, where a tenant had opened new mines and made a profit out of them, and a discovery was required, a court of equity could compel the wrong doer to make an account.

Upon an examination of these cases, it will be found that the court generally assumes jurisdiction on some equitable ground, such as fraud, accident or mistake; or the want of a discovery; or because there is some impediment at law, and, for this reason, justice cannot be obtained there; or that there exists some constructive trust; or that the interference of the court is required to prevent a multiplicity of suits;

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(a) 1 Story, Eq. Jur. § 485, 487, 488; 1 Pow. on Mort. 311; *White v. White*, 4 Ves. 33; *Allan v Backhouse*, 2 Ves. & B. 70; *Penryn v. Hughes*, 5 Ves. 107; 1 Fonbl. Eq. B. 1, c. 5, § 9, and note. A tenant for life of an equity of redemption is bound to pay the interest on a mortgage of the premises, although he cannot be required to pay the principal. *Saville v. Saville*, 2 Atk. 463; *Shrewsbury v. Shrewsbury*, 1 Ves. jun. 233.

these being the *grounds* upon which courts of equity assume a jurisdiction.

SECTION 2.—OF DOWER.

3943. Dower may be recovered in courts of law, and in the United States great facilities have been given for its recovery, so that recourse is seldom had to courts of equity; besides, the simplicity of our titles, and their want of intricacy, enables courts of law in general to do complete justice. Courts of equity, however, have concurrent jurisdiction, particularly when a bill of discovery is required in order to obtain a just account of the rents and profits of the estate; as, when the title deeds of dowable lands are kept from the widow.

In some cases, indeed, the remedy at law is very imperfect; for example, when the widow dies after judgment, and before the damages are assessed, her personal representatives lose their damages; *(a)* and if the tenant dies, during the same period, she cannot recover. On the contrary, if, at the time of filing a bill, the plaintiff's legal right to damages is not gone, the court will decree an account of the rents and profits to their respective representatives. *(b)*

SECTION 3.—OF PARTITION.

3944. The third remedy in particular cases, where courts of law and courts of equity have concurrent jurisdiction, is *partition*. The latter courts interfere only because the remedy at law is inadequate and imperfect; and, without the aid of a court of equity to promote a discovery, or to remove some obstruction at law to the right of recovery, or to grant some other

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*(a)* See *White v. Parnther*, 1 Knapp, 226.

*(b)* Park on Dower, 330, 339; *Jer. Eq. Jur.* 306; 1 Story, *Eq. Jur.* § 624; *Curtis v. Curtis*, 2 Bro. Ch. R. 632.

equitable redress, justice could not be done;(a) or to prevent a multiplicity of suits.(b)

Another reason why a court of equity should interfere is, that such a court, with a view of making a more convenient and perfect partition of the premises, may decree a pecuniary compensation, in order to equalize them, to one of the parties for *owelty* of partition.(c) At law there is no authority to give *owelty*, the jury being required to make partition of the premises between the parties, regard being had to their true value.(d)

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TITLE IV.—OF THE EXCLUSIVE JURISDICTION OF COURTS OF EQUITY.

3945. We come next to treat of the great head of equitable jurisdiction, in which the courts of equity no longer act as assistants to courts of law, or where they have only a concurrent jurisdiction with them. In the cases to be considered under this title they have *exclusive* jurisdiction, no other court being able to grant relief, or to redress the injury. The principal subjects usually treated of under this head relate to, 1, trusts; 2, election and satisfaction; 3, charities; 4, infants; 5, married women; 6, idiots, lunatics, and persons *non compos mentis*; 7, the writ of *supplicavit*; 8, the writ of *ne exeat regno*.

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(a) *Agar v. Fairfax*, 17 Ves. 551; Mitf. Eq. Pl. 110; Jer. Eq. Jur. 303; 1 Fonbl. Eq. B. 1, c. 1, § 3, note (f).

(b) Mitf. Eq. Pl. 110, n.

(c) Co. Litt. 169 a; 1 Whart. 292; 1 Watts, 265; Hugh. Ab. Partition and Partner, § 2 n. 8; *Calmody v. Calmody*, 2 Ves. jr. 570; *Wilkin v. Wilkin*, 1 John. Ch. 116.

(d) Co. Litt. 167 b.

## CHAPTER I.—OF TRUSTS.

3946. In the view which we took of equitable estates,(a) we bestowed some considerations on the creation and nature of trusts, which it will not be necessary here to repeat. Our present observations will be confined to the management of the trust property, so far as a court of equity can direct it, and the remedies for breaches of trust.

This chapter will be divided into six sections, which will treat of, 1, assignments; 2, marriage settlements; 3, mortgages; 4, wills; 5, the execution of implied trusts; 6, foreign trusts.

## SECTION 1.—OF ASSIGNMENTS.

## § 1.—Of general assignments.

3947. A *general assignment* for the benefit of creditors is a transfer of all a debtor's property to an assignee, in trust for the payment of the assignor's debts. This is generally done by deed, under the regulations of the statute law in the place where it is made; when the assignment has been accepted by the assignee, he becomes a trustee for the creditors, and chancery will compel the execution of the trust for their benefit.(b)

3948. All kinds of property will pass by such an assignment, for although a *chose in action* is not assignable at law, yet it may be assigned in equity. Courts of equity will consequently give effect to assignments and trusts, and possibilities of trusts, and contingent interests whether of real or personal estates, and of *choses in action*. In all these cases the assignment will be considered as amounting to a declaration of trust,

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(a) Ante, n. 1888.

(b) *Moses v. Murgatroyd*, 1 John. Ch. 119; *New England Bank v. Lewis*, 4 Pick. 518; *Robertson v. Sublett*, 6 Humph. 313; *Pearson v. Rockhill*, 4 B. Monroe, 296; *Montelius v. Wright*, Wright, 61.

and an agreement to permit the assignee to use the name of the assignor in order to recover the debt, or to reduce the property into possession.

The assignment may be enforced or it may be impeached in a court of equity. When a creditor seeks the benefit of the assignment, he must either make the other creditors parties, or file a bill on behalf of others who may choose to come in, as well as of himself; but when his object is to set aside the assignment, he files a bill in his own name against the assignor and the assignee alone, without making the other creditors parties.(a)

§ 2.—Of particular or special assignments.

3949. Most of the principles which regulate general assignments in trust, will apply with equal force to particular or special assignments to one person in trust for another. These assignments are frequently so made that they do not give the *cestui que trust* any legal right to enforce them, and recourse must be had to a court of equity.

Take, for example, a case which frequently occurs, that of a debtor remitting a bill to one of his creditors, with direction to pay to several others a portion of the money arising from the bill. In such case, the receipt of the bill or the collection of the money will not be an appropriation of it to the use of the creditors, so as to enable them to maintain an action at law for its recovery, unless there has been an assent, express or implied, to pay it.(b)

In equity, on the contrary, a trust would, in such case, be created in favor of the equitable assignee

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(a) *Wakeman v. Grover*, 4 Paige, 24.

(b) *De Bernales v. Fuller*, 14 East, 590, n. See *Mandeville v. Welch*, 5 Wheat, 277; *Tiernan v. Jackson*, 5 Pet. 597; *Yates v. Bell*, 3 B. & Ald. 64; *Williams v. Everett*, 14 East, 582; *Bacon v. Husband*, 4 B. & Ald. 611.

on the fund, and would constitute an equitable lien upon it.

But in order to entitle a creditor to claim such money in equity, he must have had notice of the transaction, and assented to it; for, till this is done, the debtor may revoke his authority and the creditors will have no lien on the fund.<sup>(a)</sup> If, instead of a bill, merchandise had been sent, the debtor might have withdrawn it, and applied it to some other use, at any time before the knowledge and acceptance of the creditor for whom it was intended. The true test, in such cases, to ascertain whether the creditor is or is not entitled to the money or merchandise, is to consider who should have borne the loss if it had been destroyed. Undoubtedly, until the creditor's knowledge and assent, the loss must have been supported by the debtor, for the property was then his own; after such assent, the creditor would have been entitled to it, and, if it had been lost, he must have suffered the damage, according to the maxim *res perit domino*.<sup>(b)</sup>

When the assignment of a *chose in action* is tainted with fraud, as where it is accompanied by champerty and maintenance, courts of equity will not lend their aid for its recovery.<sup>(c)</sup> By *champerty* is meant a bargain with a plaintiff or a defendant, *campum partire*, to divide the land or other thing sued for, between them, if they prevail at law, the champertor agreeing to carry on the suit at his own expense.<sup>(d)</sup> It differs from *maintenance* in this, that in the latter the person

<sup>(a)</sup> *Scott v. Porcher*, 3 Meriv. 662. See *Acton v. Woodward*, 3 Myl. & Keen, 492.

<sup>(b)</sup> *Tiernan v. Jackson*, 5 Pet. 598; *Williams v. Everett*, 14 East, 582.

<sup>(c)</sup> *Arden v. Patterson*, 5 John. Ch. 44; *Strachan v. Brander*, 1 Eden, R. 308; *Burke v. Green*, 2 Ball & B. 517; *Wood v. Griffith*, 1 Swans. 55; *Wood v. Downes*, 18 Ves. 125; *Hartley v. Russell*, 2 Sim & Stu. 244.

<sup>(d)</sup> *Williams v. Protheroe*, 3 Yo. & Jer. 129; *Thalhimer & Brinkerhoof*, 20 John. 386; S. C. 3 Cowen, 623; 1 Pick. 416; 1 Ham. R. 132; 5 Monr. 416; 4 Litt. R. 117; 7 Port. R. 488; 5 John. Ch. 44.

assisting the suitor receives no part of the benefit, while in the former he receives one half, or other proportion, of the thing sued for.(a)

§ 3.—Of the assignment of trust property.

3950. When a trustee has power to sell and assign property held in trust, and the purchaser has notice of the trust, he is generally bound, unless a different provision has been made in the instrument creating the trust, to see to the *application of the purchase money*, and that the trust is executed by the trustee; but this rule applies only to cases when the trust is of a defined and limited nature, as that the purchase money shall be laid out for the payment of a portion or of a mortgage; for if the trust is of a general and unlimited kind, as to pay all the debts of a testator, the rule does not apply.(b)

It will be readily perceived that when *personal estate* is directed to be sold by a testator, or when it is sold without a direction, for the payment of the testator's debts, the purchaser will not be liable to see to the application of the purchase money; if this were otherwise, purchasers would be greatly embarrassed, and the estate much injured by such a rule.

With regard to *real estate*, when there is a devise for the payment of debts generally, the rule applies as in the case of personalty, for the same reason, the general nature of the trust and the difficulty of seeing to the application of the purchase money.(c) But when the trust is for the payment of debts ascertained, and mentioned in a schedule, or for the payment of legacies, the purchaser is bound to see to the application of the purchase money.(d)

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(a) 4 Bl. Com. 135.

(b) 1 Madd. Ch. Pr. 443, 609; 1 Pow. on Mort. 214, 250.

(c) Co. Litt. 290 b, Butl. note (1), § 12; 2 Fonb. Eq. B. 3, c. 6, § 2, notes (k) and (b); 2 Story, Eq. Jur. § 1130.

(d) Sugden on Vend. 518; 1 Madd. Ch. Pr. 609.

## SECTION 2.—OF MARRIAGE SETTLEMENTS.

3951. A marriage settlement is an agreement made by the parties in contemplation of marriage, in relation to their estate or some parts of it, by which it is tied up, and declared to be for the uses therein mentioned.(a) But a distinction must be observed between a settlement made before marriage, and marriage articles only for a settlement; when a settlement is made after marriage in pursuance of articles made before, it will be controlled by the articles.(b)

In the construction of these instruments, the rule is, that with regard to marriage settlements when the trusts are accurately created and defined by the parties, and, consequently, may be said to be *executed*, courts of equity construe them in the same way as legal estates of the same kind would be construed at law, if the same terms had been used.(c) But when no settlement has been executed, and there are only articles for a settlement which are merely *executory*, the courts of equity when called upon to execute them, will regard the end and legal operation of the words in which the articles or trusts are expressed,(d) always construing them according to the presumed intent most beneficially for the issue of the marriage. They will require that the limitations in the marriage settlement shall be what are denominated in strict settlement.(e)

Marriage settlements, as used in England, are of rare occurrence in this country.

(a) Rice, Eq. R. 315.

(b) *Stubbs v. Whiting*, 1 Rand. 322.

(c) 1 Fonbl. Eq. B. 1, c. 6, § 7.

(d) 1 Fonbl. Eq. B. 1, c. 6, § 7, note (n), and § 8, note (s).

(e) By *strict settlement* is meant the limitation of the estate to the parents for life, with remainders to the first and other sons, etc., in fee tail, and not to the parents in fee tail. When the settlement is applicable to daughters, then they are to take in the same way. 2 Story, Eq. Jur. § 983.

## SECTION 3.—OF MORTGAGES.

3952.—When treating of estates upon condition, we considered the form, the nature, and the different kinds of mortgages, the rights of the mortgagor and of the mortgagee, and the requisites of such instruments; little remains to be added in this place.(a)

By a strict construction of the mortgage at law, if the money due by the condition was not paid at the day, the estate was forfeited, and the mortgagor had no remedy. This was such manifest injustice, that courts of equity, acting upon their general principles, and in imitation of the Roman law,(b) soon began to interpose to prevent such flagrant injustice, and treated a mortgage as a security for money borrowed, and the estate forfeited at law as a trust, and that the mortgagor had an *equity of redemption*, which he could enforce against the mortgagee as any other trust, by offering, within a reasonable time, to pay the debt and all just charges, and redeem his estate.(c) This right of the mortgagor is so perfect, that it cannot be defeated, even by an express agreement contained in the mortgage; as, if the mortgagor agreed that if the money should not be paid by a particular day, the estate should be irredeemable.(d)

## SECTION 4.—OF TRUSTS CREATED BY WILL.

3953. Having already examined the nature of wills and testaments, and by whom they may be made and their effects, our inquiries will now be confined to the consideration of *express trusts* of real or personal

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(a) Vide ante, n. 1819 to 1826.

(b) Poth. Pand. lib. 20, t. 5; 1 Domat, lib. 3, t. 1, § 3, art. 1.

(c) 2 Fonbl. Eq. B. 3, c. 1, § 13, note (c).

(d) 2 Fonbl. Eq. B. 2, c. 3, § 4, note (e), and B. 2, c. 3, § 5; Co. Litt. 204 b, Buttler's note; Com. Dig. Chancery, 4 A, 1 and 2; Holdridge v. Gillespie, 2 John. Ch. 33.

property created by last wills and testaments. These trusts, in whatever manner they arise, or for what objects soever they may be created, are within the jurisdiction of courts of equity.

In the construction of trusts created by will, courts are called upon to decide of their effect, when, 1, there is no trustee appointed; 2, when the trustee refuses to execute the trust; 3, when the persons who are to take, or the property given, are uncertain.

§ 1.—When no trustee has been appointed.

3954. It not unfrequently happens that a testator creates trusts by his will, without designating any trustee who is to execute them; and sometimes there is such an imperfect designation of the trustee, that it is doubtful who is the proper party. In such cases the courts of equity will themselves undertake, through their officers, to execute the trust, it being a rule in equity that a trust shall never fail for the want of a proper trustee. In such case, when real estate is the object of the trust, the *heir at law* will be considered as the trustee; and if personal estate be its object, the *personal representative* will be so treated.(a)

When executors are named in the will, and there is a mere naked authority to sell, if no one is designated as the trustee, and executors are named in the testament, they will be deemed, by implication, to be the proper parties to sell; because when lands are directed to be sold, they are treated as money; and, as executors are liable to pay the debts, and, if lands were money, would be the proper parties to receive it for that purpose, it is considered, in equity, that the testator intended that the parties who are finally to execute the trust, are the proper parties to sell the land to carry out the intention of the testator.(b)

(a) See *White v. White*, 1 Bro. C. C. 12; *Pit v. Pelham*, 1 Ch. Rep. 288.

(b) *Peter v. Beverly*, 10 Peters, 532; *Jackson v. Ferris*, 15 John, 346.

## § 2.—When the trustees refuse to execute the trust.

3955. When a person has been appointed trustee, by the last will of the testator, he may accept of the trust or reject it, for it is a rule that powers are never imperative; it is always at the election of the party to whom they are given to act under it or not. At law, when a power is given, coupled with a trust, and the party to whom it is given refuses to act or dies, the trust is gone forever. In equity, on the contrary, the courts would compel the trustees to execute the powers, because coupled with a trust, although they could not compel them to execute a mere naked power, unconnected with any trust.<sup>(a)</sup> In case of their death, the trust is held to survive, and its execution may be enforced by a decree, when a proper bill has been filed by the parties in interest.<sup>(b)</sup>

## § 3.—When the persons who are to take, and the property given, are uncertain.

3956. In the administration or distribution of assets, it is sometimes difficult to say who are the parties entitled to take, and to point out the exact limitations of their respective interests. In such cases courts of equity exercise a beneficial jurisdiction, by which the cross equities, and the conflicting claims of the various claimants, are settled and equitably adjusted. This is done by a reference to a master, upon whose report a decree is made.

3957. Although recommendatory or precatory words used by a testator, of themselves, seem to leave it as a matter of discretion to the devisee to act as he may deem proper, giving him a discretion, as when a

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(a) *Tollett v. Tollett*, 2 P. Wms. 490.

(b) *Brown v. Higgs*, 8 Ves. 570; *Richardson v. Chapman*, 5 Bro. Parl. Cas. 400. See *Com. v. Barnitz*, 9 Watts, 252; *Co. Litt.* 113 a, note (2) by Harg.

testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, a wish or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have construed such precatory or recommendatory expressions as creating a trust.<sup>(a)</sup>

But this construction will not prevail where either the objects to be benefited are imperfectly described,<sup>(b)</sup> or the amount of property to which the trust should attach, is not sufficiently defined.<sup>(c)</sup>

#### SECTION 5.—OF IMPLIED TRUSTS.

3958. The reader will remember that it has already been stated<sup>(d)</sup> that an implied trust is one which, without being expressed, is deducible from the nature of the transaction, as a matter of interest, or which is superinduced upon the transaction by operation of law, as a matter of equity, without any intention of the parties.<sup>(e)</sup> These implied trusts may, therefore, be divided into, 1, those which arise from the presumed intention of the parties; and, 2, those which arise by operation of law.<sup>(f)</sup>

§ 1.—Of implied trusts which arise from the presumed intention of the parties.

3959. Many cases of implied trusts have already been considered,<sup>(g)</sup> so that our labors here will be much reduced. Our inquiries will now be confined

<sup>(a)</sup> *Dashwood v. Peyton*, 18 Ves. 41; *Paul v. Compton*, 8 Ves. 380; *Bac. Ab. Legacies*, B.

<sup>(b)</sup> *Harland v. Trigg*, 1 Bro. C. C. 142; *Tibbits v. Tibbits*, 19 Ves. 664; *Cary v. Cary*, 2 Sch. & Lef. 189.

<sup>(c)</sup> *Meredith v. Heneage*, 1 Sim. 542, 556; *Morice v. Bishop of Durham*, 10 Ves. 536. See *Lewin on Trusts*. 77; 2 *Story, Eq. Jur.* § 1070, 1071.

<sup>(d)</sup> *Ante*, n. 1901.

<sup>(e)</sup> *Bac. Ab. Uses and Trusts*, part 1, C, *Bouv. ed.*

<sup>(f)</sup> *Elliott v. Armstrong*, 2 *Blackf.* 198.

<sup>(g)</sup> *Ante*, n. 1901.

to 1, cases of resulting trusts; 2, equitable liens; 3, cases where property is purchased subject to a charge.

*Art. 1.—Of resulting trusts.*

3960. A resulting or constructive trust is one which arises in a case where it would be contrary to the principles of equity that he in whom the property becomes vested, should hold it otherwise than as a trustee for the party who originally created it. Suppose, for example, Primus should deliver property to Secundus to be paid or delivered to Tertius. In such case, Secundus would be a trustee for Tertius, although there might be no agreement on the subject. But until Tertius has become a party to it, if the trust has been without consideration, it is revocable by Primus, and then the original trust is gone, and there is an implied resulting trust in favor of Primus.(a)

The cases of resulting trusts are very numerous, and cannot be here examined in detail. As a general rule it may be stated that where the whole of the estate is conveyed or devised, but for particular objects and purposes, or on particular trusts, if the objects, purposes or trusts fail and do not take effect by any accident, or if they are all accomplished and do not exhaust the whole property, there arises a resulting trust for the grantor or devisor or his heirs.(b)

3961. But there are circumstances, which, when fully established by evidence, will rebut the presumption of a resulting trust; when, for example, a parent purchases in the name of a son, the purchase will be deemed *primâ facie* intended as an *advancement*, because a parent is under a moral obligation to provide for his

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(a) Priddy v. Rose, 3 Meriv. 102; Linton v. Hyde, 2 Madd. 9; Dearle v. Lovering, 3 Russ. R. 1; Page v. Broom, 4 Russ. 6.

(b) 2 Fonbl. Eq. B. 2, c. 5, § 1, note (a); Jer. Eq. Jur. 13, 130; 2 Story, Eq. Jur. § 1200.

children.(a) Upon the same principles, when a parent takes securities in the name of a child, they will be considered as an advancement,(b) unless the contrary be fully established by proof. And, as he is alike bound to provide for his wife, securities taken in her name will be considered as a provision for her.(c)

*Art. 2.—Of equitable liens.*

3962. A lien, in its most extensive signification, includes every case in which real or personal property is charged with the payment of any debt or duty, every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim against the owner is satisfied. A lien is not either a *jus in re*, nor a *jus ad rem*; that is, not a property in the thing itself, nor does it constitute a right of action for the thing; it is simply a charge upon it. For this reason, it is not attachable as personal property, nor as a chose in action of the person who is entitled to it.(d)

Liens at law generally arise either from express contract, or the usage of trade, or the manner of dealing between the parties;(e) and, with some exceptions, are in general lost, when they consist in the possession of the thing, by the loss of the possession;(f) for example, the lien on goods for freight, the lien for repairs of goods, and lien on goods for the balance of accounts, are all extinguished by a voluntary surrender of the

(a) *Dyer v. Dyer*, 2 Cox, R. 93; Com. Dig. Chancery, 4 W 4; Jer. Eq. Jur. 89 to 92; Bac. Ab. Uses and Trusts, D.

(b) *Rider v. Kidder*, 10 Ves. 366; *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Lloyd v. Read*, 1 P. Wms. 607.

(c) 1 Fonbl. Eq. B. 2, c. 5, § 3; *Dyer v. Dyer*, 2 Cox, 92; Jer. Eq. Jur. 92.

(d) *Meany v. Head*, 1 Mason, 319.

(e) *Jarvis v. Rogers*, 15 Mass. 389.

(f) In the case of seamen's wages, and bottomry bonds, it is not necessary to retain the possession of a thing, in order to continue the lien.

thing to which they are attached.(a) But, when the possession is not requisite to support the lien, its surrender will not destroy it; as, for example, if a tenant of a farm should have a judgment against his landlord, the surrender of the estate, after the lease expired, would not affect the lien of the judgment.

1. *Of equitable liens for purchase money.*

3963. Liens are divided into legal and equitable. The former are those which may be enforced in a court of law; the latter are valid only in a court of equity. Our observations under this head will be confined to equitable trusts. These liens arise from constructive trusts, and are wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance. The lien which the vendor of real estate has on the estate sold, for the *purchase money* remaining unpaid, is a familiar example of an equitable lien.(b) It exists not only against the vendee himself and his heirs, and other privies in estate, but also against all subsequent purchasers, having notice that the purchase money remains unpaid.(c) The vendee, his heirs, and all other persons, who have such notice, are considered to the extent of the lien, as trustees for the vendor, upon the ground that having gotten the estate of another, they cannot, in conscience, keep it, without the payment of the consideration money.(d)

But a distinction must be observed between the cases

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(a) Abbott on Shipp. 171.

(b) Math. on Pres. 392.

(c) Mackreth v. Symmons, 15 Ves. 329; Bayley v. Greenleaf, 7 Wheat. 46; Garson v. Green, 1 John. Ch. 308; Champion v. Brown, 6 John. Ch. 402; 1 Fonbl. Eq. B. 1 c. 3, § 3, note (e); Ross v. Whitson, 6 Yerg. 50; Eubank v. Poston, 5 Monr. 287; White v. Casanave, 1 Har. & John. 106; Ghiselin v. Ferguson, 4 Har. & John. 522; Graves v. McCall, 1 Call, 414; Hundley v. Lyons, 5 Munf. 342; Wynne v. Alston, Dev. Eq. 163; Voorhis v. Instone, 4 Bibb, 342; Galloway v. Hamilton. 1 Dana, 576; Watson v. Wells, 5 Conn. 468.

(d) See Mackreth v. Symmons, 15 Ves. 340, 347.

of a volunteer and purchasers under him with notice, or having an equitable title only, and a purchaser under a conveyance of the legal estate, made *bonâ fide*, without notice, for a valuable consideration which has been paid. In the former case, the purchaser becomes a trustee, and as such, responsible for the unpaid purchase money; in the latter, the lien of the vendor is gone.

When the vendee has sold the estate to a *bonâ fide* purchaser without notice, and the consideration money has not been paid by the latter, the original vendor, being unpaid, may proceed against the estate for his lien, or against the consideration money in the hands of such purchaser for satisfaction, because, in such case, the latter, not having paid his money, takes it *cum onere*, to the extent of the consideration money which remains unpaid; it being a rule in equity, that where trust money can be traced, it shall be applied to the purposes of the trust.(a)

An assignee, under a general assignment for the benefit of creditors generally, will be considered as a volunteer, and not a purchaser for a valuable consideration, and therefore, bound to pay the purchase money remaining unpaid, out of the property assigned; on the contrary, an assignment made to particular creditors for their security or satisfaction, when they have no notice that the purchase money remains unpaid, will be considered as any other *bonâ fide* purchaser without notice.(b)

In general, the lien of the vendor is presumed to exist for the unpaid purchase money, and it lies upon the purchaser to show it has been discharged;(c) this

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(a) See *Lench v. Lench*, 10 Ves. 511; *Ex parte Morgan*, 12 Ves. 6; *Irvine v. Campbell*, 6 Binn. 118; *Wood v. Bank of Kentucky*, 5 Monroe, 195; *Eubank v. Poston*, 5 Monroe, 287.

(b) *Bayley v. Greenleaf*, 7 Wheat. 56; *Mitford v. Mitford*, 9 Ves. 100.

(c) 15 Ves. 342; 1 John. Ch. 308; *Hughes v. Kearney*, 1 Sch. & Lef. 135.

may be done by proving that separate securities have been taken by the vendor for the purchase money.(a)

2. *Of equitable liens for repairs and improvements.*

3964. Sometimes a lien is created for the money expended in *repairs and improvements* of an estate, either real or personal, as where they have been made on joint property for a joint benefit.

3965.—1. With regard to *real estate*, it may be stated that, at common law, when there are two tenants in common, or joint tenants of a house or mill, and it happens to fall into decay, and one of them is willing to repair, and the other is not, he who is willing to repair may sue out a writ *de reparatione facienda*, because the owners are bound, *pro bono publico*, to maintain houses and mills which are for the habitation of man.(b) In equity, money laid out, *bonâ fide*, for repairs and improvements, constitutes a lien upon the land, when expended by one tenant in common, or a joint tenant for the benefit of both.(c)

At law there is no remedy in these cases, unless there has been an express or implied agreement, upon which the action may be founded; but in equity, on the contrary, the remedy has been extended to all cases where the party making the repairs and improvements acted *bonâ fide*, and innocently, and there has been a substantial benefit conferred on the owner, so that, *ex æquo et bono*, he ought to pay for such benefit.(d)

3966.—2. Liens for repairs to *personal property* do not generally exist where the property is not in the possession of the creditor, but it seems a lien exists

(a) *Brown v. Gilman*, 4 Wheat. 255, 290.

(b) Co. Litt. 200, b; Bac. Ab. Joint Tenants, L; F. N. B. 127, a.

(c) 2 Fonbl. Eq. B. 2, c. 4, § 2, note (g); *Lake v. Gibson*, 3 P. Wms. 158.

(d) *Town v. Needham*, 3 Paige, 545; *Hibbert v. Cooke*, 1 Sim. & Stu. 552. See *Graham's heirs v. Graham*, 6 Monr. 562; *Robinson v. Ridley*, 6 Madd. R. 2; *Green v. Biddle*, 8 Wheat. R. 1; *Shine v. Gough*, 1 Ball & Beat. 444.

for repairs done to foreign ships in favor of material men and artificers; and, if paid by the master of the ship, he is substituted with regard to such claims to the rights of artificers and material men.(a)

3. *Of equitable liens where property is purchased subject to a charge.*

3967. When property is bought subject to a charge or debt, and the debtor makes himself personally liable by his own express contract or covenant for it, the lien is continued by implication, and the real estate is treated as the primary debtor, and the purchaser is a surety. In a case of this kind, when the purchaser dies, as between his heirs, devisees or distributees, the debt is to be paid out of the real estate, and if it should be collected on the bond or personal obligation, out of the personal estate, the party entitled to the personal assets will be substituted in the place of the creditor, and be entitled to payment out of the real estate.(b)

§ 2.—Of implied or constructive trusts created without the intention of the parties.

3968. The next object to occupy our attention will be implied or constructive trusts, which arise without any intention on the part of the trustee, but which are binding upon his conscience by operation of law.

*Art. 1.—Of the payment of money by mistake.*

3969. The law raises a trust where money has been paid to another by mistake, and where the receiver cannot in conscience keep it; he is then considered as a trustee for him from whom he received it. It is material in these cases to distinguish between a mis-

(a) *The Aurora*, 1 Wheat. 105; *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Wheat. 409.

(b) *Lechmere v. Charleton*, 15 Ves. 197; *McLearn v. McClellan*, 10 Pet. 625.

take of law and a mistake of fact. If Peter pay to Paul, a sum of money which he believed he owed him, and, in fact, Peter's agent had before that time paid Paul's agent, this is a mistake of fact, and Paul becomes a trustee for that money for the use of Peter; but if Peter had paid the same money to Paul, supposing that the statute of limitation was no bar, when, in truth, it barred the debt, this is a mistake of law, and, as Paul was justly entitled to be paid, the money cannot be recovered from him;(a) for, having received only what belonged to him, he is not bound in conscience to return it.(b)

*Art. 2.—How far trust funds may be traced.*

3970. It is a rule of very universal application, that whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be liable in its new form to the rights of the original owner, or of the *cestui que trust*.

When property which is the object of a trust, is sold or transferred by the trustee to another, with notice of the trust, the purchaser will hold it subject to the trust as it was in the hands of the original trustee.(c) And when trust property has been changed, it will not be divested of the trust, but if it can be traced, that, or the property which represents it, will continue subject to the trust, because an abuse of a

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(a) 2 Fonb. Eq. B. 2, c. 1 § 1, note (b); Ripley v. Gelston, 9 John. 201; Morris v. Tarrin, 1 Dall. 148; Bogart v. Nevins, 6 S. & R. 369; Irvine v. Hanlin, 10 S. & R. 219; Espy v. Allison, 9 Watts, 462; Mann's Appeal, 1 Penn. St. R. 24; Hinkle v. Eichelberger, 2 Penn. St. R. 484.

(b) Courts of law will entertain an action of assumpsit, for money had and received, when the money has been paid under circumstances that the receiver cannot, *ex aequo et bono*, retain it.

(c) Adair v Shaw, 1 Sch. & Lef. 243, 262.

trust can never give a right.(a) For the same reason, the trustee is liable for all profits and interest he has made out of the property held by him in trust.(b)

SECTION 6.—OF FOREIGN TRUSTS.

3971. The trusts which have been the subject of our inquiries have all been of domestic origin, and to be executed in this country. There are others which attach to trust property situate in a foreign country, or are to be executed there.

It has already been observed that courts of equity are not confined in their jurisdiction to the subject matter which is to be affected by the decree. The decree of such a court acts primarily *in personam*. When the parties are within their jurisdiction or within their territorial process, these courts will take cognizance of the case, and afford full relief, although the property may be in a foreign country, unless in cases where the court cannot, in the nature of things, afford the relief asked; as to grant partition of lands in a foreign country.(c)

In cases of fraud, trust, or contract, courts of equity will exercise a jurisdiction wherever the person may be found, although lands which are the subject matter in dispute, may be in another jurisdiction, and they may be affected by the decree.(d)

CHAPTER II.—OF ELECTION AND SATISFACTION.

SECTION 1.—OF ELECTION.

3972. By the term election, as used in equity, is meant the obligation on a party to choose between

(a) *Hassel v. Smithers*, 12 Ves. 119; *Taylor v. Plumer*, 3 M. & S. 574; *Murray v. Lyburn*, 2 John. Ch. 441; Com Dig. Chancery, 4 W, 29.

(b) *Murray v. Lyburn*, 2 John. Ch. 441; *Murray v. Ballou*, John. Ch. 581.

(c) *Kildare v. Eustace*, 2 Ch. Cas. 188; *Cartwright v. Pettus*, 2 Ch. Cas. 214.

(d) *Massic v. Watts*, 6 Cranch, 160.

two inconsistent rights or claims, in cases where he is entitled to one, but not to both. The second gift is designed to be effectual only in the event of his declining the first; and the substance of the gifts combined is an *option*.

The foundation of the doctrine is the intention of the author of the instrument; as the intention extends to the whole disposition, it is frustrated by the failure of any part. This doctrine of election, with many other doctrines of the courts of equity, appears to be derived from the civil law.<sup>(a)</sup> In that system of law this doctrine seems to have been confined to wills, and it was first applied to such cases in English jurisprudence.<sup>(b)</sup>

3973. Courts of equity have adopted from the civil law the principle, that a person shall not be permitted to claim under any instrument, whether it be a deed or will, without giving full effect to it, in every respect, so far as such person is concerned. This doctrine is particularly called into exercise when a testator gives what does not belong to him, but to some other person, and gives to that person some estate of his own; by virtue of which gift a condition is implied, either that the legatee shall part with his own estate, or shall not take the bounty.

In a case of this kind, equity will not allow the first legatee to insist upon that by which he would deprive another legatee under the same will of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate, and therefore compels him to make his election between his rights, independently of the will, and the benefit under it. The principle of equity does not give to the disappointed legatee the right to detain the thing itself,

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<sup>(a)</sup> Inst. 2, 20, 4, 24, 1; Dig. 30, 39, 7; Poth. Pand. lib. 30, t. 1, n. 125; Domat, liv. 4, t. 2, § 3, art. 3, 4, et 5.

<sup>(b)</sup> Dillon v. Parker, 1 Swanst. 397, note.

but gives a right of compensation out of something else.(a)

3974. To impose upon a party claiming under a will the obligation of making an election, the intention of the testator must be expressed, or clearly implied in the will itself, in two respects: 1st, to dispose of that which is not his own; and, 2dly, that the person taking the benefit under the will should take under the condition of giving effect to it.

Other cases of election might be put. A testator may bequeath property to his wife in satisfaction of her dower; wherever this appears either by express words, or by implication, it creates a case of election. But a simple gift of a legacy to his wife will not deprive her of her dower, and, unless the intention to the contrary is clear, she will be entitled to both.(b)

Again, where the testator gives one of several things, as one of my horses; or where he mentions two things, and bequeaths one of them, as my house in the city of Philadelphia, or five thousand dollars, at his choice.

3975. This doctrine of election applies only to *volunteers, it does not bind creditors*; they may take the benefit of a legacy for payment of debts, and also enforce their legal claims for the balance remaining unpaid, upon other funds disposed of by will.(c)

3976. As the very term election imports a choice, the party who is to make it has a right to take sufficient time *to obtain information*, and, if need be, to a bill of discovery for that purpose. In general he is not bound to make an election, until all the circumstances are known, and the state, condition, and value of the funds are clearly ascertained, for till then, he can make no discriminating choice; and a choice made

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(a) 2 Rop. on Leg. ch. 23, s. 1, p. 378.

(b) *Birmingham v. Kirwan*, 2 Sch & Lef. 452; 3 Woodes. Lect. 493.

(c) *Kidney v. Coussmaker*, 12 Ves. 154.

in ignorance of such facts is not conclusive upon him.(a)

3977. An election may be made by express acts, or by implication; in general the cases must be decided by the circumstances attending them, rather than upon any rule; but long acquiescence is always evidence of a choice.(b)

SECTION 2.—OF SATISFACTION.(c)

3978. In equity, *satisfaction* is defined to be the donation of a thing, with the intention, express or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. By satisfaction the testator does not intend to fulfil the contract, but he substitutes one thing for another which is at least equivalent to it.(d)

This, like the doctrine of election, and many others, were known and used by the civilians, and have been transplanted, much to the ornament and usefulness of our system of equity jurisprudence.(e)

Satisfaction may be express or implied. When a testator gives a legacy and declares that it shall be considered as a payment, settlement, or satisfaction of a debt or duty he owes, it is *express*, and the legatee will not be entitled to it and also the debt or duty.

But most cases of satisfaction are *implied*, it being presumed that the legacy is given for the purpose of

(a) *Dillon v. Parker*, 1 Swanst. 381, note (a).

(b) *Dillon v. Parker*, 1 Swanst. 359, 381. As to the manner of making an election, when there is a disability on account of minority or coverture, see Mr. Swanston's note (c) to *Gratton v. Howard*, 1 Swanst. 413.

(c) See, generally, as to Satisfaction, Fonbl. Eq. 333; Yelv. 11, note; Suppl. to Ves. jun. 204, 308, 311, 342, 348; 8 Com. Dig. Appendix, tit. Satisfaction; Rob. on Frauds, 46. n. 15; 2 Story, Eq. Jur. Ch. 30; Roper on Leg. Ch. 17; Stallman on Election and Satisfaction; Math. on Pres. Ch. 6; 1 Rop. on H. & W. 501 to 511; 2 Rop. H. & W. 53 to 63.

(d) *Goldsmith v. Goldsmith*, 1 Swanst. 219.

(e) Dig. 30, 1, 84, 6; Dig. 30, 1, 123.

liquidating or satisfying the obligation of the testator; for where a person indebted to another bequeaths to his creditor a legacy, equal to, or exceeding the amount of the debt, which is not noticed in the will, courts of equity, in the absence of any intimation of a contrary intention, have adopted the rule that the testator shall be presumed to have meant the legacy as a satisfaction of the debt.

When a testator, being indebted, bequeaths a legacy to his creditor *simpliciter*, and of the same nature as the debt, and not coming within any of the exceptions mentioned below, it has in general been held to be a satisfaction of the debt, when the legacy is equal to, or exceeds the amount of the debt.(a)

3979. To this general rule of implied satisfaction, there are many exceptions,(b) the principal of which are the following:

1. When the legacy is of *less* value than the debt, it shall not be deemed a part payment or satisfaction.(c)

2. When the debt and legacy are of equal amount, and there is a difference *in the times of payment*, so that the legacy may not be equally beneficial to the legatee as the debt.(d)

3. When the legacy and the debt are of a *different nature*, either with reference to the subjects themselves, or with respect to the interest given.(e)

4. When the provision by the will is given for a *particular purpose*, such purpose will prevent the testa-

(a) Prec. in Ch. 240.

(b) The courts of equity lay hold of slight circumstances to escape from the general rule and create exceptions to it. In the case of *Mathews v. Mathews*, 2 Ves. sen. 636, Sir Thomas Clark, master of the rolls, gives the subject an examination well worthy of perusal.

(c) *Graham v. Graham*, 1 Ves. sen. 262.

(d) *Atkinson v. Webb*, Prec. Ch. 236; *Goldsmid v. Goldsmid*, 1 Swanst. 219; *Nicholls v. Judson*, 2 Atk. 300; *Clark v. Sewell*, 3 Atk. 96; *Haynes v. Mico*, 1 Bro. C. C. 129; 1 McClel. & Yo. Exch. R. 41.

(e) *Forsight v. Grant*, 1 Ves. jun. 298; *Richardson v. Elphinstone*, 2 Ves. jun. 463; *Eastwood v. Vinke*, 2 P. Wms. 614.

mentary gift from being construed a satisfaction of the debt, because it is given *diverso intuitu*.(a)

5. When the debt is contracted, *subsequently* to the making of the will; because the testator could not intend to satisfy a debt which he did not owe at the time of making his will.(b)

6. When the legacy is *uncertain and contingent*.(c)

7. When the *debt itself is contingent*, as when it arises from a running account between the testator and legatee,(d) or it is a negotiable bill of exchange.(e)

8. When there is an express direction in the will for the payment of *debts and legacies*, the court will infer from the circumstances, that the testator intended that both the debt owing from him to the legatee, and the legacy, should be paid.(f)

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CHAPTER III.—OF CHARITIES.(g)

3980. Another important subject in which courts of equity have exclusive jurisdiction is that of *charities*, which are a species of trusts.

Charity, in its widest sense, denotes all the good affections which men ought to bear toward each other;(h) in its most restricted, which is the popular sense, it signifies relief to the poor. These species of charity are mere moral duties which cannot be enforced

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(a) *Mathews v. Mathews*, 2 Ves. sen. 635. See *Foster v. Evans*, 6 Sim. 15.

(b) *Cransmer's case*, 2 Salk. 508; *Thomas v. Bennet*, 2 P. Wms. 343.

(c) *Nichols v. Judson*, 2 Atk. 300.

(d) *Rawlins v. Powell*, 1 P. Wms. 296.

(e) *Carr v. Eastbrook*, 3 Ves. 361.

(f) *Chancey's case*, 1 P. Wms. 408; *Field v. Mostin*, Dick. R. 543.

(g) As to charities generally, see Boyle on Charities; Shelf. on Mortm. 59; 2 Story, Eq. Jur. Ch. 31; Appendix to 4 Wheat. Rep. 1 to 23; 2 Madd. Ch. Pr. 60; 2 Rop. on Leg. ch. 19; 2 Hov. on Frauds, ch. 26; Jer. Eq. Jur. 236; Bac. Ab. Charitable Uses and Mortmain; 1 Spence on Eq. Jur. ch. 11; Duke on Charities.

(h) 1 Epistle to Cor. c. xiii.

by the law.(a) But the term charity is not employed in either of these senses in law; its signification is derived chiefly from the statute of 43 Eliz. c. 4. Those purposes are considered charitable which are enumerated in the act, or which, by analogy, are deemed within its spirit and intendment.(b) Lord Chancellor Camden describes a charity to be a gift to a general public use, which extends to the rich as well as to the poor.(c)

In the discussion of this subject, it will be proper to inquire into, 1, the history of charities; 2, the jurisdiction of courts of equity in cases of charities; 3, the form and construction of the gift; 4, void charities.

#### SECTION 1.—OF THE HISTORY OF CHARITIES.

3981. The use of charities probably owes its origin to the Roman law. The emperor Constantine, after his conversion to Christianity, greatly encouraged them. The usual rapacity of the clergy soon introduced such great abuses, that it was found necessary to restrain them, and accordingly, in the time of Valentinian, certain mortmain laws were passed, by which this permission to bequeath so lavishly to the church was withdrawn.

The history of uses in England is not easily traced anterior to the time of Elizabeth. It is probable that when charitable uses, not superstitious, were established at law, in analogy to other cases of trusts, the court of chancery immediately held the feoffees to such uses accountable in equity, for the due execution of them; and in order to regulate them, the statute of 43 Elizabeth was passed.

(a) Kames on Eq. 17.

(b) Shelf. on Mortm. 59; Morice v. Bishop of Durham, 9 Ves. 399; S. C. 10 Ves. 522; Cox v. Basset, 3 Ves. 155; Attorney General v. Bower, 3 Ves. 714; Moggridge v. Thackwell, 7 Ves. 36; Brown v. Yeall, 7 Ves. 59, note (a).

(c) Amb. 651; Boyle on Char. 51; Bouv. L. D. h. v.

In the preamble of the statute are énumerated the uses which are considered charitable; these are gifts, devises and bequests for the relief of aged, impotent and poor people; for the maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens, causeways, churches, sea banks and highways; for the education and preferment of orphans; for, or toward the relief, stock, or maintenance for houses of correction; for marriages of poor maids; for the support, aid, and help of young tradesmen, handicraftsmen, and persons decayed; for the relief or redemption of prisoners or captives, or for aid or ease of any poor inhabitants, concerning payment of fifteenths, setting out of soldiers, and other taxes.

Since the passage of this statute, which is emphatically called the statute of charitable uses, no bequest is deemed within the authority of chancery, and capable of being established and regulated by it, except bequests for those purposes, which that statute enumerates as charitable, or which, by analogy, are deemed within its spirit and intendment.

Though gifts for superstitious uses will not be supported, yet others which are useful, although they are not within the letter of the statute, are deemed charitable within the equity of its provisions.<sup>(a)</sup> In imitation of the Romans, the English were obliged to pass statutes of mortmain to prevent the abuse of giving charities,<sup>(b)</sup> the principal of which is the statute of 9 Geo. II., c. 36. This has not been generally adopted in the United States, though some of the provisions of the older statutes of mortmain have been adopted in some of the states of the Union.

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<sup>(a)</sup> Duke on Char. 105.

<sup>(b)</sup> 2 Rop. on Leg. 101; 2 Bl. Com. 272. As to the etymology and meaning of mortmain, see Bouv. L. D. h. t.

## SECTION 2.—OF THE JURISDICTION OF COURTS OF EQUITY IN CASES OF CHARITABLE USES.

3982. Since the enactment of the statute of 43 Elizabeth, courts of chancery have had express jurisdiction. After reciting the gifts for charitable uses which it legalizes, and that they had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver or employ the same, the statute proceeds to enact that it shall be lawful for the lord chancellor, or lord keeper, to award commissions under the great seal to the bishop of every diocese, and other proper persons, to inquire by the oaths of a jury, and by other lawful ways and means, of all gifts, limitations, assignments, and appointments aforesaid, of lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting, and misgovernment in respect of such property given, limited, assigned or appointed, or hereafter to be given, etc., to, or for any of the charitable or godly uses therein rehearsed; and upon inquiry had, to set down such orders, judgments, and decrees, etc., as the lands, etc., may be duly and faithfully employed for the charitable uses and intents before rehearsed for which they are given; which orders, etc., not being contrary to the orders of the founders, shall stand firm and good, and shall be executed accordingly, until the same shall be altered by the lord chancellor, etc., upon complaint by the party grieved.(a)

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(a) The statute of 43 Eliz. c. 4, is in force in Kentucky, *Gass v. Wilhite*, 2 Dana, 170; and North Carolina, *Griffin v. Graham*, 1 Hawks, 96; it is not in force in Maryland, *Dashiell v. Attorney General*, 5 Har. & John. 392; nor in Virginia, *Galleo v. Attorney General*, 3 Leigh, 450. See 4 Wheat. 1; 3 Pet. 481. In Massachusetts and Pennsylvania, the principles adopted in the English courts of chancery, respecting charitable uses, under the 43

The statute next makes provisions directing that certain cases shall be excepted from its operation, and how orders shall be made by the chancellor, etc., and how they shall be executed; and how and when such orders may be reëxamined, and final orders and decrees shall be made.(a)

The ample powers given to the court of chancery by this statute, were exercised to their full extent, and the court assumed to do by original bill in the first instance, what it could do upon a commission. When the trust was for a definite object, and the trustee living, the court had jurisdiction by its ordinary authority, to compel its execution by bill, independently of the statute, for over all trusts the court has jurisdiction.(b)

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Eliz., have been adopted as the common law of those states. *Going v. Emery*, 16 Pick. 107; 4 Dane's Ab. 6; *Whitman v. Lex*, 17 S. & R. 88; *Mayor, etc. v. Elliot*, 3 Rawle, 170; *McGirr v. Aaron*, 1 Penna. R. 49; *Addis*, 362; 5 Rawle, 151. In delivering the opinion of the court in the case of *Wheeler v. Smith*, 9 How. U. S. Rep. 78, McLean, Justice, says, "Charitable bequests, from their nature, receive almost universal commendation. But when we look into the history of charities in England, and see the gross abuses which have grown out of their administration, notwithstanding the enlarged powers of the courts, aided by the prerogative of the sovereign and the legislation of parliament, doubts may be entertained whether they have, upon the whole, advanced the public good. When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states; and this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the crown. The state, as a sovereign, is *parens patriæ*."

"The common law, it is said, we brought with us from the mother country, and which we claim as a most valuable heritage. This is admitted, but not to the extent sometimes urged. The common law in all its diversities has not been adopted by any one of the states. In some it has been modified by statute, in others by usage. And from this it appears that what may be the common law of one state, is not necessarily the common law of any other. We must ascertain the common law of each state by its general policy, the usages sanctioned by the courts, and its statutes. And there is no subject of judicial action which requires the exercise of this discrimination more than the administration of charities. No branch of jurisprudence is more dependent than this upon the forms and principles of the common law."

(a) See Statute 43 Eliz. c. 4.

(b) See 2 Fonbl. Eq. B. 2, pt. 2, c. 1, § 2, note(d).

SECTION 3.—OF THE FORM AND CONSTRUCTION OF CHARITABLE GIFTS.

§ 1.—Of the form of the gift.

3983. In order to create a charity, the gift must be within the scope of the 43 Elizabeth, and it must be definite and certain. A distinction must be observed between gifts in favor of individuals, however charitable the motive, and gifts for charitable purposes, in the sense of our definition, or between those which have been named respectively *public* and *private* trusts.<sup>(a)</sup> In the latter case, an intended bounty which wants certainty in the designation of the person, necessarily fails, for there is no one on whom the gift is to be bestowed. But when the gift is general, as for the poor of a particular place or district, objects may readily be found; so a perfect private trust, from its very nature, may be varied or even annulled by the persons who are its sole objects. When the trust is intended to be permanent, it cannot be subject to the will or caprice of those who, for the time being, may be its objects; so the rules against perpetuities cannot apply to charitable or public trusts, which, from their very nature, are generally intended to be perpetual.<sup>(b)</sup>

It is a general rule that when the trust is not ascertained, or when it is general and indefinite, or it is of a mere private nature, or not within the scope of the statute, it is utterly void, and the property passes to the next of kin.<sup>(c)</sup>

§ 2.—Of the construction of charities.

3984. Courts of equity have always looked upon charities with a favorable eye, and such bequests have

<sup>(a)</sup> Attorney General *v.* Aspinall, 2 My. & Cr. 618.

<sup>(b)</sup> *White v. White*, 7 Ves. 433.

<sup>(c)</sup> See *Ommaney v. Butcher*, 1 Turn. & Russ. 260.

been more liberally construed than in the case of gifts to individuals. If, for example, a testator should give his property to such person as he should name to be his executor, and he should appoint no executor, in this case, as to individuals, the testator must be held to die intestate, and the next of kin will take. In cases of charity, courts of equity will supply the place of an executor, and carry the bequest into effect, although, in the case of individuals, it must have failed.(a)

But the courts have gone still further, and have held that when the bequest indicates a charitable intention, and the object to which it is to be applied is against public policy, the court will lay hold of the positive intention, and execute it for the purposes of charity agreeably to law, instead of defeating it altogether, or enforcing a thing to be done against the policy of the law.(b)

3985. Another rule has been adopted in equity, that when a bequest is uncertain as to the persons, or whether the persons who are to take are *in esse* or not; or whether the legatee is capable or incapable of taking; or whether the bequest can be carried into execution or not; the courts will sustain the legacy on the doctrine of *cy près*.(c)

These words, *cy près*, are old French, and signify *as near as*. When a devise is attempted which cannot be carried out, the courts do not declare the charitable bequest to be utterly void, but expound the will in such a manner as to carry the intention of the testator into effect, as near as the rules which prevent its being

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(a) *Mills v. Farmer*, 1 Meriv. 55, 96; *Moggridge v. Thackwell*, 7 Ves. 36. See *Attorney General v. Hickman*, 2 Eq. Cas. Ab.; *White v. White*, 1 Bro. Ch. Cas. 12.

(b) *Duke on Uses*, by Bridgman, 466; *De Costa v. De Pas*, 1 Vern. 248; 7 Ves. 36, 75; *Casey v. Abbot*, 7 Ves. 490.

(c) *Duke on Char. Uses*, by Bridgman, 355; *Baptist Assoc. v. Hart's Ex'rs*, 4 Wheat. 1; S. C. 3 Pet. R. App. 481.

literally fulfilled will permit; this is called a construction *cy près*.(a)

Numerous examples of such construction may be found in the books,(b) as, if a devise be made to an existing corporation by a misnomer, which makes it void at law, it will be held good in equity.(c) When a charity is so given, that there can be no objects, the court, under the doctrine of carrying the execution *cy près*, will order a new scheme to execute it.(d)

Formerly, this doctrine of *cy près* was carried to such extravagant length, that the court of chancery made a man's will, instead of permitting that to stand which he had himself declared to be such. But in modern times a more just and reasonable interpretation is given to such dispositions; the general intention will be carried into effect, if not in form, in substance. The court will not decree the execution of the trust of a charity, in a manner different from that intended, unless it is apparent that intention cannot be carried out literally. When that is the case, the court will adopt another mode consistent with the general intention, so as to execute it in substance according to the will of the testator. And, to prevent the defeat of a charity, the court will dispose of the revenue by a new scheme, by virtue of the principle of *cy près*, as near as may be, consistently with the testator's will.

(a) Cruise, Dig. t. 38, c. 9, s. 34; 2 Story, Eq. Jur. § 1169; Jer. Eq. Jur. 245. See, as to performance of conditions *cy près*, 1 Rep. on Legacies, 514.

(b) See *Mills v. Farmer*, 1 Meriv. 55; *Attorney General v. Combe*, 2 Ch. Cas. 13; *Rivett's case*, Moore, 890; *Attorney General v. Bowyer*, 3 Ves. 714; *West v. Knight*, 1 Chan. Cas. 135; *White v. White*, 1 Bro. Ch. Cas. 12; *Attorney General v. Platt*, Rep. temp. Finch, 221; *Attorney General v. Peacock*, Rep. temp. Finch, 245; *Attorney General v. Syderfin*, 1 Vern. 224; *Clifford v. Francis*, 1 Freem. 330; Bac. Ab. Charitable Uses and Mortmains, E; *Duke on Char. Uses*, 33, 115; *Com. Dig. Chancery*, 2 N 2; *Highm. on Mortm.* 204.

(c) *Anon.* 1 Chan. Cas. 267.

(d) *Attorney General v. Oglander*, 3 Bro. C. C. 160. See *Att. Gen. v. City of London*, 3 Bro. C. C. 171; *S. C.* 1 Ves. jun. 243.

## SECTION 4.—OF VOID CHARITIES.

3986. In general, charitable bequests ought to be certain as to the persons or objects to which they are applied; but an uncertainty as to them will not render them void, for when the testator has manifested a general intention to give to charity, the failure of the particular mode by which the charity is to be effected will not destroy it, and if there are surplus funds, they will, upon the same principle, be applied to other similar purposes, as those for which the principal fund was given. These rules go upon the intention of the testator, which courts of equity endeavor to effectuate. (a)

3987. But when the testator had but one particular object in view, and that fails, the legacy is void, and the next of kin will take, because in such case there is no general charitable intention. (b)

3988. A charitable bequest may be avoided, and the charity will fail for uncertainty on two grounds:

1. When the *amount* to be given is uncertain; for example, where the bequest contemplated the surplus which was to remain, after a prior gift, void by the statute of mortmain, and as that gift was void, it left the whole *corpus* of the fund unaffected by the prior gift, of course there could not be any *surplus* in strictness; and, there being no means of ascertaining how much the residue would have been, the charitable bequest was void. (c)

2. When the *purpose* of charity, expressed by the testator, is uncertain and indefinite; as, where the testator directed that the proceeds of certain trust moneys should, from time to time forever, be applied by his trustees "in the purchasing of such books as,

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(a) See *Attorney General v. Earl of Winchelsea*, 3 Bro. C. R. 373; *Mills v. Farmer*, 1 Meriv. 65; *Attorney General v. Hurst*, 2 Cox, 364, 365.

(b) *Jer. Eq. Jur.* 245; 2 *Story, Eq. Jur.* § 1182.

(c) *Chapman v. Brown*, 6 Ves. 404.

by proper dispositions of them, under the following directions, may have the tendency to promote the interests of virtue and religion, and the happiness of mankind, the same to be disposed of in Great Britain, or any other part of the British dominions; this charitable design to be executed by, and under the direction or superintendence of such persons, and under such rules and regulations, as by any decree or order of the high court of chancery, shall from time to time be directed in that behalf." This bequest was determined to be too indefinite to be executed by the court, and of course the next of kin became entitled to it.(a)

3989. By the English law, a *superstitious use* is described to be when lands, tenements, rents, goods, or chattels are given, secured or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest, or other man, to pray for the soul of any dead man, in such a church or elsewhere; to have or maintain perpetual obiits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; these and such like uses are declared to be superstitious, to which the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable.(b)

In the United States, where all religious opinions are free, and the right to exercise them is secured to the people, a bequest to support a catholic priest, and perhaps certain other uses forbidden in England, would not, in this country, be considered as superstitious uses.(c) It is not easy to see how there can be a

(a) Browne v. Yeale, cited in note to 7 Vesey, 50. See Morice v. Bishop of Durham, 9 Ves. 399; S. C. 10 Ves. 522; Moggridge v. Thackwell, 7 Ves. 36; James v. Allen, 3 Meriv. 17; Ommaney v. Butcher, 1 Turn. 260; Vezey v. Jamson, 1 Sim. & Stu. 69.

(b) Bac. Ab. Charitable Uses and Mortmain, D; Duke on Char. Uses, 105; Smart v. Spurrier, 6 Ves. 567; Adams v. Lambert, 4 Co. 104.

(c) See Magill v. Brown, (Zane's case,) Pamph.; McGirr v. Aaron, 1 Penna. R. 49; Beaver v. Filson, 8 Penn. St. R. 327; Witanan v. Lex, 17 S. & R. 388; The Methodist Church v. Remington, 1 Watts, 224.

*superstitious use* in this country, at least in the acceptance of the British courts.(a)

In England, gifts and bequests to superstitious uses are not held to be void, but the chancellor directs their application to some charitable purposes which are lawful, under the idea that the main object of the testator was charity, and if his gift be applied to charitable uses, his intention has been followed.

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CHAPTER IV.—OF INFANTS.

3990. The next subject to be submitted to examination, under this head of exclusive jurisdiction, is that which is exercised for the protection of infants, and of their property.

It is perhaps not very certain upon what principle courts of equity have assumed jurisdiction over infants, nor is the speculative examination of the origin of such power of much consequence. In every civilized state the law must protect those who are unable to protect themselves, and where courts of chancery exist, this power is vested in them, or in courts possessing equitable powers. In some of the states of the Union, the power of appointing and removing guardians for infants, and of taking care of their property, is confided in special jurisdictions, vested with ample powers for the purpose, but differing greatly in their details.

Courts of equity exercise a power of appointing and removing guardians for infants, and providing for their maintenance.

SECTION 1.—OF THE APPOINTMENT AND REMOVAL OF  
GUARDIANS.

3991. When treating of persons,(b) we considered

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(a) 1 Watts, 224.

(b) B. 1, part 2, t. 9, n. 339.

the various kinds of guardians, their rights and duties; it will not here be required that we should examine that subject. It will be sufficient to say that when an infant who has property has no guardian, or none who is capable of acting, and there is no other tribunal vested with this jurisdiction, a court of equity will appoint a guardian to take care of the person and estate of the infant.

Not only will a court of equity appoint guardians, but remove them, for the protection of the infant or of his property, whenever such guardians have been guilty of misconduct; and this, whether they have been appointed by its own authority or by the courts of common law, or even testamentary or statute guardians, whenever sufficient cause can be shown for such a purpose.(a) This is upon the principle that a guardian is considered as a delegated trustee, and, as such, answerable in a court of equity for any abuse, or danger of abuse, of his trust. When the guardian has only been mistaken, or his conduct is less reprehensible than the commission of a wilful wrong, the court will regulate and direct his conduct in regard to the custody and maintenance of the ward.(b)

In its provident care for the benefit of infants, a court of equity will not only remove guardians for improper conduct, but will assist them, when required, to obtain the custody of the ward, and compel the latter to submit to the lawful authority of the guardian.(c)

3992. Though the law, following nature, has vested the parents with a power and authority over their children, upon the presumption that the children will be

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(a) *Matter of Nicoll*, 1 John. Ch. Rep. 25; *Kettleas v. Gardner*, 1 Paige, 488; *Disbrow v. Henshaw*, 8 Cowen, 350.

(b) *Jer. Eq. Jur.* 217; *Foster v. Denny*, 2 Cas. in Ch. 237; *Spencer v. Earl of Chesterfield*, Ambl. 146; *O'Keefe v. Casey*, 1 Sch. & Lef. 106; *Duke of Beaufort v. Bertie*, Dick. 791; S. C. 1 P. Wms. 703; *De Manneville v. De Manneville*, 10 Ves. 65.

(c) *Ex parte Hopkins*, 3 P. Wms. 152; Cox's note; *Real v. Mellish*, 2 Swanst. 533, 537, note.

properly taken care of, and brought up as useful members of society, yet, when this presumption is rebutted, and it is found that they are guilty of gross ill treatment or cruelty toward their infant children, the latter will be taken out of their custody, and placed under the care of persons who shall act as guardians. If, for example, a father should be in constant habits of drunkenness and blasphemy, or of low and gross debauchery, or guilty of such other conduct as tends to the corruption and contamination of his children, or should he otherwise act injuriously toward their interest or their property, the court of chancery will deprive him of this power which he has so shamefully abused, and vest it in more worthy hands.(a)

SECTION 2.—WHEN AN INFANT WILL BE CONSIDERED A WARD OF CHANCERY.

3993. In many instances, an infant who stands in the condition of a ward in chancery will receive protection to which he would not be entitled if he were in another situation. An infant may be a ward of chancery by express appointment of a guardian, or by implication. Properly considered, a *ward of chancery* is a person who is under a guardian appointed by the court of chancery;(b) but whenever there is a suit instituted in that court, relative to the person or property of an infant, although he is not under any express general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance, care and protection.(c)

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(a) *Ex parte Mountfort*, 15 Ves. 445, 446; *Jer. Eq. Jur.* 217, 218; 2 Story, *Eq. Jur.* § 1341; *Wellesley v. Wellesley*, 2 Bligh, N. S. 124; S. C. 2 Russ. R. 1, 20; *Wood v. Wood*, 3 Ala. R. 756.

(b) 2 Fonbl. *Eq. B.* 2, part 2, c. 2, § 1, note (b).

(c) *Wellesley v. Wellesley*, 3 Bligh, N. S. 137; *Wright v. Nayler*, 5 Madd. 77; *Hughes v. Science*, Amb. 302, note,

A ward of chancery being under the care and protection of the court, not only his person, but his property is subject to its control. Every act done without direction of the court, is considered a violation of its authority, and the party offending may be punished for a contempt, and compelled to submit to such orders, by imprisonment, as is applied to other cases of contempt.(a)

SECTION 3.—OF THE MAINTENANCE OF INFANTS.

3994. When the matter is not vested by statutes in other tribunals, a court of equity will, upon petition, without any formal proceedings by bill, settle a due maintenance upon the infant, whether he be a ward of the court or not.

It is usual in considering the amount to be fixed for the maintenance of an infant, to take into view all the circumstances of the case, and in all things to do what is most for the benefit of the infant. In common cases the courts confine the expenses within the limits of the income;(b) but, when the estate is small, and more means are necessary for the maintenance and support of the ward, the court will sometimes allow the capital to be broken upon; but without the sanction of the court, a trustee will not be permitted to use any of the capital for that purpose.(c)

When the father of the infant is living, he is bound to support his child, if of sufficient ability; but, if he be not able to support his child according to his situation and prospects in life, and the child has a separate

(a) 2 Fonbl. Eq. B. 2, part 2, c. 2, § 1, notes (b) and (c).

(b) Teague v. Dendy, 2 McCord, Ch. R. 211; Sweet v. Sweet, Speer's Eq. R. 309; Long v. Norcom, 2, Ired. Eq. R. 354.

(c) 2 Fonbl. Eq. B. 2, part 2, c. 2, § 1, note (d); Ex parte Green, 1 Jac. & W. 253; McDowell v. Caldwell, 2 McCord's Ch. R. 58; Heyward v. Cuthbert, 4 Desaus. 445; Matter of Bostwick, 4 John. Ch. 100; Cudworth v. Thompson, 3 Desaus. 258; Hanson v. Chapman, 3 Bland's Ch. R. 198.

estate, a court of equity will, for his benefit, allow a sufficient sum for his maintenance and education.(a)

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CHAPTER V.—OF MARRIED WOMEN.

3995. The courts of equity, considering a married woman as having some capacity, treat her differently from what she is at law. The object of this chapter will be to examine, 1, her condition during the coverture; 2, her right to make contracts with her husband; 3, how she may acquire separate estate; 4, her right to alimony and maintenance.

SECTION 1.—OF THE CONDITION OF THE WIFE DURING COVERTURE.

3996. By the common law, the husband and wife are treated for most purposes as one person. The legal existence of the wife is merged during the coverture into that of her husband, so that she is, in general, unable to enter into contract with himself, or, without his consent, with any other person;(b) she cannot sue or be sued without being joined with him.

In courts of equity, on the contrary, the husband and wife, although they are recognized as they are treated at common law, in relation to their legal rights, are yet considered, as they are by the civil law, as having separate estates, being able to make separate

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(a) Jer. Eq. Jur. 221, 222; *Barry v. Barry*, 1 Moll. R. 210; *Simon v. Barber*, Taml. R. 22. See *Edgeworth v. Edgeworth*, 1 Beat. 328; *Cudworth v. Thompson*, 3 Desaus. 258; in the matter of *Kane*, 2 Barb. Ch. R. 375.

(b) See ante, B. 1, part 2, t. 6, c. 6. By statute, she is allowed to convey her real estate, or her dower in that of her husband, when she joins him in the deed, and it is acknowledged, as may be required by law. Even by the common law her very being is not absolutely extinct; she may act as attorney for her husband, and, with his consent, for others; she may swear articles of peace against him; she may also, with his consent, act as executrix. See 2 Story, Eq. Jur. § 1367, note.

contracts, creating separate debts, and suffering separate injuries. In equity, the wife may be sued by her husband, or she may sue him, as we will see when we come to consider who may sue and be sued in equity:

SECTION 2.—OF THE CONTRACTS BETWEEN HUSBAND AND WIFE.

§ 1.—Of contracts made before marriage.

3997. When the husband and wife make a contract before marriage, it is generally extinguished, both at law and in equity, by their subsequent union. But when by articles entered into, or a settlement is executed before marriage, which is to acquire its force and effect by the marriage, by which the wife is to have a certain provision in lieu of her fortune, the husband virtually becomes a purchaser of the wife's fortune, and she becomes entitled to her provision, although there may be no intervention of trustees, and such contract will be enforced in equity.(a) And where the wife, before the marriage, gave a bond to her intended husband, that, in case a marriage took effect, she would convey to him her estate in fee, the parties having subsequently married, this contract was enforced in equity.(b) It may be laid down as a rule, that when the agreement is such that it cannot create a debt, or raise a demand during the coverture, the marriage shall not extinguish the agreement.(c)

§ 2.—Of contracts made after marriage.

3998. A contract made between husband and wife cannot be enforced at law, but post nuptial contracts,

(a) *Garforth v. Bradley*, 2 Ves. sen. 675, 677.

(b) *Carmel v. Buckle*, 2 P. Wms. 243. See 2 Eden's R. 252; *Rippon v. Dawding*, Ambl. 566; *Rivers v. Executors of Rivers*, 3 Desaus, 190.

(c) *Smith v. Stafford*, Hob. 216; *Clark v. Thompson*, Cro. Jac. 571; *Tylley v. Pierce*, Cro. Car. 376; *Lady D'Arcy's case*, 1 Ch. Cas. 21; *Pridgeon's case*, 1 Ch. Cas. 117.

as between themselves, are, in general, obligatory in equity.(a) If, for example, for a sufficient legal or equitable reason, a man contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be enforced in equity, as where the husband used the separate property of the wife, it was held this was a sufficient consideration for a deed by him to her.(b) So, on the other hand, if the wife, having a separate estate, should enter, *bonâ fide*, into a contract with her husband, to make him a certain allowance out of the income of such separate estate, it would be enforced in equity, though void at law.(c)

Indeed, not only will the express contracts between husband and wife, when made *bonâ fide*, be enforced in equity, but the wife may become the creditor of her husband, without any such express agreement; as when the wife unites with her husband to pledge her separate estate to pay his debts, or to relieve his necessities, in equity the transaction will be treated according to the intent of the parties, and she will be deemed a creditor, or if so agreed upon in the first place, as a surety for him.(d)

SECTION 3.—OF THE SEPARATE ESTATE OF THE WIFE.

3999. In order clearly to understand this subject, we must ascertain, 1, what is the wife's separate estate; 2, how a married woman acquires separate property; 3, how far the wife's separate property can be bound during the coverture; 4, what is the wife's

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(a) Fonbl. Eq. B. 1, c. 2, § 6, note (n); *Livingston v. Livingston*, 2 John. Ch. R. 539.

(b) *Lessee of Hill v. West*, 8 Ohio R. 223. See *Garlick v. Strong*, 3 Paige, 440; *Sweat v. Hall*, 8 Vern. 187; *Dibble v. Hutton*, 1 Day, 21.

(c) *More v. Freeman*, Bunb. 205.

(d) Fonbl. Eq. B. 1, c. 2, § 6, note (n); *Rop. on Husb. and Wife*, 143. See *James v. Fisk*, 9 Sm. & Marsh, Rep, 144; *Naimcewicz v. Gahn*, 3 Paige, 614.

equity to have a settlement out of her own property ; 5, what right a married woman has to dispose of her separate estate.

§ 1.—What is the wife's separate estate.

4000. By the term *separate estate*, is meant that property which belongs to a married woman, and over which her husband has no right in equity. This may consist of lands or personal chattels.(a)

There is one kind of property to which a *feme covert* is entitled, known by the name of *paraphernalia*. This term is derived from the Greek, and transplanted from the civil law into our own;(b) it is personal property, which a married woman uses personally during her husband's life, consisting generally of her clothing, jewels and ornaments suitable to her condition in life, and which she is entitled to retain after his death.(c)

4001. During the lifetime of her husband, a woman has only a qualified right to her paraphernalia. If such articles were given to her by her husband, they will not be treated as an absolute gift to her, and as her separate property; for if they were, she might dispose of them at any time, and he could under no circumstances appropriate them to his own use. In this case a distinction is made between those which are articles of necessity and those which are mere ornaments; the former are hers absolutely, while the latter are subject to the payment of his debts, and even liable to his disposition.(d) But if such articles

(a) *Fireman's Ins. Co. v. Bay*, 4 Barb. S. C. Rep. 407. Such estate is not liable at common law for her debts contracted before marriage ; and the only ground on which it can be reached in equity, is that of appointment ; that is, where she has done some act after marriage, indicating an intention to charge her property. *Vanderheyden v. Mallory*, 1 Comst. 452.

(b) Dig. 23. 3, 9, 3 ; Cod. 5, 14, 8 ; Domat, lib. 1, t. 9, § 4.

(c) 2 Bl. Com. 435 ; Com. Dig. Baron and Feme, F 3.

(d) Bac. Ab. Executors, etc. H ; Roll. Ab. 911. See *Graham v. Londonderry*, 3 Atk. 393 ; *Ridout v. Earl of Plymouth*, 2 Atk. 104 ; 2 Story, R. 312.

were given to her by her father, or other relative, or even by a stranger, either before or during the coverture, they will be considered her separate property, and, if received with the husband's consent, he has no right to dispose of them, nor can his creditors take them for his debts.(a)

§ 2.—How a married woman acquires separate property.

4002. Formerly, a married woman could not take and enjoy any estate, whether personal or real, separately and independently of her husband; and though this rule has been somewhat relaxed, yet at common law, a wife is much restricted in this respect. In equity, on the contrary, a married woman has the capacity to take both real and personal property to her separate use.(b)

The power to hold property to her separate use, is frequently created by ante-nuptial agreements, which will be upheld in courts of equity. But this authority may be given in a variety of ways, when the intention of the parties is clear; and no technical words are necessary to create such separate estate.(c)

It was formerly supposed that trustees were indispensable in order to create a separate estate, and though it is highly proper that trustees should hold the legal estate for her, yet, according to the modern practice and decisions, it is not indispensably requisite that they should interpose; for whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her exclusive and separate use, without the intervention of trustees, the intention of the parties will be carried out in equity; and for this purpose the hus-

(a) 2 Rep. on Husb. and Wife, 143; 3 Atk. 393. In the matter of Grant, 2 Story's R. 312.

(b) Fonbl. Eq. B. 1, c. 2, § 6, note (n).

(c) Ballard v. Taylor, 4 Desaus. 550; Griffith's adm. v. Griffith, 5 B. Monr. R. 113; Trenton Banking Company v. Woodruff, 1 Green's Ch. 117.

band will be turned into a trustee for her ;(a) or she will be regarded as a feme sole.(b)

Not only under ante-nuptial agreements will she be able to hold separate property, but also under a contract during the matrimonial connection, made between him and her alone, will be sufficient to entitle her to such separate property, and it will be enforced as if made with a stranger ; whether the separate estate be derived from the husband himself or from a stranger, he will, in either case, be treated as a trustee.(c)

In cases of this kind, in order to create a separate estate, the intention must clearly appear,(d) for unless this intention is manifest, she will not have such separate estate as to exclude the marital rights of the husband.(e)

4003. A married woman may also acquire a separate property by becoming a sole dealer and trader, by permission of her husband, even without deed ; in this case she becomes entitled to all her earnings as her separate estate.(f) And if a husband should desert his wife, and, by the aid of her friends she should be enabled to carry on a separate trade, her earnings in such trade will be protected in equity, from the claims of his creditors ;(g) or if, by virtue of

(a) 2 Story, Eq. Jur. § 1380. See *Franklin v. Creyon*, Harp. Eq. R. 243 ; 5 B. Monr. Rep. 113. See *Guardian of Elms v. Hughes*, 3 Desaus. 158.

(b) *Firemen's Ins. Co. v. Bay*, 4 Barb. S. C. Rep. 407.

(c) Fonbl. Eq. B. 1, c. 2, § 6, note (n) ; 2 Story, Eq. Jur. § 1380.

(d) *Franklin v. Creyon*, Harp. Eq. 243 ; *Darley v. Darley*, 3 Atk. 399 ; *Wagstaff v. Smith*, 9 Ves. 520 ; *Tyler v. Lake*, 2 Russ. & Myl. 183 ; *Johnes v. Lockhart*, 3 Bro. C. R. 383, note ; *Adamson v. Armitage*, Coop. Eq. Rep. 283 ; S. C. 19 Ves. 416 ; *Pritchard v. Ames*, 1 Turn. & Russ. 222 ; *Stanton v. Hall*, 2 Russ. & Myl. 175.

(e) *Tyler v. Lake*, 2 Russ. & Myl. 183 ; *Kensington v. Dolland*, 2 Myl. & Keene, 184 ; *Willes v. Sayers*, 4 Madd. R. 409 ; *Roberts v. Spicer*, 5 Madd. R. 491.

(f) *Magrath v. Adm'rs of Robertson*, 1 Desaus 445.

(g) *Cecil v. Juxon*, 1 Atk. 278 ; *Lamphir v. Creed*, 8 Ves. 599 ; S. C. 2 Rep. Husb. and Wife, 173.

ante-nuptial agreement, she should carry on business on her sole and separate account, her profits will be treated as her private property.(a)

§ 3.—How far a wife's separate property can be bound during the coverture.

4004. In general, the wife cannot bind her person or property generally. She is allowed to bind her separate property, because as to that she is considered as a *feme sole*; but as to her general property, she is treated as a married woman, and, in that capacity, incapable of binding it, and subject to all the disabilities of that condition.

The intention of the wife must be clear that she intends to charge her separate property, for otherwise any contract she may make will not be enforced in equity, at least during her life. But, when such is her intention, manifested by her acts, such estate will be charged, not in consequence of her contract, but upon the principle of an appointment; having the absolute power of disposing of the whole, she may dispose of a part, and her agreement to charge such estate will be considered an appointment *pro tanto*.(b)

§ 4.—Of the wife's equity to have a settlement out of her own property.

*Art. 1.—Of the nature of the wife's equity and how it may be enforced.*

4005. At common law, by the marriage, the wife is considered as giving absolutely all her personal estate, whether in possession or in action, to which she is actually or beneficially entitled or possessed of, at that time, in her own right, or to which she may be entitled

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(a) 2 Roper, *Husb. and Wife*, 171.

(b) *Field v. Sowle*, 4 Russ. 112; *Stuart v. Kirkwall*, 3 Madd. 387; *Greatley v. Noble*, 3 Madd. 94. See Roper on *Husband and Wife*, 243, 244; Clancy on *Marr. Wom.* 345.

during coverture, to her husband. But, before the husband can have an absolute right to her choses in action, he must reduce them to possession; and, unless he does so during the coverture, on his death they survive to her, and, when she dies first, he can recover them only as her administrator.

4006. In relation to her chattels real, either in possession or which she may acquire during coverture, the husband has a qualified right; he may alienate them during coverture, and by that means deprive her of them forever; or he may retain them till the death of one of them. When he dies first, they survive to her; when she dies first, he will be entitled to them.

4007. In some cases the husband cannot acquire the absolute title to the wife's personal property, without the aid of a court of equity; in such case she is entitled to have settled upon her and her children a suitable provision out of her personal estate; this is called the *wife's equity*.(a)

4008. The principal cases, when the courts of equity interpose to secure the wife her equity, are the following:

1. When the husband seeks the *aid of a court of equity*: the court requires in such case that he who seeks equity shall do equity; and, therefore, if the husband has not already made a settlement upon his wife and children, he will be required to do so, before any assistance will be given him. Indeed, the court will go further, for where an allowance has been made

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(a) Shelf. on Mar. and Div. 605; 1 Meigs, R. 551; Udall v. Kenney, 3 Cowen, 590; Kenney v. Udall, 5 John. Ch. 446; Howard v. Moffat, 2 John. Ch. R. 206; Glen v. Fisher, 6 John. Ch. 33. See Ex parte Beresford, 1 Desaus. 263; Greenland v. Brown, 1 Desaus. 196; Bethune v. Beresford, 1 Desaus. 174; Clancy on Mar. Wom. 465; Murray v. Lord Elibank, 13 Ves. 6; Johnson v. Johnson, 1 Jac. & Walk. 459; Steinmetz v. Hathin, 1 Glyn & Jam. 64; Bennett v. Dillingham, 2 Dana, 437; Andrews v. Jones, 10 Ala. R. 400; Stevenson v. Brown, 3 Green's Ch. 503; Davis v. Newton, 6 Met. 537; Vanduzer v. Vanduzer, 6 Paige, 366.

to the wife out of a settled estate, and that against the claim of creditors, on a new accession of fortune during the coverture, they will decree a still further allowance, though the husband's creditors may be in danger of not being fully paid.(a)

2. When the husband makes an *assignment of her equitable interest*, and the assignee cannot obtain it without coming in chancery, he will stand in no better position than the husband who assigned it; it is a general rule that the assignee of a chose in action, or other equitable interest, takes it subject to all equities to which they were liable in the hands of the assignor; whether such assignment be special for the benefit of the assignee, or general for the payment due to creditors. Assignees, therefore, take the property assigned, subject to the wife's right of survivorship, and if the husband should die before such assigned property has been reduced by them to possession, she will be entitled to it.(b)

An assignment of her *reversionary interest*, even with her consent, will not, in general, deprive her of her right to it, in case of survivorship. The reason assigned for this is, that the assignment cannot, from the nature of the thing, amount to a reduction of possession of such interest, and her consent during coverture is not binding upon her.(c)

3. When she seeks similar relief, *as plaintiff*, against her husband or his assignee, in regard to her equitable interest,(d) the rule is now established that when-

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(a) Ex parte Beresford. 1 Desaus. 263.

(b) Durr v. Bowyer, 2 McCord's Ch. 368; Elliott v. Waring, 5 Monroe, 340; Mumford v. Murray, 1 Paige, 620; Van Epps v. Van Dusen, 4 Paige, 64; Clancy on Mar. Wom. 124; Bell v. Bell, 1 Kelly, R. 637.

(c) Stamper v. Barker, 5 Madd. Ch. R. 157; Hornsby v. Lee, 2 Madd. R. 16; Donne v. Hart, 2 Russ. & Myl. 360.

(d) See Fry v. Fry, 7 Paige, 461. In this case the husband had obtained a conveyance of his wife's estate by undue means and unconscious advantage of her ignorance of her rights, and confidence in his representations; on a bill filed in chancery, the court set aside the conveyance.

ever she is entitled to this equity for a settlement out of her separate equitable interests against her husband or his assignees, she may enforce it by bringing suit and filing a bill by her next friend.(a)

*Art. 2.—How the wife's equity\* may be abandoned or lost.*

4009. The wife's equity may be waived or lost in numerous ways, among which are the following:

1. When *she has had an ample settlement* made upon her, she cannot of course ask for another, and therefore the court will not in such case interfere in her favor; but when the settlement is inadequate, unless it be made under an express contract before marriage, her equity will remain; and, as mentioned before, where there has been an increase of her fortune during the coverture, a further allowance will be made.(b)

2. Although the wife's equity is for the benefit of herself and children, yet it is altogether *personal to her*, and if she die, the husband will be entitled to recover her equitable rights, through the aid of a court of equity, without making any provision for the children.(c)

3. By giving her *consent* in open court, pending such proceedings, and before a decree has been made, the wife may waive her rights; but when she is a ward of the court, and marries without its authority, she cannot, by giving her assent, entitle the husband to the fund.(d)

4. A wife may lose her equity by her own *misconduct*; as when she lives apart from her husband in adultery, for by such misconduct she loses all right to

(a) Clancy on Mar. Wom. 471; 1 Rop. on Husb. and Wife, 260.

(b) *Ex parte Beresford*, 1 Desaus. 263; *Elliott v. Waring*, 5 Monroe, 340; *Westbrook v. Comstock*, Walk. Ch. R. 314.

(c) Clancy on Mar. Wom. 532; 1 Rop. on Husb. and Wife, 263; 1 Fonbl. Eq. B. 1, c. 2, § 6, note (k); *Johnson v. Johnson*, 1 Jack. & Walk. 479. See *Bell v. Bell*, 1 Kelly, R. 637.

(d) 1 Rop. on Husb. and Wife, 264, 267.

the protection of the court; but on the other hand, as she is not a charge on her husband, he will not be entitled to her equitable rights.(a)

§ 5.—Of the right of a married woman to dispose of her separate estate.

4010. When her separate estate is vested in trustees for her use, she cannot dispose of it otherwise than according to the trust, for by that her rights are limited and established. When it is secured to her by some *ante-nuptial* agreement, she will, in general, unless there is an express or implied stipulation to the contrary, have full power, in equity, to dispose of the same, whether real or personal, by any proper instrument, in her lifetime, or by her last will, in the same manner, and to the same extent, as if she were a feme sole.(b)

The rights of a married woman to dispose of her separate estate are different, if she has acquired it by virtue of a *post-nuptial* agreement with her husband, it can then affect only the rights of her husband. This will authorize her to dispose of her separate personal property, because her husband only has the right to prevent it; but with regard to her real estate, her heirs have an interest in it, of which they cannot be deprived by the act of her husband. The only mode of disposing of it, is by a conveyance made in her lifetime by a deed acknowledged, as is provided by the law of the state where the lands are located.

SECTION 4.—OF THE ALIMONY AND MAINTENANCE OF A MARRIED WOMAN.

4011. We have seen that by the marriage, at com-

(a) 1 Rep. on Husb. and Wife, 276; Clancy on Mar. Wom. 586; 2 Story, Eq. Jur. § 1419.

(b) Jer. Eq. Jur. 208; 1 Fonbl. Eq. B. 1, c. 2, § 6, note (q); 2 Rep. on Husb. and Wife, 177.

mon law, the whole of the personal property of the wife becomes vested in the husband, so that she must depend upon him for her living and support. When she is deprived of this maintenance by the unjustifiable acts of her husband, equity requires that she should have some relief; as when he totally abandons her, or forces her, by his cruelty, to leave his house and to seek an asylum elsewhere.

Though perhaps courts of equity, in general, have no jurisdiction to allow alimony out of the husband's estate,<sup>(a)</sup> yet, if the wife has any equitable property within the jurisdiction of the court, in a case of desertion or ill treatment of the wife by the husband, or when he is unable or unwilling to maintain her, the court will decree a suitable maintenance out of such equitable funds.<sup>(b)</sup>

4012. This right of alimony may be lost for several reasons, of which the following cases are examples:

1. When the wife has been guilty of adultery, which has not been condoned, prior to the acts of cruel treatment by the husband.<sup>(c)</sup>

2. When she has a competent maintenance of her own, independently of him.

3. When the separation from her husband is voluntary, and it has not been caused by cruelty or ill treatment, or when he is ready and willing, *bondâ fide*, and perfectly able to maintain her, and, without good cause, she refuses to return to him; because it is

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(a) In Virginia, the court of chancery has jurisdiction in all cases of alimony. *Purcell v. Purcell*, 4 Hen. & Munf. 507. In Pennsylvania, and perhaps some other states, jurisdiction is given, in cases of desertion and ill treatment or cruelty, to certain tribunals, by statute.

(b) *Nicholls v. Danvers*, 2 Vern. 671, Raithby's note. See *Jelineau v. Jelineau*, 2 Desaus. 45; *Denton v. Denton*, 1 John. Ch. 364; *Mix v. Mix*, 1 John. Ch. 108; *Anon.* 1 Hayw. 347.

(c) *Bedell v. Bedell*, 1 John. Ch. 604; *Watkyns v. Watkyns*, 2 Atk. 96; *Carr v. Eastbrook*, 4 Ves. 146.

against the policy of the law to encourage these separations.(a)

(a) In speaking of the distinctions which have been established in equity as to the effect of a deed of separation between husband and wife, the learned Judge Story, in his *Equity Jurisprudence*, § 1428, says: "In the first place, a deed of separation does not relieve the wife from any of the ordinary disabilities of coverture. *Marshall v. Rutter*, 8 T. R. 545. In the next place, a deed of separation, entered into by the husband and wife alone, without the intervention of trustees, is utterly void. *Legard v. Johnson*, 3 Ves. 352, 359, 361; *Westmeath v. Salisbury*, 5 Bligh, (N. S.) 375. In the next place, a deed for an immediate separation, with the intervention of trustees, will not be enforced so far as it regards any covenant for separation; but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor. *Legard v. Johnson* 3 Ves. 359, 360; 2 *Roper on Husband and Wife*, ch. 22, § 2, p. 270, and note; *Id.* 287; *Westmeath v. Westmeath*, Jacob. R. 126; *Worrall v. Jacob*, 3 Meriv. 267; *Jee v. Thurlow*, 2 B. & Cresw. 547; *Elworthy v. Bird*, 2 Sim. & Stu. 372; *Rodney v. Chambers*, 2 East R. 283; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.) 339, 375. A covenant on the part of the trustees, to indemnify the husband against the maintenance of the wife, will be a legal foundation for a covenant on his part to furnish a specific maintenance for her, when there is a general trust deed between the parties. *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.) 375; *Id.* 356. In the next place, if a deed of separation contains a covenant, purporting to preclude the parties from any future suit, for the restitution of conjugal rights, the covenant will be utterly void. *Ibid.* In the next place, a deed, containing a covenant with trustees for a future separation of the husband and wife, and for her maintenance consequent thereon, will be utterly void. *Durant v. Titley*, 7 Price, R. 577; *Hindley v. Westmeath*, 6 B. & Cresw. 200; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.) 339, 367, 373, 375, 393, 395, 396, 400, 415, 416, 417; *St. John v. St. John*. 11 Ves. 526. In the next place, even in case of a deed for an immediate separation, if the parties come together again, there is an end to it with respect to any future, as well as to the past, separation. *Fletcher v. Fletcher*. 2 Cox, R. 99; 3 Bro. Ch. R. 619; *Bateman v. Ross*, 1 Dow. R. 235; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.) 375, 395; *St. John v. St. John*, 11 Ves. 537; 2 *Roper on Husband and Wife*, ch. 22, § 1, p. 273, note; *Id.* § 5, p. 316; *Clancy on Married Women*, B. 4, ch. 4, p. 405, 413 to 417; 1 *Fonbl. Eq. B. 1*, ch. 2. § 6, note (n 2). Whether a covenant for a separate maintenance would now be enforced against the husband, in case of an immediate separation, after the husband was willing to receive his wife again, and cohabit with her, and there was no reason to suppose it to be otherwise than a bonâ fide effort at reconciliation, is perhaps questionable. See, on this point, the authorities collected and commented on by Mr. Clancy. (*Clancy on Married Women*, B. 4, ch. 4, p. 405 to 420.) Mr. Clancy thinks, that, where the separation is intended to be temporary, it would not be enforced; where it is intended to be permanent, it would. See, also, 2 *Roper on Husband and Wife*, ch. 22, § 5, p. 313 to 316; *Id.* 320 to 322. But see the judgment in *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.) 339 to 421."

## CHAPTER VI.—OF IDIOTS AND LUNATICS.

4013. When treating of persons, we had occasion to consider the remedy which the law allowed in cases of *idiocy* and *lunacy*;(a) it will now be requisite only to state what powers courts of equity exercise in such cases.(b)

An idiot or lunatic is less capable of taking care of himself and of his estate than an infant, and requires the provident superintending care of the law in a greater degree. For this reason the court of chancery in England may be properly deemed to have had originally, as the general delegate of the crown, as *parens patriæ*, the right not only to protect infants, but also to have the custody of idiots and lunatics, when they had no other guardian. This jurisdiction has been extended in that country from time to time by various statutes.

In the United States, where courts of chancery have been established, they generally possess, in this respect, the same jurisdiction as the English courts.

As to the form of the proceedings, it is unnecessary to add to what has already occupied our attention in another place.(c)

## CHAPTER VII.—OF THE WRIT OF SUPPLICAVIT.

4014. The remedies which we have discussed, over which courts of chancery have exclusive jurisdiction, depend upon the subject matter of the controversy; there are others which relate to the nature of the remedy, some of which we have considered when treating of assistant jurisdiction, as bills of discovery, and bills to perpetuate testimony. There are two others which will form the subject of the present and

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(a) Ante, B. 1, t. 10, c. 1.

(b) In some of the states of the Union special jurisdiction is given by statute to courts of law in cases of lunacy and idiocy.

(c) Ante, B. 1, part 2, t. 10, c. 1, n. 378.

the next chapter; these are the writ of *supplicavit*, and the writ of *ne exeat regno*.

The first is in the nature of process at common law, requiring the defendant to find surety of the peace, upon articles filed for the purpose by the plaintiff. It is sometimes used upon the complaint of a wife against her husband. In such case it is usual for her to file a bill of complaint stating her grievances, and the danger she is in of being injured, in which she prays the protection, which bill is called *articles of peace*. It must always be made on oath.<sup>(a)</sup> When the court obtains jurisdiction over the parties, in such a case, the power of granting a maintenance and alimony to the wife is incident to it, when the wife is compelled to live apart from him on account of his misconduct.

4015. A *supplicavit* may be had upon complaint and oath made of the party, when any suitor of the court is abused, and stands in danger of life, or is threatened with death by another suitor. By virtue of this writ the contemner is taken into custody, and must give bail to the sheriff; he may move the court to discharge the writ of *supplicavit*, when the court will hear affidavits on both sides; but the truth of the articles cannot, in this preliminary investigation, be contradicted, either by affidavit or otherwise; but the defendant may either except to their sufficiency, or tender affidavits in reduction of the amount of the bail.<sup>(b)</sup>

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CHAPTER VIII.—OF THE WRIT OF NE EXEAT REGNO.<sup>(c)</sup>

4016. This writ originated probably for the purpose of depriving a subject of the king of England from

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<sup>(a)</sup> See the form of Articles of Peace in 1 Chit. Pr. 679; 12 Ad. & Ell. 599.

<sup>(b)</sup> 13 East, 171. See Bac. Ab. Surety of the Peace, E. See 1 Chit. Gen. Pr. 683; Gilb. For. Rom. 202; 2 Story, Eq. Jur. § 1477.

<sup>(c)</sup> See generally Beames' Ne exeat regno; Bac. Ab. Perogative, C; 1 Bl. Com. 138; Blake's Ch. Pr. Index, h. t.; Madd. Ch. Pr. Index, h. t.; 1 Smith's Ch. Pr. 576; Story, Eq. Jur. § 1464 to 1475.

quitting the kingdom, when the king desired to have the control of his person. It was not unfrequently used in political cases. In the course of time, it was used by the court of chancery in private cases, for the purpose of securing the defendant when sued in that court upon an equitable right, so that it was in fact nothing more than a means of procuring *equitable bail*.<sup>(a)</sup>

The writ of *ne exeat regno*, or, as it is sometimes called, *ne exeat regnum*, or with us *ne exeat republica*,<sup>(b)</sup> is one issued by a court of chancery,<sup>(c)</sup> directed to the sheriff, reciting that the defendant in the case is indebted or liable to the complainant upon an equitable right, and that he designs going quickly into parts without the kingdom, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not quit the kingdom without leave of the court, and for want of bail, that he, the sheriff, do commit the defendant to prison.<sup>(d)</sup>

This subject will be examined by considering, 1, against whom the writ of *ne exeat* may be issued; 2, for what claims; 3, what amount of bail will be demanded; 4, when it may be issued.

#### SECTION 1.—AGAINST WHOM THE WRIT OF NE EXEAT MAY ISSUE.

4017. This is a writ of right, and not, as in England, a prerogative writ; in a proper case it may be issued against a foreigner, or a citizen of the state, or a citizen of another state.<sup>(e)</sup>

<sup>(a)</sup> *Dunham v. Jackson*, 1 Paige, 629; *Mitchell v. Bunch*, 2 Paige, 606; *Johnson v. Glendenin*, 5 Gill & John, 463.

<sup>(b)</sup> *Porter v. Spencer*, 2 John, 169.

<sup>(c)</sup> The district courts of the United States have no authority to issue the writ of *ne exeat*. *Gernon v. Boccarine*, 2 Wash. C. C. 130.

<sup>(d)</sup> See a form of the writ. in *Beames' Ne Exeat*, 18, 19.

<sup>(e)</sup> *Gibert v. Colt*, Hopk. 496; *Mitchell v. Bunch*, 2 Paige, 606; *Woodward v. Shatzell*, 3 John, Ch. 412.

On the same principle which has been adopted in the courts of law, that a defendant cannot be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against the defendant, who had been held to bail in an action at law.(a)

SECTION 2.—FOR WHAT CLAIMS A WRIT OF NE EXEAT MAY BE ISSUED.

4018. The claim of the plaintiff upon which this writ can be issued must be:

1. For precise amount of debt positively due, and the demand must be of a pecuniary nature. But where the claim is of such a nature that it is impossible to say what is the exact amount actually due, as in the case of an account, it is sufficient if the plaintiff swear positively to a debt or balance due him from the defendant; he is not required to swear to a certainty as to the amount.(b)

2. For an equitable demand, for which the plaintiff cannot sue at law, except in cases of accounts, and when the court has concurrent jurisdiction with the courts of law. The writ will not lie in a case where the demand is of a general unliquidated nature, or in the nature of damages.(c) The equitable debt need not have been created between the parties; it will be sufficient if it be fixed and certain; as, where the plaintiff is the assignee of a chose in action.

3. The defendant must be about to quit the country, and this fact must be proved by affidavits as positive as those required to hold to bail at law.(d)

When the demand is strictly legal, the writ cannot be issued, because the court has no jurisdiction. And

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(a) *Jones v. Sampson*, 8 Ves. 594.

(b) *Thorne v Halsey*, 7 John. Ch. 180. See *Williams v. Williams*, 2 Green's Ch. 130.

(c) *Smedberg v. Mark*, 6 John. Ch. 138; *De Rivafinelli v. Corsetti*, 4 Paige, 464; *Mattocks v. Tremaine*, 3 John Ch. 75.

(d) *Rhodes v. Cousins*, 6 Rand. 188; *Lucas v. Hickman*, 2 Stew. 11.

whenever the writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill.

4019. Not only will a writ of *ne exeat* lie on an equitable claim, but in some other cases, which may be considered as exceptions to the rule.

1. This writ may be had in the case of alimony decreed to a wife, when the husband is about to leave the country.(a)

2. It may be obtained in the case of an account on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor.(b)

SECTION 3.—OF THE AMOUNT OF BAIL UNDER A WRIT OF NE EXEAT.

4020. A bill showing a proper case must be filed, and it must pray for the writ of *ne exeat*. When it is allowed, the court fixes the amount of the bail or security to be given; in doing so, a due regard is had to the security of the plaintiff; at the same time the court will take care that the defendant shall not be oppressed. A sum is fixed usually sufficiently large to cover the existing debt, and a reasonable amount of future interest, having regard to the probable duration of the suit.(c)

SECTION 4.—WHEN AND BY WHOM THE WRIT MAY BE GRANTED.

4021. The mode of obtaining a writ of *ne exeat* is by filing a bill, containing a prayer for the writ. But if, after a bill filed, the plaintiff has just reason to believe the defendant will go abroad, he may move to amend his bill, and pray a *ne exeat*.(d) The writ may be obtained at any stage of the suit.(e)

(a) *Read v. Read*, 1 Ch. Cas. 115; *Shaftoe v. Shaftoe*, 7 Ves. 71.

(b) *Beames on Eq.* 30 to 34.

(c) *Gibert v. Colt*, 1 Hopk. 496, 501.

(d) 2 Madd. Ch. Pr. 227.

(e) *Dunham v. Jackson*, 1 Paige, 629.

This writ is usually granted by the court of chancery, or by the chancellor, when such an officer exists. It is provided by act of congress,<sup>(a)</sup> that "writs of *ne exeat* may be granted by any judge of the supreme court of the United States in cases where they may be granted by the supreme, or a circuit court. But no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

## CONCLUSION OF THE FIRST PART.

4022. Having, in the first part of this book, which treats of equity, taken a rapid view of the nature and principles of equity, by examining its general rules and maxims, and having considered the cases in which aid will be given by courts of equity, classified into those, 1st, in which those courts will exercise jurisdiction in aid of courts of law, which is called *assistant jurisdiction*; 2dly, those cases where, having a more specific, certain and better remedy, they will exercise their authority, when courts of law afford but an imperfect remedy, which is denominated their *concurrent jurisdiction*; and 3dly, when there is no remedy at law, but an effective one can be had in equity, which is their *exclusive jurisdiction*; our next consideration, in the second part of this book, will be to ascertain and point out, in a succinct manner, the forms and proceedings in equity.

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(a) Act of 2d March, 1793, ch. 22, § 5.

PART II.—OF THE FORM OF REMEDIES AND  
PROCEEDINGS IN EQUITY.

4023. After considering in the first part of this book, what are the principles and rules of equity, the assistant, concurrent, and exclusive jurisdiction of courts of chancery, it will be proper, in this second part, to take a short view of the remaining subjects connected with equity. For this purpose, it will be divided into seven titles, which will treat of, 1, the parties to a suit in equity; 2, bills in equity; 3, proceedings between filing the bill and the defence; 4, the defence; 5, the replications and their consequences; 6, the incidents to pleading in general; and, 7, the proceedings after pleadings.

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TITLE I.—OF THE PARTIES TO A SUIT IN EQUITY.

4024. Before instituting a suit in equity, it is of great importance to consider who ought to be made plaintiffs, or who should answer as defendants, for a fault committed in the selection of parties, may prove fatal, and will always cause inconvenience. Some persons are qualified and others wholly unqualified to be parties to suits in equity; and of those qualified some ought to bring the suit, and others ought to join or not join with them; and some persons ought to be made defendants, and others cannot be joined with them. This title will be divided into two chapters: 1, of the persons qualified and disqualified as parties; 2, of the proper parties to a bill.

## CHAPTER I.—OF PERSONS QUALIFIED AND DISQUALIFIED AS PARTIES.

## SECTION 1.—OF PERSONS QUALIFIED TO BE PARTIES TO SUITS IN EQUITY.

4025.—1. In general all *persons sui juris* can sue and be sued in chancery, unless they are subject to an absolute or temporary disqualification, which will be presently considered. There is no distinction among such persons; all, whatever be their condition, from the highest to the lowest, may sue and be sued in equity, as they may sue and be sued at law.

4026.—2. The *government*, or as the style is in England, the crown, may sue in a court of equity, not only strictly on its own behalf, for its own peculiar rights and interests, but also on behalf of the rights and interests of those who partake of its prerogatives, or claim its peculiar protection.(a) In these cases the suit is instituted by the proper public officer, to whom that duty is intrusted by law, and this is usually the attorney general.(b) When the attorney general sues on behalf of the government, for a claim due to the state, the public officer sues in his own official name, without joining that of any other person. On the contrary, when he sues for the benefit of a person who partakes of its prerogative, or is under its peculiar protection, or the subject matter is *publici juris*, then the suit is brought in the name of the attorney general, who sues at the relation of some other person, who is named as *relator* in the bill; the person thus made a party has no control over the proceedings, and is responsible for costs.(c)

It must be remembered that although the govern-

(a) Coop. Eq. Pl. 21, 22; Story, Eq. Pl. § 49; 1 Dan. Pr. Ch. 3.

(b) 1 Mont. Eq. Pl. 34; Coop. Eq. Pl. 21, 101; 1 Dan. Pr. Chan. ch. 2, p. 3.

(c) Story, Eq. Pl. § 8; 1 Dan. Pr. Chan. 3, 7.

ment may sue, it is not liable to be sued. But, to this general rule, there is an exception ; in some cases one of the states of the Union may file a bill in the supreme court of the United States, against another state.(a)

4027.—3. Bodies corporate may sue by themselves alone, and, in their own names, exhibit a bill of complaint in a court of equity.(b) On the other hand, they may be sued ; and the officers or servants of a corporation may be made parties, for the purpose of eliciting from them a discovery upon oath of the matters charged in the bill.(c)

Sometimes corporations are included as defendants in a bill, when they have no interest in the matter in question, but stand merely as managers of public stocks, the management of which has been intrusted to them by different acts of the legislature. Such corporations may be made parties to a suit relating to any public stock standing in their books, for the purpose of compelling or authorizing such companies to suffer a transfer of such stock to be made in their books, and also praying an injunction against them permitting such transfer.(d)

SECTION 2.—OF PERSONS WHO ARE DISQUALIFIED FROM SUING.

4028. The incapacity to sue in equity, is either absolute ; that is, while it continues, it wholly disables the party to sue ; or partial, or such as disables the party to sue without the assistance of another.

§ 1.—Of the absolute incapacity to sue in equity.

4029.—1. The principal, if not the only disability of this kind, is the case of *alienage*, but a distinction

(a) *Fowler v. Lindsay*, 3 Dall. 411.

(b) *Mitf. Pl. by Jeremy*, 24.

(c) *Anon.* 1 Vern 117 ; *Wych v. Meal*, 3 P. Wms. 310 ; *Moodaley v. Morton*, 1 Bro. C. C. 469.

(d) *Temple v. Bank of England*, 6 Ves. 770.

must be observed between alien friends and alien enemies. An alien friend is not incapacitated from suing, but an alien enemy, in general, is incapable to bring a suit in equity, while he remains an enemy. The reason for this distinction is very apparent; when an alien comes into the country he comes under the express or implied agreement of the government, while he acknowledges its authority, and bears toward it a temporary allegiance, to be protected in his person and his rights; this protection would be but illusory, if he had not the right to sue; on the contrary, an alien enemy, who sets himself against the government, by adhering to the public enemies, is not under the protection of the courts of the government he would wish to destroy.(a)

An exception to this general rule, that an alien enemy cannot sue, may possibly exist, in a case where an alien enemy is sued, and it is required, *in his defence*, that he should file a bill of discovery. If the law allows him to be sued, it would seem but simple justice to allow him to defend himself. But if the bill of discovery was to be used abroad, then the objection would lie with as much force to a bill of discovery as to an original suit.(b)

An alien enemy is disabled to sue only while the war continues, for, after peace has been made, his right to sue returns; it was only suspended by the state of hostility between his government and our own.(c)

Although an alien friend may sue, it must be understood that his right must be limited in this, that he has a right to the subject matter of the suit. In some of the states of the Union, he cannot hold land; he is then incapable to bring a suit for the recovery of land,

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(a) *Daubigny v. Davallon*, 2 Ansth. 467; *Mumford v. Mumford*. 1 Gallis. 366.

(b) See Anst. 467; *Albretcht v. Sussman*, 2 Ves. & B. 324.

(c) Co. Litt. 120; Coop. Eq. Pl. 25.

or on any demand of a mixed nature partly real and partly personal.(a)

4030.—2. A *foreign sovereign*, acknowledged by our government to be such, and not at war with this country, may sue in our courts, when he has a just right.(b) Indeed, the constitution of the United States gives jurisdiction to the courts of the United States, where foreign states are parties.(c) The Cherokee nation of Indians, not being independent, and acknowledged as such by our government, in the sense in which the words *foreign state* are used in the constitution, cannot maintain an action in the courts of the United States.(d) But this right of a foreign state or government exists only during a state of peace; by war, this right is of course suspended.

4031.—3. A *foreign corporation*, either private or municipal, when not belonging to a public enemy, may sue in equity, and it is usual to maintain suits when brought by such corporations.(e) A corporation belonging to a public enemy, is incapable of suing.

§ 2.—Of partial incapacity to sue in equity.

4032. This partial incapacity, it has been observed, disables the party to sue without the assistance of another. This is the case in relation, 1, to infants; 2, to married women; and 3, to idiots and lunatics.

*Art. 1.—Of the incapacity of infants.*

4033. Infants are disabled from bringing suits, be-

(a) Co. Litt. 120.

(b) *King of Spain v. Machado*, 4 Russ. 238; *Hullet v. King of Spain*, 1 Dow, 169; S. C. 2 Bligh, N. S. 51; *Columbian Government v. Rothschild*, 1 Sim. 94. See *The Nabob of Carnatic v. The East India Company*, 1 Ves. jun. 371; S. C. 3 Bro. C. C. 292; *City of Berne v. Bank of England*, 9 Ves. 347; *Dolder v. Bank of England*, 10 Ves. 352.

(c) *King of Spain v. Oliver*, 2 Wash. C. C. Rep. 429.

(d) *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1.

(e) *Society for propagating the Gospel v. Wheeler*, 2 Gallis. 105; *Society for propagating the Gospel v. New Haven*, 8 Wheat. 464; *Silver Lake Bank v. North*, 4 John. Ch. 370.

cause they are generally incapable of judging whether it is for their advantage that such suits should be instituted, and also, because they cannot bind themselves and become responsible for costs. But still their rights are protected. When an infant has a right, and a guardian has been appointed by competent authority to take care of his person and property, a suit may be brought in the name of the infant by his guardian, who must be named in the bill, not as his guardian, but as his next friend,<sup>(a)</sup> and who, in consequence, becomes responsible for costs. When no such guardian has been appointed, any person who will undertake to bring the suit in the name of the infant, and assumes to be *his next friend*, or as the technical phrase is, his *prochein ami*, may bring suit; in such case he must be named in the bill as such, and by that means, he will be responsible for costs. It is not necessary in a case of this kind, that the infant should be consulted, the suit may be brought without his knowledge. Indeed, a bill has been filed, and an injunction granted to stay waste at the suit of an infant *in ventre sa mere*.<sup>(b)</sup> But when there is reason to apprehend that the next friend has acted from improper motives, upon a proper application, the court will refer the matter to a master, with directions to ascertain whether such suit is for the benefit of the infant, and if the master reports it is not for his benefit, of which the court are satisfied, the proceedings will be stayed.<sup>(c)</sup> As the infant need not be consulted, there may be two suits brought by two different persons, who are each acting as next friend to the infant. In such case, the court will direct an inquiry to be made to ascertain which of the two suits is more for the

<sup>(a)</sup> It seems doubtful whether an infant can sue in chancery by his guardian; but he must defend by guardian, either a general guardian, or one appointed *ad litem*. See 1 Bl. Com. 464; 2 Inst. 261; Pract. Reg. 212; *Chandler v. Vilett*, 2 Saund. 117 f.; Story, Pl. § 58, note; *Bradley v. Amidom*, 10 Paige, 235; Mitf. Pl. 29.

<sup>(b)</sup> *Luttrel's case*, cited Pr. in Chan. 50.

<sup>(c)</sup> *Fulton v. Roosevelt*, 1 Paige, 178.

benefit of the infant, and, upon that appearing, will stay the proceedings on the other.(a)

4034. Before commencing a suit in the capacity of next friend, the party ought to reflect, whether he or his wife are witnesses to sustain the bill, for, if either of them can be a witness, he ought to procure some other person to act as *prochein ami*, because the next friend being liable for costs, cannot be examined. If, however, he should discover, after the suit has been brought, that he is a witness, the court will permit him to substitute a responsible person in his place.(b)

4035. When the suit has been commenced during infancy, and the infant become of age, and afterward he carries on the suit, by so doing he adopts the cause, relieves his next friend from all responsibility for costs, and becomes liable himself.(c)

*Art. 2.—Of the incapacity of married women.*

4036. A married woman, being under the protection of her husband, and her separate existence being for most purposes suspended, a suit respecting her rights is usually instituted by them jointly, and when it is so brought, it is considered the suit of the husband alone, so that the decree made in such suit is not binding upon the wife in any future litigation;(d) and, for this reason it is said, that if, after her husband's death, she proceed with the suit, she shall not be liable for the anterior costs.(e)

4037. But to this general rule, that the husband must be joined in all suits instituted in chancery on the rights of the wife, or against her, there are several exceptions, among which may be mentioned the following:

1. When the husband is *civiliter mortuus*, the wife

(a) Coop. on Eq. Pl. 28, 29; Mitf. Pl. 25, 27; 1 Dan. Ch. Pr. 95.

(b) Mitf. Pl. 26.

(c) Coop. Eq. Pl. 29; Mitf. Pl. 25—27.

(d) *Grant v. Van Schoonhoven*, 9 Paige, 255. See 8 Sim. 551.

(e) Coop. Eq. Pl. 29.

is looked upon as restored to her rights and capacity as a *feme sole*, and may sue alone.(a)

2. When a married woman claims a right in opposition to the rights claimed by her husband, the husband being the person, or one of the persons to be complained of, the complaint cannot be made by him. The wife being under the disability of coverture, cannot sue alone, and yet cannot sue under the protection of her husband; she is obliged to seek other protection, and that the law affords her, by enabling her to procure a next friend, who is also named in the bill, who may file the bill in her name.(b) Unlike the case of an infant, the next friend of a married woman cannot bring a suit without her consent; but, like the case of an infant, he will be responsible for costs.(c)

3. On the other hand, the husband may sue the wife in equity, for the purpose of enforcing his own marital rights against her property, however those rights may have arisen.(d) In such case, she may, by leave of court, defend a suit separately from her husband, without the protection of another;(e) not only when she claims in opposition to her husband, or lives separately from him, but when she disapproves of the defence she wishes to make, she may obtain an order to defend the suit separately.(f) Indeed, when the husband is plaintiff in a suit, and makes his wife a defendant, he treats her as a *feme sole*, and she may, therefore, answer and defend separately, without an order of the court for the purpose.(g)

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(a) Coop. Eq. Pl. 30, 31.

(b) Griffith v. Hood, 2 Ves. 452. See Troup v. Wood, 4 John. Ch. 228.

(c) Mitf. Pl. 28; Griffith v. Hood, 2 Ves. 452; Coop. Eq. Pl. 30; 1 Newl. Ch. Pr. 53.

(d) Carnel v. Buckle, 2 P. Wms. 243; Acton v. Pearce, 2 Vern. 480; Ex parte Strangeways, 3 Atk. 478; 1 Fonbl. Eq. B. 1, c. 2, § 6, note (n).

(e) Vin. Ab. Baron and Feme, 1 a, 20.

(f) Mitf. Pl. 95; Coop. Eq. Pl. 30, 31.

(g) 3 Atk. 478.

*Art. 3.—Of the incapacity of idiots and lunatics.*

4038. The care of lunatics is vested in courts of equity, in those states where these courts exercise the same jurisdiction as does the court of chancery in England. In other states, this guardianship is vested in their several courts, who, by act of assembly, are authorized to have a general superintendence.

When the rights of a lunatic, or person *non compos mentis*, are to be secured by a suit in chancery, the bill is brought by their committee or guardian; and when they are sued, they are defended by the same persons. This is generally regulated in detail by the local statutes.

In the absence of statutory regulations, and, according to the settled practice in the English courts, as adopted in this country, when a bill is filed for the benefit of a lunatic, the committee must be joined with the lunatic, or the bill must be filed in the name of the lunatic by his committee. It is not proper for the committee to bring the suit in his own name, merely describing himself as the committee of the lunatic.<sup>(a)</sup>

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CHAPTER II.—OF PROPER PARTIES TO A BILL.

4039. Having considered in the preceding chapter who may sue or be sued in equity, let us next consider who are the proper and necessary parties to a bill; a matter of great importance, for, if proper parties are wanting, inconvenience and delay, at least, if not defeat, will in some cases be the result.

It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the

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(a) *Gorham v. Gorham*, 3 Barb. Ch. 24.

suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.<sup>(a)</sup> For this purpose, with some exceptions which will be noticed, all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be.<sup>(b)</sup>

The natural course to be pursued in the examination of this rule, is to consider, 1, what persons, whose rights are concurrent with those of the party instituting the suit, ought to be joined with him; 2, what persons are interested in resisting the plaintiff's claim; 3, the joinder of parties who have no interest in the suit; 4, the objections for want of proper parties. This will form the subject of four sections.

SECTION 1.—WHO MUST BE MADE PARTIES TO A BILL AS PLAINTIFFS.

4040. As a general rule, all parties who have an interest in the subject matter of the suit must join; but for various causes there are some exceptions to the rule. This section will be divided by considering, 1, the general rule; 2, the exceptions.

§ 1.—Of the general rule.

4041. In proceedings in the courts of law, we may remember, no persons are required, or indeed can be plaintiffs, than those who have a direct and immediate interest in the subject matter of the action, and whose interests are strictly legal. All other persons, who have only an equitable or remote interest, cannot be

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<sup>(a)</sup> Mitf. Eq. Pl. 144; Coop. Eq. Pl. 33; Story, Eq. Pl. § 72; Knight v. Knight, 3 P. Wms. 333.

<sup>(b)</sup> Hickock v. Scribner, 3 John. Cas. 311; Joy v. Wirtz, 1 Wash. C. C. 517; Caldwell v. Taggart, 4 Pet. 190; Wendell v. Van Rensselaer, 1 John. Ch. 349; Calv. on Parties, 10; West v. Randall, 2 Mason, 190.

joined, and if they are joined, the fault will be fatal; for example, at law the heir and the executor cannot be joined, although each may have an interest in the matter in controversy. In equity, on the contrary, they may join, and not unfrequently they must both be made parties.(a)

It may be laid down as a general rule that those persons are necessary parties, when no decree can be made respecting the subject matter of litigation, *until they are before the court*, either as plaintiffs or defendants; or where the defendants, already before the court, have such an interest in having them made parties, as to authorize those defendants to object to proceeding without them.(b) Still, it is not easy to say what is the nature of that interest, nor how far it is liable to be affected by the decree.(c)

The cases which fall under this general rule, that all the parties must, when practicable, be brought before the court, may be classed into the following: 1, those relating to a trust estate; 2, where the property has been assigned; 3, when the interest is joint; 4, those relating to legacies; 5, to accounts; 6, to administration; 7, to mortgages; 8, those in which the government is a party.

*Art. 1.—Of parties plaintiffs relating to property in trust.*

4042. Upon this principle that all parties having an interest must join, when a plaintiff, who has only the equitable right, brings a suit, it is necessary that the party having *the legal estate should join*, for, if he

(a) *Knight v. Knight*, 3 P. Wms. 333, Cox's note A.

(b) *Bailey v. Inglee*, 2 Paige, 279; 1 Dan. Ch. Pr. 284, 285; *West v. Randall*, 2 Mason, 181; *Caldwell v. Taggart*, 3 Pet. 190; *Trescot v. Smith*, 1 McCord's Ch. R. 301; *Wendell v. Van Rensselaer*, 1 John. Ch. 340; *Duncan v. Mizner*, 4 J. J. Marsh. 447; *Crocker v. Higgins*, 7 Conn. 342; *Boughton v. Allen*, 11 Paige, 321.

(c) See Story, Eq. Pl. § 136, et seq. for the details on this subject. See also, 1 Dan. Ch. Pr. ch. 5, sec. 1, p. 284.

were not, his legal right would not be barred by the decree.(a)

For the same reason it is, that in all suits by persons claiming under a trust, *the trustee*, or other person in whom the legal estate is vested, is required to be a party to the proceeding.(b) And this rule, which requires the person who holds the legal estate to be brought before the court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different party from the one claiming the beneficial interest; for example, where a bill is filed for the specific performance of a covenant *under hand and seal* of one, for the benefit of another, the covenantee must be a party to a bill by the person for whose benefit the covenant was intended, against the covenantor.(c)

A distinction must be observed in the cases of a contract made by an agent, between a contract under seal, and one *not under seal*. In the latter it is not requisite that the agent should be made a party to a bill, because even at law the principal can interpose and supersede the right of his agent, by claiming to have the contract performed to himself, although made in the name of the agent.(d)

4043. When there is more than one trustee, and a suit is required to enforce a trust, or to set it aside, all the trustees should be made parties; for the same reason, when there are several *cestuis que trust*, they ought all to be joined in a suit respecting their common interest; for if this rule should not be observed, there must be several suits to enforce the rights of each.(e)

(a) 1 Dan. Ch. Pr. 286.

(b) *Williams v. Williams*, 4 Madd. Rep. 186. But a trustee need not be made a party after he has fully executed the trust, and the property has been delivered to the person authorized to receive it. *Swan v. Ligan*, 1 McCord, Ch. R. 231.

(c) *Cooke v. Cooke*, 2 Vern. 36.

(d) *Ante*, n. 1328.

(e) *Hamm v. Stevens*, 1 Vern. 110; *Lowe v. Morgan*, 1 Bro. C. C. 368; *In re Chertsey Market*, 1 Price, 261.

4044. In case of the death of any of the trustees, the survivor or survivors must be made parties; and if all the trustees are dead, and the estate be one of inheritance, the heir, or other representative of the realty of the survivor, should be made a party. But when the trust is of a term, or other chattel interest, which does not descend to the heir, the personal representative of the survivor is to be made a party. And if the trustee has assigned his trust, the assignee must be made a party in his stead,<sup>(a)</sup> unless he, the trustee, has committed a breach of trust, when he may be joined.<sup>(b)</sup>

4045. But there are several exceptions to this general rule, the principal of which are the following:

1. When the *cestui que trust* has a separate interest, as an aliquot part of the trust property, and the others have no common interest in the object of the bill, the others need not be made parties.<sup>(c)</sup>

2. A general breach of trust by all the trustees renders them so far responsible jointly and severally that the *cestui que trust* may bring his suit against them all or either of them, at his election.<sup>(d)</sup>

3. In cases where the bill is so framed, that it seeks an account of only so much of the trust fund as has come to the hands of a particular trustee, he may be sued alone, and the others are not properly made parties.

*Art. 2.—When the trust property has been assigned.*

4046. When the subject matter of the suit has been assigned, as in the case of a *chose in action*, the assignor if living, or if dead, his personal representatives, should be a party; because an assignment of a *chose in action*

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(a) Coop. Eq. Pl. 34; 2 Bro. C. R. 225.

(b) Bromley v. Holland, 7 Ves. 3; S. C. Coop. R. 19.

(c) Smith v. Snow, 3 Madd. R. 10.

(d) Walker v. Symonds, 3 Swanst. 75.

is not assignable at law, and it is considered good only in equity; the recovery in equity by the assignee would, therefore, be an answer to an action at law by the assignor in whom the legal right to sue still remains, and who might exercise it to the prejudice of the party liable. The court of equity, in order not to do justice by halves, requires that he should be made a party, in order to make a final decree to bind all the parties.(a)

*Art. 3.—When the interests are joint.*

4047. In cases of *joint claims and joint interests*, it is a rule that all parties must join in bringing a suit in chancery. One joint tenant or tenant in common cannot sue alone, in respect to any thing touching their common rights and interests.(b) And this rule, that all who have a joint interest must be made parties, applies equally, whether the subject matter of the suit be real or personal property; thus where a legacy is given to two jointly, one cannot sue for it alone, as in the case of a gift of a ship or a horse; though when the legacies are several, each may sue for his own.(c)

4048. When persons claim *under titles inconsistent with that of the plaintiff*, they should not be made parties to a suit, even though they are in a situation to molest the defendant, in the event of the plaintiff being unsuccessful in establishing his claim, and the rule is applicable to prohibit their being made parties as co-plaintiffs or as defendants.(d)

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(a) *Brace v. Harrington*, 2 Atk. 235; *Ray v. Fenwick*, 3 Bro. C. C. 25; *Cathcart v. Lewis*, 1 Ves. jun. 463. See *Lewis v. Outon's admr.*, 3 B. Monr. R. 453; *Kelly v. Israel*, 11 Paige, 147; *Mumford v. Sprague*, 14 Paige, 438. Judge Story appears to think that the doctrine in the text is not universally true, and it is liable to some exceptions. Eq. Pl. § 153.

(b) *Coop. Eq. Pl.* 35; 1 Dan. Ch. Pr. 298; Story, Eq. Pl. § 159; *Broughton v. Allen*, 11 Paige, 321.

(c) *Haycock v. Haycock*, 2 Chan. Cas. 124; 1 Dan. Ch. Pr. 303.

(d) *Attorney General v. Tarrington*, Hardr. 219; *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 135.

*Art. 4.—Of the parties to recover legacies.*

4049. The general rule that all parties in interest must be joined in a bill, applies to the case of legacies, when it appears by the bill that there is a deficiency of assets; and also in the case where several legacies are given, which are to be increased or diminished, according to the state of the funds.<sup>(a)</sup> But we shall see that under the rule relating to numerousness, that one of the legatees may bring a suit, in certain cases, in his own name, for himself and his co-legatees.

When legacies are charged on the real estate in the hands of the heir, and a bill is filed to recover the amount so charged, all legatees who are entitled to the benefit of the charge must be made parties in their own names, because they have a common interest in the fund.<sup>(b)</sup> And the same rule applies, when by a will the testator makes the executors trustees to sell real estate, and out of the produce, after discharging debts, to pay certain sums to certain legatees, which sums are also charged on the personal assets, in case of deficiency of the fund arising from the real estate; in such case when one of the legatees files his bill to obtain his share of the proceeds, all the other legatees must be made parties.<sup>(c)</sup>

*Art. 5.—Of parties to bills in matters of accounts.*

4050. When a bill for an account is filed, all the persons on either side having an interest in it must be made parties; as when an account is sought be-

<sup>(a)</sup> *Brown v. Ricketts*, 3 John. Ch. 553. See *Dayoue v. Fanning*, 4 John. Ch. 199; *Cromer v. Pinckney*, 3 Barb. Ch. R. 466; *Pritchard v. Hicks*, 1 Paige, Ch. R. 270; *Atwood v. Hawkins*, Finch, 113; *West v. Randall*, 2 Mason, 181; *Sherrit v. Birch*, 3 Bro. C. C. 229; *Parsons v. Neville*, 3 Bro. C. C. 365; *Peacock v. Monk*, 1 Ves. sen. 127; *Anon.* 1 Ves. jun. 29; *Cockburn v. Thompson*, 16 Ves. 321; 1 Dan. Ch. Pr. 308.

<sup>(b)</sup> *Hallett v. Hallett*, 2 Paige, 15.

<sup>(c)</sup> *Faithful v. Hunt*, 3 Anstr. 751; 1 Dan. Ch. Pr. 349, 350.

tween partners, all the partners must be made parties to the suit, either as plaintiffs or defendants.(a)

It is not indispensable that the parties, plaintiffs, should claim in the same right; if they are interested in the account, though claiming under different rights, they should all be joined. For example, heirs and personal representatives, mortgagors and mortgagees, legatees and distributees, and the like. The reason of this is, that the accountant shall not be obliged to make and settle more than one account.(b)

The rule that all persons interested in the account should be made parties, does not apply to cases where it appears that some of the parties have been accounted with and paid; thus in the case of a bill by a *cestui que trust* on coming of age, for his share of the fund, a decree will be made without requiring the other *cestuis que trust*, who have come of age before, and have received their shares, to be made parties to the bill.(c)

*Art. 6.—Of parties in cases of administration.*

4051. Whenever the property, which is the subject in dispute, would vest in the personal representatives of a deceased person, such personal representatives must be made parties to the proceedings; because the personal representatives in all cases represent the estate of the deceased, and are entitled to sue in equity as well as at law, without making the residuary legatees, or any of the other persons interested in it, parties to the suit.(d)

(a) *Ireton v. Lewis*, Rep. t. Finch, 96; *Moffat v. Farquharson*, 2 Bro. C. C. 338; *Evans v. Stokes*, 1 Keen, R. 24; 1 Dan. Ch. Pr. 308; Story, Eq. Pl. § 218.

(b) Story, Eq. Pl. § 219.

(c) 1 Dan. Ch. Pr. 310.

(d) *Jones v. Goodchild*, 3 P. Wms. 33.

*Art. 7.—Of parties plaintiffs in cases of mortgages.(a)*

4052. The next subject of consideration will be the cases of mortgagors and mortgagees and their assignees, who may have a concurrent interest with the plaintiff. These are either parties to redeem, or parties to foreclose a mortgage. When we come to the examination of the parties who are interested in resisting the claim, the proper parties to be made defendants in such cases, will then be considered.

*1. Of the proper parties as plaintiffs to a bill to redeem.*

4053. When the mortgagor and mortgagee are both living, and the former brings a bill to redeem, of course he alone is the proper party in the suit, if there has been no assignment, and the rights of the parties remain as at first, because no other person has or can have an interest.

If, on the contrary, the mortgagor be dead, those who represent him as heirs or devisees are proper parties to a bill to redeem, when the mortgage is in fee, for they alone have an interest in the land. If the mortgage be for a term of years only, then the heir has no interest, and the personal representatives of the mortgagor alone have a right to redeem, and for this purpose should alone be made parties.

A person entitled to a part only of the mortgage money cannot foreclose the mortgage without making the other persons in interest parties, so neither can a mortgagor redeem the mortgaged estate without making all those who have an equal right to redeem with himself, parties to the suit. For this reason, where two estates are mortgaged to the same person, for securing the same sum of money, and afterward the equity of redemption of one estate becomes vested

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(a) See the second section of this chapter, art. 4, for the persons who must be made defendants in cases of mortgages.

in a third person, the owner of one cannot redeem his part separately.(a)

When the mortgagor has assigned his estate, or the equity of redemption, subject to the mortgage, which the assignee has undertaken to pay, the mortgagor no longer having any interest, the assignee may alone maintain a suit to redeem. But if the mortgagor, in making his assignment, has undertaken to pay off the mortgage, he must be made a party to a bill to redeem, because he is primarily liable to discharge the debt. All persons, who have an interest as assignees, of course must join in a bill to redeem.(b)

In general, indeed, all persons who have a right to the estate, or claim by privity under the mortgagor, have a right to redeem.(c)

2. *Of the proper parties, as plaintiffs, to a bill to foreclose.*

4054. The same principle which requires the presence of all persons who have an interest in the equity of redemption, in the case of bills to redeem a mortgage, makes it necessary that a mortgagee, who seeks to foreclose the mortgage, should bring before the court all persons who have an interest in the mortgage under himself; if, therefore, there are several derivative mortgagees, they must all be made parties to a bill of foreclosure.(d)

When the parties remain the same as they were when the mortgage was created, the only party entitled to foreclose the mortgage is the mortgagee, as he alone has an interest in it. If there are two joint mortgagees, and one sues for foreclosure, the other refusing to join, but being a party, the plaintiff will

(a) *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 3, 124; 1 Dan. Ch. Pr. 304; Story, Eq. Pl. § 182; *Polk v. Lord Clinton*, 12 Ves. 48, 61.

(b) *Palmer v. Carlisle*, 1 Sim. & Stu. 423.

(c) Story, Eq. Pl. § 184, 185.

(d) *Hobart v. Abbot*, 2 P. Wms. 643; Coop. Eq. Pl. 37; Story, Eq. Pl. § 199; 1 Dan. Ch. Pr. 307; Spence, Eq. Jur. 673.

be entitled to the common decree for foreclosure of the whole.(a) But if the mortgagee has assigned the mortgage absolutely, the assignee may bring a suit upon it, without joining the assignor;(b) and in case it has been assigned in parts, all the assignees must join, for one of them cannot sue, and have a partial foreclosure.(c)

As a mortgage is personal property, if the mortgagee dies, his personal representative is alone authorized to bring a bill for foreclosure.(d)

*Art. 8.—When the government ought to be a party.*

4055. When the government is interested in the subject matter of the suit, it is essential that the attorney general, or some other officer designated by law, should be made a party, either as plaintiff or as defendant, to protect or assert the rights of the public; thus, in cases of public charities, the attorney general must be made a party to the suit, because the government, as *parens patriæ*, superintends the administration of all charities, and, in cases of this kind, acts by a proper and known officer.

§ 2.—Of exceptions to the general rule.

4056. To the rule that all parties having an interest must be joined in a suit in chancery, various exceptions have been made. These exceptions are all governed by the same principle. It is the object of the rule to accomplish the purposes of justice between the parties; the courts will not, therefore, permit it to be

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(a) *Davenport v. James*, 12 Eng. Jur. 827.

(b) *Lewis v. Nangle*, 2 Ves. 231; S. C. Ambl. 150.

(c) *Palmer v. Carlisle*, 1 Sim. & Stu. 423. See *Montgomerie v. Marquis of Bath*, 3 Ves. 560; *Lowe v. Morgan*, 1 Bro. C. R. 368; *Stokes v. Clendon*, 3 Swanst. 150.

(d) *Freake v. Horsley*, 2 Freem. 180.

applied to defeat justice, if they can dispose of the merits of the case without prejudice to the rights or interests of other persons, who are not parties, or when the circumstances render the application of the rule impracticable or impossible.(a) But, lest, in its endeavors to do justice, the court should run the hazard of doing injustice to other parties not before it, whose claims are equally meritorious, if complete justice between the parties before the court cannot be done, without other parties being made, whose rights and interests would be prejudiced by the decree, the proceedings will be stayed, though those other parties cannot be brought into court.(b)

The cases which are exceptions to the general rule, may be classed as follows: 1, when the parties are omitted on account of their numbers; 2, when it is impracticable to make all persons who have an interest parties to the suit.

*Art. 1.—When parties are omitted on account of their numbers.*

4057. It is frequently almost impossible to join all those who have an interest as plaintiffs, in a suit in equity, on account of the delays and inconveniences which would obstruct or probably defeat the purposes of justice. For this reason, if the court can make a decree without injury to the persons or parties before the court, the others will be dispensed with; but if no decree can be so made, without all the persons in interest being made parties, the courts of equity will not proceed.(c)

When the parties are too numerous to be all included

(a) *Hallett v. Hallett*, 2 Paige, 15; *West v. Randall*, 2 Mason, 190; *Elmendorff v. Taylor*, 10 Wheat. 152; *Cockburn v. Thompson*, 16 Ves. 321.

(b) *Joy v. Wirtz*, 1 Wash. C. C. 517; *Marshall v. Beverley*, 5 Wheat. 313.

(c) *Evans v. Stokes*, 1 Keen, R. 32; *West v. Randall*, 2 Mason, 193; *Coop. Eq. Pl.* 39.

in the bill, it should be so stated in it, and the bill must be filed not only in behalf of the plaintiff, but also in behalf of all other persons interested, who are not named as parties, so that they may come in under the decree, and take the benefit of it; or, if against them, show it to be erroneous, or entitle themselves to a rehearing.(a)

The cases in which all the parties in interest will not be required to join, may be classed into those where, 1, the question is one of common or general interest, where one may sue or defend for the whole; 2, the parties form a voluntary association, for public or private purposes, and those who sue represent the whole; 3, the parties are very numerous, though they have or may have separate interests.

1. *When the question is of general interest.*

4058. The rule that all parties must join when they have an interest in the subject matter in controversy, does not apply to cases which are of a general interest; for example, a suit may be brought by a few of the crew of a privateer against the prize agents, for an account of the prize money, when they sue for themselves and the rest of the crew, who had signed the articles, and had not received their share of the prize money.(b)

4059. Another case of exception to the general rule is that of creditors of a deceased debtor, who may be joined in a suit to administer the assets, although it is not necessary they should be so joined as plaintiffs, because one or more of them may bring suit and file a bill on their own behalf and on behalf of the other creditors upon the same estate, for an account and application of the estate of the deceased debtor, in which

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(a) *West v. Randall*, 2 Mason, 193.

(b) *Good v. Blewitt*, 12 Ves. 397; *Leigh v. Thomas*, 2 Ves. 312; *West v. Randall*, 2 Mason, 193; 1 Dan. Ch. Pr. 332; *Story, Eq. Pl.* § 98.

case the decree being made applicable to all the creditors, the others may come in under it and obtain satisfaction for their demands, as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered bound by acts done under its authority.(a)

The same principle applies when the demand is against the real as well as the personal assets;(b) when the creditors or incumbrancers are numerous, one or more may bring suit, in behalf of himself and the others, in order to prevent inconvenience and to save expenses; and the same liberal principle has been extended to the case of creditors under a trust deed for the payment of debts.(c)

4060. By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees, in order to procure a settlement of the accounts of his administration, and a payment of all the legatees.(d)

For the same reason, when the bill seeks to apply personal estate among the next of kin, or among persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been admitted by one claimant on behalf of himself and others equally interested.(e)

2. *When parties have formed associations, who is to sue.*

4061. In cases where the parties have formed a voluntary association, those who sue or defend may be

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(a) Leigh v. Thomas, 2 Ves. 312, 313; Story, Eq. Pl. § 99; 1 Dan. Ch. Pr. 329; Hendricks v. Robinson, 2 John. Ch. R. 283; Brown v. Ricketts, 3 John. Ch. 556.

(b) Leigh v. Thomas, 2 Ves. 313.

(c) Mitf. Eq. Pl. by Jer. 167, 176; 1 Dan. Ch. Pr. 330.

(d) 1 Dan Ch. Pr. 331.

(e) Weld v. Bonham, 2 S. & S. 91, 138.

fairly presumed to represent the rights and interests of the whole;(a) the impracticability and inconvenience of joining the whole as parties, have induced courts of equity to relax the rule, and to allow some of the parties to sue in behalf of themselves and all the others, when there is a substantial representation of all the interests before the court.(b) As, for example, where some of the partners in a very numerous company, consisting of five hundred or more, filed a bill for themselves and the other partners, to rescind a contract entered into in behalf of the partnership, where it was manifest, from the circumstances of the case, that it would be for the benefit of all the partners that the contract should be rescinded, and an objection was made for want of parties, it was held by the court that the suit was properly brought.(c)

3. *When the parties are very numerous, who is to sue.*

4062. One of the principal grounds on which the courts rest for allowing some of the persons in interest to bring a suit in their own behalf and for their companions, is, that it is apparent that all parties stand, or are supposed to stand, in the same situation, and have one common right, or one common interest; and that the suit so brought must be for the common benefit of all, and cannot be to the injury of any.(d)

4063. There is a class, where, on account of the great number of parties, and because it would be almost impracticable to bring them all before the court,

(a) Mont. Eq. Pl. 58.

(b) Coop. Eq. Pl. 40; *West v. Randall*, 2 Mason, 194; *Chancey v. May*, Pr. Cham. 592; *Hickens v. Congreve*, 4 Russ. R. 562; *Cockburn v. Thompson*, 16 Ves. 328; *Lloyd v. Loaring*, 6 Ves. 773; *Attorney General v. Heelis*, 2 S. & Stu. 67; *Gray v. Chaplin*, 2 Sim. & Stu. 267; *Bromley v. Smith*, 1 Sim. R. 8; *Jones v. Garcia del Rio*, 1 Turn. & Russ. 300.

(c) *Small v. Atwood*, 1 Younge, R. 407, 458. See *Walburn v. Ingleby*, 1 Myl. & K. 76.

(d) *Long v. Yonge*, 2 Sim. R. 369; *Hickens v. Congreve*, 4 Russ. R. 565.

who will, on this account, be dispensed with;(a) for example, where all the inhabitants of a district had a right of common under a trust, a suit brought by one, on behalf of himself and all the other inhabitants, was held to be well brought.(b)

*Art. 2.—When it is impracticable to make all persons who have an interest parties to the suit.*

4064. Another exception to the rule is founded on the utter impossibility of including all persons who have an interest, parties to the suit; as, for example, where one of several of the next of kin of an intestate, entitled to distribution, does not know and cannot ascertain where the other distributees are, he may sue for his distributive share, without making the other distributees parties; but in such case, this want of knowledge must be charged in the bill. In such case the master will be directed by the decree to inquire and state to the court who are all the next of kin of the intestate, and they may come in under the decree.(c)

SECTION 2.—WHO ARE TO BE MADE PARTIES TO A BILL AS DEFENDANTS.

4065. Having considered who are to be made parties as plaintiffs in a suit in equity, let us next examine who are to be made defendants. This section will be divided into two parts: 1, of persons immediately interested in resisting the plaintiff's claim; 2, of persons consequentially so interested.

§ 1.—Of persons immediately interested.

4066. The cases which fall under the general rule,

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(a) 1 Mont. Eq. Pl. 57; Coop. Eq. Pl. 41; Mitf. Eq. Pl. by Jer. 170; Story, Eq. Pl. § 121.

(b) Anon. 1 Ch. Cas. 269.

(c) Coop. Eq. Pl. 39, 40, 41.

in which all persons who have an immediate interest ought to be defendants, may be classed into those, 1, of parties defendants relating to trusts; 2, of persons jointly liable; 3, against whom a bill for an account should be brought; 4, who are parties to mortgages.

*Art. 1.—Of parties defendants relating to trusts.*

4067. In all cases of trusts, the trustee and *cestui que trust* must in general be made defendants or plaintiffs; the former because he holds the legal estate, the latter because he is entitled to the equitable right. Whenever the trustee and *cestui que trust* have an interest in defending the suit, or the decree may ultimately affect their rights, they must be joined as parties; and when they have no such interest, they need not be made parties.<sup>(a)</sup> But this rule is subject to an exception; where the party is in the situation of a mere naked trustee, without any estate vested in him, it is not, in general, necessary to make him a party. For example, a broker or agent signing a contract in his own name, for the purchase or sale of property, is not considered necessary to a bill for specific performance of such contract against the principal.<sup>(b)</sup>

When, however, the trustee may be made responsible ultimately, he must be made a party;<sup>(c)</sup> but this refers to cases only where the bill prays for relief, for it is not necessary that all trustees or other persons should be made parties, as to bills of discovery.<sup>(d)</sup>

However numerous the trustees or *cestuis que trust* may be, when it is proper that any of them should be made parties, they should all be joined; that is, if one of several trustees must be made a party, all the trustees must be joined; and if one of several *cestuis*

<sup>(a)</sup> See *Franco v. Franco*, 3 Ves. 75; *Selyard v. Harris' Ex'rs*, 1 Eq. Abr. 74; *Swan v. Ligan*, 1 McCord, Ch. 231.

<sup>(b)</sup> *Coop*, Eq. Pl. 42.

<sup>(c)</sup> *Sturge v. Starr*, 2 M. & K. 195; *Harrison v. Pryn*, Barnard, 324.

<sup>(d)</sup> *Trescott v. Smith*, 1 McCord, Ch. R. 301.

*que trust* is to be made a defendant, all must be so made.(a)

4068. But there is an exception to this rule; if there are several trustees, all implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against them all, or against either of them, at his election, for in such case the injury or tort may be treated as several as well as joint.(b)

Another exception depends upon the frame of the particular bill; it may, in some instances, be filed against one of several trustees, without joining the others; as where it is so framed as to seek an account of so much of the trust fund as has come to the hands of a particular trustee; in this case he may be sued alone.(c)

*Art. 2.—When persons jointly liable must be made joint defendants.*

4069. All persons who are liable to a common charge, or a common debt, must in general be made parties defendants, not only for ascertaining and contesting the right or title of the plaintiff, but, should he succeed, to make each liable for contribution.(d) A few cases will exemplify this rule.

4070.—1. Where a bill was filed by the captain of a ship, against the survivor of two partners, who were joint owners of the ship, for an account and satisfaction of his demand, it was held that the suit was defective, because the representatives of the other partner, who might be interested in the account, was not before the court, although at law the rule was different; for there the survivor and the representatives

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(a) *In re Chertsey Market*, 1 Price, R. 261.

(b) *Walker v. Symonds*, 3 Swans. 75.

(c) *Lady Selyard v. Harris' Ex'rs*, 1 Eq. Ab. 74; *Routh v. Kinder*, 3 Swans. 144, n.; 1 Dan. Ch. Pr. 339, 340.

(d) *Jackson v. Rawlins*, 2 Vern. 195.

of the deceased could not be joined.(a) The fact that the surviving partner had bought the share of the deceased partner in the ship, makes no difference, as the proceeding is not *in rem*; the rule in such case being that on a demand against a partnership firm, all the persons constituting the firm must be before the court; and if any of them are dead, the representatives of the deceased partner must be made parties.(b)

4071.—2. For a similar reason, a bill for the payment of money due upon a bond must be against all the obligors; therefore, in a suit against the executor of an obligor to discover assets, all the obligors must be made parties, that the charge may be equal.(c)

4072.—3. When debts are charged on land by a will, in aid of the personal assets, and proceedings are commenced to enforce the right against the land, by a sale or otherwise, the heirs or devisees who are to be affected by the decree, must be made parties, as well as the personal representatives.(d)

These instances will perhaps be sufficient to show the application of the rule. Numerous others might be mentioned, together with the qualifications to which they are subject, but such details are not within the plan of this work.(e)

*Art. 3.—Against whom a bill for an account should be brought.*

4073. When an account is sought against several persons, either as partners or because they are jointly

(a) *Pierson v. Robinson*, 3 Swans. 139, n.; *Weymouth v. Boyer*, 1 Ves. jun. 416.

(b) See *Wilkinson v. Henderson*, 1 Myl. & K. 582; *Holland v. Pryor*, 1 Myl. & K. 237.

(c) *Blois v. Blois*, 3 Vent. 348; *Anon.* 2 Freem. 127; *Maddox v. Jackson*, 3 Atk. 406; *Cockburn v. Thompson*, 16 Ves. 326; *Angerstein v. Clarke*, 2 Dickens, 738; 3 Swanst. 147; *Story Eq. Pl.* § 169; 1 Dan. Ch. Pr. 302.

(d) *Berry v. Askham*, 2 Vern. 26.

(e) See *Coppard v. Page*, 1 Forrest, R. 1; S. C. 2 Yo. & Coll. 68; *Perrot v. Bryant*, 2 Yo. & Coll. 61; *Cranborne v. Crisp*, Rep. temp. Finch, 105; *Collins v. Griffith*, 2 P. Wms. 313; 1 Dan. Ch. Pr. 362, 363; *Story, Eq. Pl.* § 159 to 169.

liable to account, they must all be made parties to the suit; so if two executors or other personal representatives, are bound to render an account, the suit should be brought against both of them.(a)

*Art. 4.—Of parties defendants in cases of mortgages.*

4074. Having considered in the preceding section who are to be made plaintiffs, either to redeem or to foreclose a mortgage, under the present article our attention will be confined to the examination of the persons who must be made defendants, 1, to a bill to redeem; 2, to a bill to foreclose.

1. *Of the proper parties as defendants to a bill to redeem.*

4075. As a general rule, it may be stated that all persons should be made defendants whose rights may be affected by the decree. As between the original parties to the contract, when the mortgagee has not parted with any interest he had in the mortgage, and he is living, the mortgagee is the only party defendant.

In case of the death of the mortgagee when the mortgage is in fee, the legal title vests in the heir at law, or a devisee; the person in whom the legal estate has become vested, must be made a party, because, having the legal title, he is bound by the decree; and the personal representative of the mortgagee must also be made a party, on the ground that he is entitled to the purchase money when paid, as it is to be returned to the fund out of which it came, namely, the personal estate.(b)

But if the mortgage is of a term of years, created by the owner of the fee, the heir is not entitled to it; it being merely a chattel real, the personal representative

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(a) *Cowslad v. Cely*, Prec. Ch. 83; *Scurry v. Morse*, 9 Mod. 89; *Moffat v. Farquharson*, 2 Bro. C. R. 338.

(b) *Coop. Eq. Pl.* 37; 1 *Dan. Ch. Pr.* 381; *Story, Eq. Pl.* § 188.

only is the proper party, because he alone has an interest in it, unless it has been disposed of in favor of a third person, who, in such case, must be made a party to the suit.(a)

4076. Who ought to be the parties defendant when a mortgage has been absolutely assigned depends upon this circumstance, whether it was assigned without the authority or the privity of the mortgagor or not.

1. In the first case, where the mortgage has been assigned without such authority or privity, it is not requisite, in a bill brought to redeem, to make any other person than the last assignee a party to the bill. The fact that there were mesne assignments will make no difference, because the last assignee stands in the place of the original mortgagee.(b)

2. When the assignment has been made with the authority or privity of the mortgagor, the intermediate assignees must be made parties, when they have any interests which are to be protected.

Other cases have occurred where other than the original parties have an interest on which the decree must operate, and when, therefore, they must be joined in the suit.(c)

*2. Of the proper parties as defendants to a bill to foreclose a mortgage.*

4077. It has already been observed several times that all parties who have an interest in the suit, and will be bound by the decree, must be made parties, plaintiffs or defendants; all persons who have an interest in the equity of redemption must be made parties to a bill of foreclosure.(d)

(a) Coop. Eq. Pl. 37; Osbourn v. Fallows, 1 Russ. & Myl. 741.

(b) Bishop of Winchester v. Beaver, 3 Ves. 315; Hill v. Adams, 2 Atk. 39.

(c) See Anon. 2 Freem. 59; Cholmondeley v. Clinton, 2 Jac. & Walk. 134; Whistler v. Webb, Bunb. 53; Hobart v. Abbott, 2 P. Wms. 643; Norrish v. Marshall, 5 Madd. 475.

(d) See Hallock v. Smith. 4 John. Ch. R. 649; Palk v. Clinton, 12 Ves. 58; 2 Spencer, Eq. Jur. 695.

A *bill of foreclosure* is a proceeding in chancery, by which the mortgagor's right of redemption of the mortgaged premises is barred and foreclosed forever. This takes place when the mortgagor has forfeited his estate by the non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case the mortgagee files a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or in default thereof, to be forever foreclosed and barred from any right of redemption.(a)

When the equity of redemption belongs to different persons as heirs, devisees, or as having charges upon it, as legatees, they should all be made defendants. And in general all incumbrancers, who have an interest in the redemption of the land, should be made defendants. It is immaterial whether such incumbrancers are prior or subsequent to the time of the mortgage under which the bill is filed, if they are not parties, they are not bound; if they were prior incumbrancers, their rights are paramount; if subsequent, they cannot be bound by the decree, without any opportunity on their part to protect them, as they might have done, if they had been made parties to the bill.(b)

In the case of an absolute assignment of the equity of redemption by the mortgagor, so that he has no further interest in it, the assignee only need be made

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(a) Sometimes a bill is filed praying for the sale of the mortgaged premises, and the mortgagee obtains a decree for the sale of the land, under an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to their priority. This practice has been adopted in Indiana, Kentucky, Maryland, South Carolina, Tennessee and Virginia. 4 Kent's Com. 180. See *Mills v. Dennis*, 3 John Ch. 367. In Pennsylvania a *scire facias* is issued upon the recorded mortgage, a judgment is obtained, and the land is sold under it, for the benefit of the mortgagee, and other incumbrancers, and the surplus of the proceeds is paid over to the mortgagor.

(b) *Finley v. Bank of U. S.*, 11 Wheat. 304; *Rose v. Page*, 2 Sim. R. 471; *Haines v. Beach*, 3 John. Ch. 459; *Draper v. Earl of Clarendon*, 2 Vern. 518; *Calvert on Parties in Eq.* 128; *Story, Eq. Pl.* § 193.

a party to the bill to foreclose, for no one else can be affected by the decree.(a)

§ 2.—Of persons consequentially interested in resisting the plaintiff's claim.

4078. To prevent a multiplicity of suits, in some cases the courts require that parties who may be consequentially liable to, or affected by the decree, to be made parties in the first instance, so that their liabilities may be adjudicated upon and settled by one proceeding. It is necessary to make these persons defendants to a suit, not because their right may be affected by the decree, but because, in the event of the success of the plaintiff in his object against the principal defendant, that defendant will thereby acquire a right either to call upon them to reimburse him the whole or part of his demand, or to do some act reinstating him in the condition he would have been in but for the success of the plaintiff. Many cases of this kind have been anticipated in other parts of this work, those which are now to be considered may be classed as follows: 1, cases of joint obligors and sureties; 2, when real and personal representatives must be made parties; 3, when a party is entitled to indemnification from a third person, the latter must be made a party.

*Art. 1.—Cases of joint obligors and sureties.*

4079. It is upon this principle that the courts proceed in the case of sureties of joint obligors in a bond, by requiring all those who are bound, or their personal representatives, to be before the court, in order to avoid the multiplicity of suits which would be occasioned if one or more were to be sued without the others, and left to seek a contribution from their co-sureties, or the obligors, in other proceedings.(b)

(a) *Gifford v. Hort*, 1 Sch. & Lef. 386.

(b) See *Madox v. Jackson*, 3 Atk. 406; 1 Dan. Ch. Pr. 362; *Roversy v. Grayson*, 3 Swanst. 145, note.

*Art. 2.—When the real and personal representatives must be made parties.*

4080. In a case where a specialty creditor sues to recover his demand out of the real estate of the deceased, the courts require for the same reason that the personal as well as the real representatives should be brought before the court, because the personal estate is the primary fund for the payment of debts, and ought to be applied in ease of the land; (a) the heir, therefore, has a right to insist that it shall be exhausted for this purpose before the realty is charged; so that if a decree were made in the first instance against the heir, he would be entitled to file a bill against the personal representatives to reimburse himself. For this reason the court requires both to appear, that, by decreeing the executor to pay the debt, in the first instance, as far as he has assets, a multiplicity of suits may be avoided. (b)

For the same reason, if a vendor were to file a bill against the heir, the latter would have a right to insist that the personal representative should be brought before the court, because the purchase money, which is the object of the suit, is, in the first instance, payable out of the personal assets. But, where the personal representative cannot be made liable for the money, he need not be made a party. (c)

*Art. 3.—When a party is entitled to indemnification from a third person, the latter must be made a party.*

4081. The following cases are examples of this kind. In a suit brought by Peter against Paul, the latter, in his answer, insisted that he was entitled to be reimbursed by James, what he might be decreed to pay

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(a) Galton v. Hancock, 2 Atk. 434.

(b) Knight v. Knight, 3 P. Wms. 333.

(c) See Astley v. Fountain, Rep. temp. Finch, 4; Green v. Poole, 5 Bro. P. C. 504.

the plaintiff, and therefore, that James was a necessary party; at the time of the hearing, the court directed the cause to stand over, with liberty to the plaintiff to amend by making James a defendant.(a)

Another case, ruled upon the same principle, was that of an heir at law, who brought a suit against a widow, and by his bill prayed that she might be compelled to abide her election, and to take a legacy in lieu of dower; in this case it was held that the personal representative was a necessary party, because, in the event of the plaintiff's succeeding, she was entitled to satisfaction for her legacy out of the personal assets, and the plaintiff had leave to amend by making the executor a party.(b)

SECTION 3.—OF THE JOINDER OF PARTIES WHO HAVE NO INTEREST IN THE SUIT.

4082. Although it is not easy to say who are the necessary parties to a suit, and it is doubtful, until the decision of the cause, what interests may be affected by that decision,(c) yet it is a rule that no one should be made a party to a suit against whom, if brought to a hearing, there could be no decree.(d)

This section will be divided by considering, 1, what is a joinder of parties who have no interest; 2, the effect of such a joinder.

§ 1.—What is a joinder of parties who have no interest.

4083. Persons who have no interest are, 1, agents, auctioneers, stewards, solicitors, attorneys, witnesses, and the like; 2, persons whose interests are only consequential; 3, those who are not in privity with the

(a) *Greenwood v. Atkinson*, 5 Sim. 419.

(b) *Lesquire v. Lesquire*, Rep. temp. Finch, 134.

(c) *Mitf. Eq. Pl. by Jer.* 179.

(d) *Wych v. Meal*, 3 P. Wms. 311, n.

parties; 4, nominal or formal parties; 5, claimants by paramount title.

*Art. 1.—Agents, witnesses, and the like, not to be made parties.*

4084.—1. Persons, who have *no interest in the thing sued for*, can have no right to recover, and, therefore, ought not to be joined as parties, and, if such persons have been joined, this is fatal to the proceedings.*(a)* For the same reason, persons having adverse or conflicting interests in the subject of litigation, ought not to be joined as complainants in the suit.*(b)*

On the other hand, when persons have been connected with the transaction in some capacity which gives them no title to the subject matter of the suit, they cannot, in general, be made defendants; as, for example, an auctioneer who has sold an estate, the sale being the matter in controversy; an attorney who has negotiated an annuity, when the bill prays to set aside the contract; an arbitrator to a suit, when the bill is to enforce or set aside the award; a steward or receiver of rents or profits, in a suit between the vendor and vendee, and a bill is filed for a specific performance; in all these cases, these agents should not be joined, and, if they are, and it appears upon the bill that they have no interest, it will be ground for demurrer.*(c)*

4085. But, it must be remembered, that, in cases of this kind, when there is any charge of fraud in the transaction, in which these parties have been participants, and such fraud is charged in the bill, they may be made parties defendant; for, at least, they may

*(a)* See *Beaty v. Judy*, 1 Dana, 103.

*(b)* *Alston v. Jones*, 3 Barb. Ch. R. 397. See *Miff. by Jer.* 185, 187; *Coop. Eq. Pl.* 189, 190; *Welf. Eq. Pl.* 282; *King of Spain v. Machardo*, 4 Russ. R. 244.

*(c)* *Coop. Eq. Pl.* 42; 1 Dan. Ch. Pr. 394, 397, 399; *Stery, Eq. Pl.* § 231; *Welf. Eq. Pl.* 283.

be made responsible for costs in consequence of their fraud.(a)

4086.—2. A mere *witness* ought not, for the same reason, to be made a party to a bill, although the plaintiff might deem his answer more satisfactory than his examination, because he has no interest in the cause, and no decree can be made against him. Besides, his answer would not be evidence against his co-defendant.(b) The injustice of harassing him with such a suit, and putting him unjustly to the trouble and expense of defending himself, is a sufficient reason why he should not be made a party.(c)

4087. But to this rule there is an exception, which is somewhat anomalous; it is, nevertheless, fully established. It cannot be better stated than in the words of King, P. J.(d) “To this rule there is one established exception,” he says, “cases of corporations, where chief officers may be made parties to a discovery, although no decree is sought, or could be had against them. The reason of this exception, which has been considered as a stretch of the authority of the court, to prevent a failure of justice, seems to have sprung from the fact that a corporation could only answer under its common seal, and, therefore, could not be indicted for perjury, however falsely it might answer; and from the idea that, though the answer of the officers could not be read in evidence against the corporation, it might be of use in directing the plaintiff

(a) Mitf. by Jer. 160.

(b) *Twells v. Costen*, 1 Pars. 373, 378. The reason why the answer of a co-defendant is not evidence against a defendant, is, that the latter ought not to be compromised by what may be said in the answer, because he had no opportunity to cross-examine him, and it would be unjust to let his answer be evidence, when he responds merely to the interrogatories of their common adversary. *Plumer v. May*, 1 Vesey, sen. 426; *Dinely v. Dinely*, 2 Atk. 394; *Cookson v. Ellison*, 2 Bro. C. C. 252; *Fenton v. Hughes*, 7 Ves. 287; *Howe v. Best*, 5 Madd. 19; *Twells v. Costen*, 373, 379.

(c) 1 Dan. Ch. Pr. 397; *Cookson v. Ellison*, 2 Bro. C. C. 252; Mitf. Eq. Pl. by Jer. 188; *Twells v. Costen*, 1 Pars. 373.

(d) 1 Pars. 379.

how to draw his interrogatories to obtain a better answer.”(a)

*Art. 2.—Of the joinder of persons whose interests are only consequential.*

4088. We have already seen, that when the party has a mere consequential interest, it is not requisite he should be made a defendant; for example, where a bill is filed by a creditor for the payment of his debt out of the assets of his deceased debtor, whether the plaintiff sues for himself alone, or for himself and on behalf of all others.(b) This subject was fully considered in the preceding section.

*Art. 3.—Of the joinder of persons when there is no privity between them and the plaintiff.*

4089. When there has been no contract between the plaintiff and another person, and there is no *privity*, it is evident the latter ought not to be made a defendant, although he may have in his hands what may be eventually liable for the claim; because his liability, if any, is to another person. For example, when a creditor brings a suit against an executor for the payment of his debt out of the assets, a debtor of the estate cannot, in general, be joined as a defendant, because he is liable solely to the executor.(c) But if it appear that there is collusion between the executor and the debtor, the latter may be made a defendant upon that ground, for a court of equity has jurisdiction on the ground of fraud.

*Art. 4.—Of the joinder of nominal parties.*

4090. Nominal parties are those from whom no

(a) See *Wych v. Meal*, 3 P. Wms. 312; *Fenton v. Hughes*, 7 Ves. 289; *Dummer v. Chippenhorn*, 14 Ves. 524; *Gibbons v. Waterloo Bridge*, 5 Price, 491; *Story*, Eq. Pl. § 235; *Wright v. Dame*, 1 Met. 237.

(b) *Mitf.* by Jer. 170.

(c) *Utterson v. Mair*, 2 Ves. jun. 95; *Gedge v. Traill*, 1 Russ. & Myl. 281.

account, payment, conveyance, or other direct relief is sought, not being an infant.(a)

In general the joinder of mere *nominal parties* will not be required, and if such persons cannot be made parties, they will be dispensed with, and the want of them will not arrest the proceedings.(b)

*Art. 5.—Of claimants by paramount title.*

4091. When a suit is brought for the recovery of a subject matter, which is due the defendant, if a third person has a claim upon it by a paramount title, he ought not to be made a defendant, for if he has a prior title or incumbrance, he cannot be affected by the decree; for example, when a bill is filed to carry into effect the trusts of a will, a person who claims a title or incumbrance prior to the will, or to the testator, ought not to be made a party, because his title being paramount to that of the testator, he cannot be affected by such a bill.(c)

§ 2.—Effect of the joinder of parties who have no interest.

4092. When the objection of a want of interest applies, it is as fatal when applicable to one of several plaintiffs, as it is when applicable to one of several defendants. In the former case it is fatal to the whole suit; in the latter, when taken in due time, it is fatal against the defendant improperly joined.(d)

SECTION 4.—OF OBJECTIONS FOR WANT OF PROPER PARTIES.

4093. Having examined to some extent the rules with reference to making parties to a suit in equity,

(a) Rules for the courts of equity of the U. S., Rule 54.

(b) *Wormley v. Wormley*, 8 Wheat. 451; *Butler v. Pendegrift*, 2 Bro. P. C. 170.

(c) *Devonsher v. Newenham*, 2 Sch. & Lef. 210; *Pelham v. Gregory*, 1 Eden, R. 518; S. C. 5 Bro. P. C. 435; 1 Dan. Ch. Pr. 359.

(d) Story, Eq. Pl. § 232; *Makepeace v. Hawthorn*, 4 Russ. 244; 1 Dan. Ch. Pr. 399; 1 Welf. Eq. Pl. 25.

and shown who ought to be joined, and the defect of joining those who have no interest, let us now take a passing notice of the manner of curing the defects of having made improper parties, when such faults can be cured.

When the want of necessary parties appears upon the face of the bill, the defendant may demur. If, however, the defect be of vital importance, with regard to the character of the bill and the nature of the relief prayed for, the defendant is not forced to demur, but may insist upon the defect at the hearing.<sup>(a)</sup> When the defect is not apparent on the bill, it may be objected to by plea or answer.<sup>(b)</sup>

But if, instead of too few persons having been made parties to the bill, the defect is, on the contrary, that persons have been joined who had no interest in the suit, and such defect appears on the face of the bill, the party improperly joined may demur, or at the hearing may rely upon it as a ground of defence as to himself. When the defect is not apparent on the face of the bill, the party improperly joined may rely on the objection by plea or answer.

A demurrer for want of parties must show who are the proper parties, not indeed by name, for that might be impossible; but in such a manner as to point out to the plaintiff the objections to his bill, and enable him to amend by adding proper parties.<sup>(c)</sup> In case of demurrer for want of parties, an amendment has been permitted, even when the demurrer has been allowed.<sup>(d)</sup>

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<sup>(a)</sup> Coop. Eq. Pl. 33, 185; Mitf. by Jer. 180.

<sup>(b)</sup> Coop. Eq. Pl. 289; Mitf. Eq. Pl. by Jer. 280.

<sup>(c)</sup> Mitf. Eq. Pl. 146; Mitf. by Jer. 180; Attorney General *v.* Jackson, 11 Ves. 369; Welf. Eq. Pl. 267, 319.

<sup>(d)</sup> Mitf. Eq. Pl. 146; 1 Dan. Ch. Pr. 385.

## TITLE II.—OF BILLS IN EQUITY.

4094. As to the origin of these bills it will not be required, in a work of this kind, to go into long details of their history; it will perhaps be sufficient to state that they have by degrees been reduced to a perfect system, though at first they were extremely simple, being a mere petition to the king, which was referred by him to his chancellor. In the course of time this petition was addressed to the chancellor himself; and afterward it assumed a regular and uniform frame. In it was stated the cause of complaint, and this was followed by a prayer to the court to grant suitable relief. Like every other thing human, by degrees the bill was improved to what we now find it.

Bills in equity were doubtless borrowed from the civil and canon law, and the latter was in many respects copied from the former. The early English chancellors were generally ecclesiastics, accustomed to the jurisprudence of those two systems, and naturally introduced into the English law many of the principles and maxims which they had learned, and which are founded for the most part in common sense and sound reason.

Equity pleading, which is the formal mode of alleging that on the record, which would be the support or defence of the party on evidence,<sup>(a)</sup> has become a science of considerable refinement, and of many nice distinctions, so that it requires much time, diligence, and attention, fully to master the subject, but which attention, diligence, and time will conquer. It will be the object of this title of the work to develop the principles of equity pleading, without however going into minute details.

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(a) *Read v. Brookman*, 3 T. R. 159. See *Bouv. L. D. Pleading*.

This title will be divided into two chapters, relating, 1, to the several kinds of bills; 2, to the frame of bills, or the analysis, or several parts of a bill.

CHAPTER I.—OF THE SEVERAL KINDS OF BILLS.(a)

4095. When considered as to their kinds, bills may be classified into, 1, original bills; 2, bills not original; 3, bills in the nature of original bills; 4, bills which derive their names from the object the complainant has in view.

SECTION 1.—OF ORIGINAL BILLS.

4096. An original bill is one which relates to some matter not before litigated in the court by the same persons and standing in the same interests. It is one which first brings before the court the matter which is in litigation, and not as assistant to any other proceeding.(b) These bills may pray relief against an injury sustained, or only seek assistance of the court to enable the plaintiff to defend himself against a possible injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills are, therefore, classed into those which, 1, pray for relief; 2, those which do not ask for relief.

§ 1.—Of original bills praying for relief.

4097. An *original bill* praying relief is one by which the plaintiff prays the court to secure him some right

(a) It is proper here to observe, in the words of Judge Story, that “a very large portion of the following remarks as to these different kinds of bills, is borrowed from Lord Redesdale’s Treatise, with little more than an occasional verbal alteration. I have not the presumption to suppose, that upon so complicated a subject I could add any thing to the remarks of this great master of equity, upon whose work the highest eulogy was pronounced by Lord Eldon, in *Lloyd v. Johnes*, 9 Ves. 541.” Other works and the books of Reports have been consulted, but little can be added to so perfect a work as that of Mr. Mitford, afterward Lord Redesdale. All the text writers upon this subject who have published their works, since that of Lord Redesdale was given to the profession, have made the same free use of his lordship’s labors.

(b) Mitf. by Jer. 33.

to which he is entitled, or to relieve him from some injury to which he is liable or for which he suffers unjustly. These bills are of three kinds.

*Art. 1.—Of bills praying relief touching some right.*

4098. A bill praying a decree or order *touching some right* claimed by the person exhibiting it, in opposition to some right claimed by the person against whom the bill is exhibited. In the most general sense, all bills may be said to pray for relief, all seek the aid of the court to remedy some existing or apprehended wrong or injury. But, in the sense used in courts of equity, bills only are deemed bills for relief, which seek from the court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree which shall ascertain and declare his present rights, or redress his present wrongs. Other bills, merely asking the aid of a court of equity against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction, are deemed bills not for relief.<sup>(a)</sup> The nature and frame of a bill praying relief will be fully considered in the next chapter.

*Art. 2.—Of a bill of interpleader.*

4099. A bill of *interpleader* is one by which the complainant claims no relief against either the plaintiff or defendant, but solicits to pay the money or deliver the property in dispute to the one to whom it justly, legally, or equitably belongs, and prays that he may be protected and relieved from the claim of either of them. The plaintiff does not pray a decree of the court touching the rights of the parties in the original suit, but simply for his own safety, so that he shall not be compelled to pay the debt he owes or perform his obligation twice.<sup>(b)</sup>

<sup>(a)</sup> Mitf. by Jer. 33, 34; Story, Eq. Pl. § 17.

<sup>(b)</sup> Bedell v. Hoffman, 2 Paige, 199. See Gibson v. Goldthwaite, 7 Ala. 281; Griggs v. Thompson, 1 Geo. Decis. 146; Hayes v. Johnson, 4 Ala. 267.

When examining the assistant jurisdiction of the courts of equity, this subject was fully examined, so that here it will not be necessary further to consider it.<sup>(a)</sup>

*Art. 3.—Of a bill of certiorari.*

4100. A bill of *certiorari*, is one which prays for a writ of *certiorari* to remove a suit from an inferior to a superior court of equity,<sup>(b)</sup> on account of some alleged incompetency of the inferior court, or because of injustice in its proceedings. In its form, this bill first states the proceedings in the inferior court, next its incompetency, by suggesting that the cause is out of its jurisdiction, or that the witnesses or the defendants live out of its jurisdiction, and cannot, in consequence of their age, infirmity, or the distance of the place, follow the suit there; or, that from some cause, equal justice is not likely to be done there, and it then prays a writ of *certiorari*, to certify and remove the record to the superior court. This kind of bill is seldom used in the United States.

§ 2.—Of original bills not praying relief.

4101. An original bill, not praying relief, is one which is brought to ascertain facts, or to secure the evidence of them. In these cases, of course, no relief is asked, the sole object being the discovery of the existence of facts, known to the defendant, and which the plaintiff seeks to discover from him, so that the same shall be used as evidence against him; or, in another case, he seeks to perpetuate the knowledge of facts and prevent the evidence from being lost. Bills not praying relief are of two kinds.

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<sup>(a)</sup> See B. 5, part 1, tit. 3, c. 1, s. 2, § 4, n. 3822.

<sup>(b)</sup> Mitf. by Jer. 34; Coop. Eq. Pl. 43.

*Art. 1.—Of a bill of discovery.*

4102. Every bill praying for relief is, in one sense, a bill of discovery, because the plaintiff asks the defendant to answer upon oath or affirmation as to all matters charged in the bill, and seeks from him a discovery of all such matters. But a bill of discovery, in its technical sense, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray for the stay of proceedings at law, till the discovery is made.

Having fully examined the subject of discovery, by whom, against whom, and for what cause a bill may be filed, when considering the assistant jurisdiction of courts of equity, the reader is referred for further examination to that place.(a)

*Art. 2.—Of bills to secure the testimony of witnesses.*

4103. When considering the assistant jurisdiction of courts of equity, it will be remembered, we examined the nature of, 1, a bill for the examination of witnesses *de bene esse*; and, 2, bills to perpetuate testimony. It will not be requisite to repeat that matter here.(b)

## SECTION 2.—OF BILLS NOT ORIGINAL.

4104. Bills not original, are those which are brought after some other bill has already been filed, between the parties, relating to the subject matter of the suit; they of course, always presupposed the existence of some other bill.

Sometimes there is an imperfection in the frame of a bill, which, till remedied, is a bar to the plaintiff's

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(a) Ante, B. 5, part 1, tit. 2, c. 1, n. 3474.

(b) Ante, B. 5, part 1, tit. 2, c. 2, n. 3747.

recovery. It may frequently be removed by amendment; but sometimes it remains undiscovered while the proceedings are in such a state that an amendment can be permitted by the practice of the court, for, after some event has occurred affecting the rights or interests of the parties, no amendment can be allowed. This is particularly the case where, after the court has decided upon the suit as framed, it appears to be necessary to bring some other matter before the court to obtain the full effect of the decision; so, when some other point appears necessary to be made, or some additional remedy is requisite, in order to do justice between parties.(a)

But when a suit is perfect in its institution, it may, by some subsequent event, to the filing of the bill, become defective, so that no proceeding can be had upon it, either as to the whole, or as to some part, with effect; or it may become abated either as to the whole, or as to a part of the bill. The first is the case where, although the parties to the suit remain before the court, some event subsequent to its institution has either made such a change in the interests of those parties, or given to some other person such an interest in the matters in litigation, that the proceedings, as they stand, cannot have their full effect. The other is the case, when, by some subsequent event, there is no person before the court by whom, or against whom, the suit, in whole or in part, can be prosecuted.(b)

Though it does not appear to be accurately ascertained in what cases a suit becomes defective, without being absolutely abated, and in what cases it abates as well as becomes defective; yet, it seems, that if by any means any interest of a party to the suit, in the matter in litigation, becomes vested in another, the

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(a) Mitf. by Jer. 56. See *Jones v. Jones*, 3 Atk. 110; *Goodwin v. Goodwin*, 3 Atk. 370.

(b) Mitf. by Jer. 56.

proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained.(a) And if such a change of interest is occasioned by, or is the consequence of, the death of a party, whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued in whole or in part; for, as far as the interest of the party extends, there is no longer any person before the court, by or against whom the suit may be prosecuted; and a married woman is incapable, by herself, of prosecuting the suit.(b)

It is not accurately ascertained, either, in what manner the benefit of a suit may be obtained, after it has become defective, or abated, by any event subsequent to its institution, as there is in the distinction between the cases where a suit becomes defective merely, and where it likewise abates. It seems, however, clear, that if any property or right in litigation, vested in a *plaintiff*, is transmitted to another, the person to whom it is transmitted is entitled to supply the defects of the suit, if become merely defective, and to continue it, or at least to have the benefit of it, if abated.(c) It seems also clear that if any property or right, before vested in the *defendant*, becomes transmitted to another, the plaintiff is entitled to render the suit perfect, if become defective, or to continue it, if abated, against the person to whom that property or right is transmitted.(d)

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(a) *Hoxie v. Carr*, 1 Sumn. R. 173, 177; *Mole v. Smith*, 1 Jac. & W. 665.

(b) *Mitf. by Jer.* 57. See numerous instances cited by Lord Redesdale, in his admirable *Treatise on Equity Pleading*. *Mitf. by Jer.* 57—60; *Quackenbush v. Leonard*, 10 Paige, 131. When a female *defendant* marries, the suit does not thereby become abated; in such case, it is only necessary to obtain an order that the suit proceed against her, by her new name, in conjunction with her husband, who is also to be named in the subsequent proceedings. *Ib.*

(c) *Deas v. Thorne*, 3 John. R. 543.

(d) *Mitf. by Jer.* 61.

The means of supplying the defects of a suit, continuing it, if abated, or obtaining the benefit of it, are, 1, by supplemental bill; 2, by bill of revivor; 3, by bill of revivor and supplement.

§ 1.—Of the supplemental bill.(a)

4105. A supplemental bill is, as has already been observed, one occasioned by some defect in a suit already instituted, whereby the parties cannot obtain complete justice, to which otherwise they would have been entitled, under the case stated in their bill. It is a continuation of the original bill, and will sustain the original bill by the allegation of facts, which did not exist until after the original bill was filed.(b) It is proper to consider, 1, in what cases such a bill may be filed; 2, its frame and particular requisites.

*Art. 1.—In what cases a supplemental bill is the proper remedy.*

4106. The cases in which a supplemental bill may be filed are numerous, and may in general be reduced to classes. The principal of these are the following:

1. When the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely.(c) Thus a supplemental bill may be filed to obtain a further discovery from the defendant, to put a new matter in issue, or to add parties, where the proceedings are in such state that the original bill cannot be amended for the purpose. And this may be done, as well after as before decree,

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(a) See Mitf. by Jer. 61; 3 Dan. Ch. Pr. 150; Coop. Eq. Pl. 73; Story, Eq. Pl. § 332; 1 Smith, Ch. Pr. 525.

(b) Hill v. Hill, 10 Ala. 527.

(c) Humphreys v. Humphreys, 3 P. Wms. 349; Brown v. Higdon, 1 Atk. 291; Sanders v. Frost, 5 Pick. 275; Chandler v. Pettit, 1 Paige, Ch. 168; Stafford v. Howlett, 1 Paige, 200.

but, whenever the same end may be obtained by amendment, the court will not permit a supplemental bill to be filed.(a)

2. When any new events or new matters have occurred since the filing of the bill, they may in general be introduced by a supplemental bill, for then the bill cannot be amended in these respects. The events and matters which can thus be introduced, must, however, be confined to such as refer to and support the rights and interests already mentioned in the bill.(b)

3. When, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court, to obtain the full effect of the decision ; or before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined (in which case an amendment is not in general permitted,) some other point appears necessary to be made, or some additional remedy is found requisite,(c) these may be supplied by a supplemental bill.

4. In like manner, such a bill may be filed when a party necessary to the proceedings has been omitted, and cannot be admitted by an amendment.(d)

5. When the interest of a *plaintiff*, *swing in autre droit*, entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property, under the same title, as in the case of new assignees under a commission of bankruptcy, upon the death or removal of former assignees,(e) or in the case of an executor or administrator, upon the deter-

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(a) *Stafford v. Howlett*, 1 Paige, 200 ; *Chandler v. Price*, 1 Paige, 168 ; Mitf. by Jer. 62.

(b) Story Eq. Pl. § 336 ; Mitf. by Jer. 63.

(c) Mitf. by Jer. 55. See *Jones v. Jones*, 3 Atk. 110 ; *Goodwin v. Goodwin*, 3 Atk. 370 ; Coop. Eq. Pl. 74.

(d) Mitf. by Jer. 61.

(e) *Anon.* 1 Atk. 88 ; S. C. 1 Atk. 571.

mination of an administration *durante minori etate*, or *pendente lite*, the suit may likewise be added to and continued by supplemental bill. In these cases, it will be observed, there has been no change of interests which can affect the question between the parties, but only a change of the person in whose name the suit may be prosecuted.(a)

6. If a *sole plaintiff*, *suing in his own right*, is deprived of his whole interest in the matters in question, by an event subsequent to the institution of a suit, as in the case of bankruptcy or insolvency, and the plaintiff's whole interest is assigned to another, the plaintiff has no longer any interest for which he can prosecute his suit, the assignees must claim by an original bill in the nature of a supplemental bill.(b)

7. When, by any event, the *whole interest of a defendant is entirely determined*, and the same interest is vested in another by a title not derived from a former party, as on the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described, must be obtained by original bill in the nature of a supplemental bill. But a distinction must be observed. If the interest of a defendant is *not determined*, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit has become defective merely, or abated as well as become defective.(c) In these cases the new party comes before the court exactly in the same plight and condition as the former party, is bound by

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(a) Mitf. by Jer. 64.

(b) See *Harrison v. Ridley*, Com. Rep. 589.

(c) See *Phillips v. Clark*, 7 Sim. 231.

his acts, and may be subject to all the costs of the proceedings from the beginning.(a)

In all these cases, if the suit has become abated as well as defective, the bill is commonly termed a supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor, continuing the suit.(b)

*Art. 2.—Of the frame or form of a supplemental bill.*

4107. Having ascertained in what cases it is proper to file a supplemental bill, let us in the next place consider the frame of such a bill. A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event and the consequent alteration with regard to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if the cause has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter. If, indeed, the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties defendant to the origi-

(a) Mitf. by Jer. 68.

(b) Mitf. by Jer. 68.

nal bill need not in general be made parties to the supplemental.(a)

§ 2.—Of the bill of revivor.(b)

4108. A bill of revivor is one which is brought for the continuance of an original bill, when, for some reason, it is suspended, so that the parties to it cannot proceed in the suit. Let us inquire in the first place, in what cases such a bill is allowed and required; secondly, by and against whom a bill of revivor may be brought; and, thirdly, the frame of a bill of revivor.

*Art. 1.—In what cases a bill of revivor is the proper remedy.*

4109.—1. This is the proper remedy whenever the suit abates by the death of one of the parties, and the interest of the party whose death has caused the abatement is transmitted to another, which the law gives or ascertains, as the heir at law, the executor or administrator, so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by a bill of revivor merely.(c)

4110.—2. The suit abates also by the marriage of a female plaintiff; when this takes place and there is no act done to affect the rights of the parties but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and, therefore, this suit may, in this case also, be continued by bill of revivor merely.(d) But upon the marriage of a female defendant the suit does not abate, though her husband ought to be named in the subsequent proceedings.(e)

(a) Mitf. by Jer. 75, 76; Coop. Eq. Pl. 83, 84; Rignall v. Atkins, 6 Madd. R. 369.

(b) See Story, Eq. Pl. § 354; Mitf. Eq. Pl. 68, 76; 3 Dan. Ch. Pr. 197; Coop. Eq. Pl. 63; 1 Smith's Ch. Pr. 511.

(c) Mitf. by Jer. 68.

(d) Mitf. by Jer. 69.

(e) Quackenbush v. Leonard, 10 Paige, 131, 133.

4111.—3. When there is an original bill and a cross bill thereto, and an abatement takes place, there must, in general, be a bill of revivor in each cause; but if the bills relate to an account, and there is a decree for an account, the two causes thereby become so consolidated, that one bill of revivor, praying for a revivor of the whole, will revive both causes.<sup>(a)</sup> For the same reason, where a bill, cross bill, and bill in the nature of a supplemental bill of revivor between the same parties, and on the same subject, all abated by the death of one of the parties in a partition suit, it was held that all the proceedings might be revived by one bill of revivor.<sup>(b)</sup>

4112. The reader must remember that the term *abatement* is not understood in equity in the same sense it is used at law. In the common law it means an entire overthrow of the action, so that it is quashed and ended. In equity an abatement signifies only a present suspension of all proceedings in the suit, because there are no proper parties capable of proceeding therein. At law, a suit when abated, is absolutely dead; in equity, it is merely suspended until revived.<sup>(c)</sup>

*Art. 2.—By and against whom a bill of revivor may be brought.*

4113. The suit may be revived by the plaintiff or his representatives, or those who claim in privity with him; and, in some cases, the defendant may bring a bill of revivor.

1. *Of bills of revivor by the plaintiff or his representatives.*

4114. When there is but one single plaintiff and one defendant, and the latter dies, the suit must be revived by the plaintiff against the representatives of

<sup>(a)</sup> Coop. Eq. Pl. 88; Hinde's Pr. 51.

<sup>(b)</sup> Wilde v. Jenkins, 4 Paige, 481, 500.

<sup>(c)</sup> Story, Eq. Pl. § 20, note, and § 354; Hoxie v Carr, 1 Sumn. 173. See Hawley v. Barnett, 4 Paige, 163; 3 Dan. Ch. Pr. 223.

the deceased. When the plaintiff dies, the suit must be revived by the representatives of the plaintiff;(a) and the same rule obtains, when the bill is brought by a creditor, in behalf of himself and all other creditors, and he dies, the suit may be revived by his personal representatives, and in case the latter do not choose to revive it, then any creditor, or at least any one who has proved his debt under a decree before the master, may by a supplemental bill continue the cause, and proceed in it for the benefit of all the creditors.(b)

In a case where there are several plaintiffs or several defendants, all having an interest which survives, the death of one of them makes an abatement only as to himself, and the suit is continued as to the rest who are living.(c) When, however, any thing is required to be done by or against the interests of the party who is dead, his proper representative must be brought into court by a bill of revivor. In case some of the plaintiffs, entitled to a bill of revivor, refuse to join, they may be made defendants.(d)

*2. Of bills of revivor by the defendant.*

4115. In some cases, when the defendant has an interest in the revival of a suit, he may himself bring a bill of revivor. As a general rule, after a decree, a defendant is allowed to file a bill of revivor, if the plaintiff or those standing in his right neglect to do it, because the rights of the parties are then ascertained, both the plaintiff and defendant being entitled to the benefit of the decree, and both having a right to prosecute it. But it must be remembered that a defendant

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(a) In some of the states, a substitution of the representatives may be made upon petition, by virtue of statutory provisions.

(b) In the matter of the Receiver of the City Bank of Buffalo, 10 Paige, 378; Mitf. by Jer. 79, note; Dixon v. Wyatt, 4 Madd. 393; Burney v. Morgan, 1 Sim. & Stu. 358.

(c) Mammond v. St. John, 4 Yeag. 107.

(d) Finch v. Lord Winchelsea, 1 Eq. Cas. Ab. 2, pl. 7; Nicoll v. Roosevelt, 3 John. Ch. 60.

cannot bring such a bill unless he can derive some benefit from the proceeding.<sup>(a)</sup> The bill of revivor, in this case, merely substantiates the suit, and brings before the court the parties necessary to the execution of the decree, and to be the object of its operations, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided.<sup>(b)</sup>

*Art. 3.—Of the frame of a bill of revivor.*

4116. A bill of revivor must state the original bill, the proceedings thereon, and the abatement; it must also show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with regard to the parties in the bill of revivor, as it was with respect to the parties in the original bill at the time the abatement happened; and it must pray that the suit be revived accordingly. It may also be necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revival merely; but, if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case, usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purpose of the suit, those accounts may be taken, and, so far, the bill is in the nature of an original bill.<sup>(c)</sup>

<sup>(a)</sup> Story, Eq. Pl. § 372; Coop. Eq. Pl. 68; Mitf. by Jer. 79.

<sup>(b)</sup> See *Finch v. Lord Winchelsea* 1 Eq. Cas. Ab. 2.

<sup>(c)</sup> Mitf. by Jer. 76; Judge Story, (Eq. Pl. § 374,) and Mr. Cooper, (Eq. Pl. 70,) have copied this passage from Lord Redesdale's Treatise, making a slight verbal alteration.

If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer may have been given, the bill of revivor, though requiring itself no answer, must pray that the person against whom it seeks to revive the suit, may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or to the amendment remaining unanswered.<sup>(a)</sup>

§ 3.—Of a bill of revivor and supplement.<sup>(b)</sup>

4117. This is a compound of a supplemental bill, and a bill of revivor, and not only continues the suit which has abated by the death of the plaintiff, or the marriage of a female plaintiff, but supplies any defects in the original bill, arising from subsequent events, so as to entitle the party to relief upon the whole merits of the case.

*Art. 1.—In what cases a bill of revivor and supplement is the proper remedy.*

4118. When a suit becomes abated, or by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement, or a devise, under certain circumstances, though a bill of revivor only may continue the suit, so as to enable the parties to prosecute it; yet to bring before the court the whole matter for its consideration, the parties must, by supplemental bill, added to and made a part of the bill of revivor, show the settlement, or devise, or other act, by which their rights are affected. And, in the same manner, if any other event which occasions an abatement, is accompanied or followed by any

<sup>(a)</sup> Mitf. by Jer. 76, 77; Coop. Eq. 70, 71.

<sup>(b)</sup> Mitf. by Jer. 70, 80; Story, Eq. Pl. § 387; 3 Dan. Ch. Pr. 150; Coop. Eq. Pl. 84.

matter necessary to be stated to the court, either to show the right of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by and against whom the cause is to be revived, the matter must be set forth by way of supplemental bill, added to the bill of revivor.<sup>(a)</sup>

*Art. 2.—Of the frame of a bill of revivor and supplement.*

4119. A bill of revivor and supplement is merely a compound of those two species of bills, and, in its separate parts, must be framed and proceeded upon in the same manner.<sup>(b)</sup>

SECTION 3.—OF BILLS IN THE NATURE OF ORIGINAL BILLS.

4120. Bills of this class are of a mixed nature, they are not strictly original bills, because they always relate to some other bill already filed; and though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain the reversal of a decision, are not considered a continuance of the former bill; they are, in fact, in the nature of an original bill. These bills are brought for the purpose of cross litigation. They consist of, 1, cross bills; 2, bills of review; 3, bills in the nature of bills of review; 4, bills to impeach a decree for fraud; 5, bills to carry decrees into execution; 6, bills to avoid the operation of a decree; 7, original bills in the nature of bills of revivor; 8, supplemental bills in the nature of original bills.

§ 1.—Of cross bills.<sup>(c)</sup>

4121. A cross bill is one brought by a defendant

<sup>(a)</sup> Mitf. Eq. Pl. 71; Ross v. Hatfield, 1 Green, Ch. R. 363, 366; Garrett v. Noble, 6 Sim. 504.

<sup>(b)</sup> See Bampton v. Birchall, 5 Beav. 330.

<sup>(c)</sup> See Mitf. Eq. Jer. 80; Story, Eq. Pl. § 389; Coop. Eq. Pl. 85; 1 Smith, Ch. Pr. 459; Welf. Eq. Pl. 223; 1 Mont. Eq. Pl. 327.

against a plaintiff, or other party, in a former bill depending, touching the matter in question in that bill.(a) A bill of this kind is usually brought to obtain either a necessary discovery, or full relief to all parties.

Like many other proceedings, particularly in equity, this bill owes its origin manifestly to the Roman law; from that system of jurisprudence it was transplanted into the canon law, and from the latter borrowed by the English courts of equity. By the Roman and canon laws, when the *reus*, or defendant, was brought in to answer, he was said to be convened, which the canonists called *conventio*, because the plaintiff and defendant met to contest; and, as the defendant might have demands against the plaintiff, he would exhibit a bill against him which was called *reconventio*.(b)

A cross bill may be considered with regard to, 1, the cases in which it may be brought; 2, the time when it may be brought; 3, the frame of the bill.

*Art. 1.—In what cases a cross bill may be brought.*

4122. A bill of this kind is usually brought either to obtain the necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties, touching the matters of the original bill.

1. A cross bill for discovery is required because the plaintiff cannot be examined as a witness in his own suit, and when his testimony is wanted by the defendant as to any material facts, it must be obtained by means of a cross bill.(c)

(a) Mitf. Eq. Pl. 80, 81.

(b) Bouv. L. D. Reconvention; Voet, in tit. de Judiciis, n. 78. In Louisiana, to entitle a defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it, and incidental to the same. Co. of Pract. of Lo. art. 375; 11 Lo. Rep. 309; 7 N. S. 282; 4 N. S. 439; 8 N. S. 516. See further, as to the origin of the cross bill, *White v. Bu-loid*, 2 Paige, 164; *Gilb. For. Rom.* 45, 47; 2 Bro. Civ. Law, 348; Code, 7, 45, 14; Dig. 2, 1, 11; Nov. 96, c. 2; Story, Eq. Pl. § 402.

(c) The rules of equity prevent a defendant from examining a plaintiff. *Mayor of Colchester v. ———*, 1 P. Wms. 595.

2. A cross bill for relief is wanted particularly when any question arises between two defendants to a bill, and the court cannot make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon proofs. In this case, it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, to bring the litigated point properly before the court.(a)

*Art. 2.—Of the time when a cross bill may be sued.*

4123. The proper time for filing a cross bill, when such bill is necessary, is at the time of putting in the answer to the original bill, and before issue is joined by the filing of a replication to such answer.(b) It must be brought before publication is passed on the first bill,(c) and not after, except the plaintiff in the cross bill go to the hearing on the depositions already published; because of the danger of perjury and subornation of perjury, if the parties should, after publication of the former depositions, examine witnesses *de novo* to the same matter before examined into.(d)

4124. But a cross bill may be filed to answer the purpose of a plea *puis darrein continuance* at common law. For example, when pending a suit, and after replication and issue joined, the defendant having obtained a release, he attempted to prove it *viva voce* at the hearing, it was determined that the release not

(a) Mitf. by Jer. 81.

(b) Irving v. De Kay, 10 Paige, 319; 3 Barb. S. C. Rep. 151.

(c) 1 John. Ch. 62; Talbott v. McGee, 4 Monroe, 379; Pattison v. Hull, 9 Cow. 747; Carnochan v. Christie, 11 Wheat. 446.

(d) Field v. Schieffelin, 7 John. Ch. 250. See White v. Buloid, 2 Paige, 164; Gouverneur v. Elmendoof, 4 John. Ch. 327.

being in issue in the cause, the court could not try the facts, or direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue.<sup>(a)</sup>

4125. Sometimes, on the hearing of a cause, it appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens when persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if, upon the hearing of the cause, the difficulty appears, and a cross bill has not been filed to remove it, the court will direct a bill to be filed, in order to bring all the rights of the parties fully before the court for its decision; and will reserve the directions or declarations, which it may be necessary to give or make touching the matter not fully in litigation under the former bill, until this new bill has been brought to a hearing.<sup>(b)</sup>

*Art. 3.—Of the frame of a cross bill.*

4126. A cross bill should state the original bill, and the proceedings thereon, and the rights of the parties exhibiting the bill, which are necessary to be made the subject of cross litigation, on the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But a cross bill being considered as a defence, or as a proceeding to procure a complete determination of matter already in litigation in the court, the plaintiff is not, at least, as

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<sup>(a)</sup> *Hayne v. Hayne*, 3 Ch. Rep. 19; 3 Swanst. 472.

<sup>(b)</sup> *Mitf. by Jer.* 82, 83.

against the plaintiff in the original suit, obliged to show any ground of equity to support the jurisdiction of the court.(a)

§ 2.—Of bills of review.

4127. A bill of review is one whose object is to procure an examination and reversal of a decree made upon a former bill, which decree has been signed and enrolled. It is a proceeding in the nature of a writ of error at common law.(b) A bill of review may be considered with regard to, 1, the cases when it is proper; 2, the time when it must be brought; 3, the frame of such bill; 4, the supplemental bill in the nature of a bill of review.

*Art. 1.—In what cases a bill of review is the proper remedy.*

4128. A bill of review is the proper remedy only in two cases, first for an error in law, apparent in the body of the decree, without further examination of matters of fact; and, secondly, for some new matter which has arisen since the decree, and not any new proof, which might have been used when the decree was made.(c)

1. *Of a bill of review for an error in law.*

4129. The error in law for which a bill of review may be filed must be apparent upon the record, upon the face of the decree itself; it is not sufficient that the appellate court might reverse upon the whole case;(d) for example, when a decree is made absolute against a person, who upon the face of it appears to

(a) Mitf. by Jer. 81, 82; Doble' v. Potman, Hardr. 160.

(b) 3 Gilm. R. 2.

(c) Bacon's Ord. n. 1. See Quarrier v. Carter, 4 H. & Munf. 242; Gullett v. Housh, 7 Blackf. 52; Respass v. McClenahan, 2 A. K. Marsh. 579; Hollingsworth v. McDonald, Harr. & John. 230.

(d) P. & M. Bank v. Dundas, 10 Ala. 661.

be an infant. A bill of this nature may be brought without leave of court.(a)

In England errors in law must appear upon the face of the decree, and the court will not look further into the record; there the decree is made with much care, and it embodies a statement of the material facts on which it proceeds, and if the error does not appear upon its face, no bill of review can be maintained for an error in law. In the courts of the United States, on the contrary, the decrees are usually made in general terms, without any such statement of facts. In England the decree embodies the substance of the bill and pleadings; here, it refers merely to such pleadings and proceedings, without embodying them. It is evident, therefore, that there must be a difference between our practice and the English.(b) Here, for the purpose of examining errors of law, the bill, answer and other proceedings are as much a part of the record before the court, as the decree itself; for it is only by an examination of such proceedings that the correctness of the decree can be ascertained.(c)

4130. Before a bill of review can be brought, the decree must first be obeyed and performed, as if it be for land, the possession must be given up; if for money, the money must be paid; if for evidences, the evidences must be brought in; and so in other cases.(d) But to this rule there are some exceptions,

(a) *Webb v. Pell*, 1 Paige, 564; *Edmonson v. Moseby's heirs*, 4 J. J. Marsh. 500; *Bleight v. McIlvoy*, 4 Monroe's R. 145. See *Urquhart v. Urquhart*, 13 Sim. 623.

(b) It seems that bills of review will lie in South Carolina for the same cause that they are allowed in England. *Haskell v. Rooul*, 1 McCord's Ch. 29.

(c) *Dexter v. Arnold*, 5 Mason, 311; *Ludlow v. Kidd*, 4 Haywood, 381.

(d) *Lord Bacon's Ord. n. 3*; *Livingston v. Hubbs*, 3 John. Ch. 124; *Wiser v. Blackley*, 3 John. Ch. 488. It has been held that placing the amount of a decree in equity in the hands of a master in bank notes, is such substantial compliance with the order of the court as will save the party from an imputed neglect or contempt, and authorize the filing of a bill of review. *Taylor v. Pearson*, 2 Hawks, 298.

which are intended to prevent injustice, and to relieve the party, against whom the decree has been made, from some hardships; the principal of which are,

1. That where the act to be done extinguishes the party's rights at common law, as making of assurances or releases, acknowledging satisfaction, cancelling bonds or evidences, and the like, the parts decreed are to be spared until the bill of review be determined; but such sparing is to be warranted by a public order made in court.(a)

2. Another exception is, when a sum of money has been ordered to be paid, and the party is too poor to pay it, he may have a bill of review without paying it.(b)

4131. A bill of review can be brought only by the parties and their privies in representation, such as heirs, executors, and administrators;(c) a party who has no interest in the question intended to be presented by a bill of review, and when he cannot be benefited by the reversal or modification of the former decree, he cannot bring a bill of review, as that would be entirely nugatory.(d) Nor can any one have a bill of review, although he may have an interest in the cause, if not aggrieved by the particular errors assigned in the decree, however injuriously the decree may affect the rights of third persons.(e)

4132. It is not for every error appearing upon the face of the decree that a bill of review will be allowed. Any error in figures, as in miscasting, may be explained and reconciled by an order, without a review; and by the term *miscasting* is not to be understood any pretended miscasting or misvaluing, but only error in auditing and numbering.(f)

(a) Lord Bacon's Ord. n. 4.

(b) Coop. Eq. Pl. 90; 1 Vern. 117, 264.

(c) Kennedy v. Ball's heirs, Litt. Sel. Cas. 125.

(d) Webb v. Pell, 3 Paige, 368.

(e) Thomas v. Harvie's heirs, 10 Wheat. 146.

(f) Lord Bacon, Ord. n. 2; Young v. Henderson, 2 Hayw. 189.

Nor can error in matter of form only, though apparent on the face of a decree, be considered as sufficient ground for reversing a decree; and matter in abatement has also been treated as not capable of being shown for error to reverse a decree.(a)

*2. Of a bill of review on the ground of new matter.*

4133. Lord Bacon's ordinance, which has been the constant rule in chancery, directs that "no decree shall be reversed, altered, or explained, once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain, either error in law, appearing in the body of the decree, without further examination of matters of fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made; nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."(b)

A bill of review may, therefore, be brought upon discovery of new matter, as a release, or a receipt since discovered; but the constant construction which has been put on this part of Lord Bacon's rule, is, that the new matter must have come to the knowledge of the party after publication passed. As a bill of review, for such a cause, cannot be filed without leave of court, it is requisite that the facts on which the application is made, should appear by affidavit.

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(a) *Jones v. Kenrick*, 5 Bro. P. C. 244, Toul. ed.; *Slingsby v. Hale*, 1 Cas. in Ch. 122.

(b) Lord Bacon's Ord. n. 1. When the bill of review is to reverse the decree for an error in law, it may in general be filed without leave of the court; if it is on the ground of newly discovered facts, leave of court must be obtained. In Virginia no bill of review can be filed, in either case, without leave of court. *Elzey v. Lane's Executors*, 2 H. & M. 591, note; *Quarrier v. Carter's Representatives*, 4 H. & M. 242.

4134. The affidavit must distinctly and positively show two facts, without which no bill of review can be obtained, on the ground of newly discovered matter.

1. In the first place, the matter must appear to be relevant and material, and such as, if known, might probably have produced a different determination. It must be new matter, to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish an old one.(a)

2. It must appear, secondly, that the new matter has come to the knowledge of the party, after the time when it could have been used in the cause at the original hearing; that is, the new matter must have been discovered after publication has passed.(b)

The new matter must not only have been discovered since publication, but it must be such as the party by the use of reasonable diligence could not have known; for the law in all cases requires a party to attend to his rights, and he will not in general be relieved from the effects of his own negligence or supineness: *vigilantibus non dormientibus jura subveniunt*.(c)

It has been questioned, whether the discovery of new matter, not in issue in the cause in which a decree has been made, could be the ground of a bill of review; and whether the new matter on which bills of review have been founded, has not always been new matter to be used in evidence to prove matter in issue, in some manner in the original bill.(d) It has, however, been established, that matter discovered after a decree has

(a) Coop. Eq. Pl. 91; Story, Eq. Pl. § 413; Dexter v. Arnold, 5 Mason, 312; Mitf. by Jer. 85; Quick v. Lilly, 2 Green's Ch. 255.

(b) Mitf. by Jer. 84, 85; Dexter v. Arnold, 5 Mason, 312; Story, Eq. Pl. § 413; Coop. Eq. Pl. 90; Livingston v. Hubbs, 3 John. Ch. 124; Talbott v. Todd, 5 Dana, 197; McCracken's heirs v. Finley, 1 Bibb, 455; Griggs v. Gear, 3 Gilm. Rep. 2.

(c) Dexter v. Arnold, 5 Mason, 312; Livingston v. Hubbs, 3 John. 124; Pendleton v. Fay, 3 Paige, 304; Gullet v. Housh, 7 Blackf. 52; McCracken's heirs v. Finley, 1 Bibb, 455.

(d) Mitf. by Jer. 85.

been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a bill of review, or of a supplemental bill, in the nature of a bill of review.<sup>(a)</sup>

4135. Notwithstanding it may have been established that the facts are material, and they have been discovered since publication, and they could not have been obtained by due diligence at any time before; yet it is in the discretion of the court whether to grant or refuse a bill of review; looking at all the circumstances, the court will not grant it when it may be productive of injury to innocent persons, or when the original bill contains no equity,<sup>(b)</sup> or when, for any other cause, it is unadvisable.<sup>(c)</sup>

*Art. 2.—Of the time within which a bill of review must be brought.*

4136. Although bills of review are not within the statute of limitations, yet a court of equity of the United States, in analogy to the provisions of the judiciary act concerning appeals, will not allow a bill of review to be filed after five years, when the bill of review is to correct errors apparent upon the decree.<sup>(d)</sup>

There can be no doubt that lapse of time would be a good bar to a bill of review upon newly discovered facts and evidence, if not brought within the time limited for writs of error.<sup>(e)</sup> But it may be questioned whether any bill of review will lie after a lapse of that period from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery of the new facts and

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<sup>(a)</sup> Partridge v. Osborne, 5 Russ. 195.

<sup>(b)</sup> Todd v. Lackey, 1 Litt. 271.

<sup>(c)</sup> Thomas v. Harvie's heirs, 10 Wheat. 146; Wood v. Mann, 2 Sumn. 316; Ord v. Noel, 6 Madd. 127.

<sup>(d)</sup> Thomas v. Harvie, 10 Wheat. 146.

<sup>(e)</sup> Bucknor v. Forker's heirs, 7 Dana, 51.

evidence. As the courts have a discretion, in these cases, they always take these circumstances of time into consideration, to form their judgment as to the propriety of granting or refusing a bill of review.(a)

*Art. 3.—Of the frame of a bill of review.*

4137. In a bill of this nature, it is necessary to state the former bill and the proceedings thereon;(b) the decree, and the point upon which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered, upon which he seeks to impeach it; and when the decree is impeached upon the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery. It has been doubted whether, after leave given to file the bill, that fact is traversable; but this doubt may be questioned if the defendant to the bill of review can offer evidence that the matter alleged in the bill of review was within the knowledge of the party who might have taken the benefit of it in the original cause.(c)

The bill may pray simply that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution. When it has been carried into execution, the bill may also pray the further decree of the court, to put the party complaining of the former decree into the situation in which he would have been, if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. And when the original has become abated,

(a) See *Thomas v. Harvie*, 10 Wheat. 146, 151; Mitf. by Jer. 88.

(b) *Turner v. Berry*, 3 Gilman, R. 541; *Dougherty v. Morgan*, 6 Monroe, 153.

(c) Upon the petition for leave to file a bill of review, the court allowed the adverse party to file counter affidavits. *Dexter v. Arnold*, 5 Mason, 308, 309.

this bill may also be made a bill of revivor.<sup>(a)</sup> A supplemental bill may likewise be added if any event has happened which requires it; and in such case the bill may partake of the compound character of a bill of review, of revivor, and of supplement, and be maintainable if it present facts which go to the merits of the original decree.<sup>(b)</sup> A supplemental bill must be added to the bill of review, particularly when any person not a party to the original suit becomes interested in the subject; he must be made a party to the bill of review by way of supplement.<sup>(c)</sup>

*Art. 4.—Of a supplemental bill in the nature of a bill of review.*

1. *In what cases this bill lies.*

4138. A distinction has been made as to the remedy between the cases of a decree signed and enrolled, and one which is not so signed and enrolled. In the English courts of equity, the enrolment of the decree is essential to what is called, by way of preëminence, a bill of review; for when the decree is not enrolled, then a bill in the nature of a bill of review, is the appropriate remedy. Though in most of the state courts of equity, and in the courts of the United States, all decrees in equity, as well as judgments at law, are matter of record, and deemed to be enrolled, as of the term of the court at which they are passed, whether actually enrolled or not; so that in those courts a bill of review is the ordinary and appropriate proceeding; yet the distinction is maintained in some other courts, and when the bill has not been actually signed and enrolled, the proper remedy is by a species of supplemental bill, in the nature of a bill of review, when

(a) See *Wilkinson v. Parish*, 3 Paige, 653.

(b) *Whiting v. The Bank of the United States*, 13 Peters, 6, 13.

(c) *Sands v. Thorowgood*, Hardr. 104; Mitf. by Jer. 89, 90.

any new matter has been discovered since the decree.(a)

As a decree not signed and enrolled may be altered upon a rehearing without the assistance of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings, the investigation of the decree must be brought on by a petition of rehearing; and the nature of a supplemental bill in the nature of a bill of review, is to supply the defect which occasioned the decree in the former bill.

It is necessary to obtain the leave of the court to bring a supplemental bill of this nature, and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review on discovery of new matter.

*2. Of the frame of a supplemental bill in the nature of a bill of review.*

4139. In its frame, this bill resembles a bill of revivor, except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause of action may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.(b)

§ 3.—Of bills in the nature of a bill of review.

4140. When a bill is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against an error in the decree, by a bill in the nature

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(a) See *Wiser v. Bluckley*, 2 John. Ch. 488; *Haskell v. Rooul*, 1 McCord, Ch. 29; *Hollingsworth v. McDonald*, Har. & John. 230.

(b) Mitf. by Jer. 92.

of a bill of review. For example, when a decree is made against a tenant for life only, a remainder man in tail or in fee cannot defeat the proceedings against the tenant for life, but by a bill showing error in the decree, the incompetency of the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and, for that purpose, that the other party may appear to and answer this new bill, that the rights of the parties may be properly ascertained.(a)

As a bill of this nature does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, it may be filed without leave of the court.(b)

§ 4.—Of bills to impeach a decree for fraud.

*Art. 1.—In what cases a bill to impeach a decree for fraud is the appropriate remedy.*

4141. A bill to impeach a decree for fraud is an original bill in the nature of a bill of review. It is a general rule, that fraud vitiates every thing, as well judgments at law as decrees of courts of equity, contracts, and all kinds of engagements. Fraud taints every thing it touches. If a decree has been obtained by fraud, it may be impeached by this sort of bill, which may be filed without leave of court. The fraud used in obtaining the decree being the principal point in issue, it must necessarily be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be.(c)

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(a) *Hepburn v. Dunlop*, 1 Wheat. 179, 195.

(b) *Osborne v. Usher*, 6 Bro. P. C. 20, Toml. ed.; Mitf. by Jer. 92.

(c) *Birne v. Hartpole*, 5 Bro. P. C. 197, Toml. ed.

Beside the cases of direct fraud in obtaining a decree, cases where a fraud is implied will be treated as fraudulent, and the parties may be relieved by this sort of a bill. And it has been said, that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill.<sup>(a)</sup> When a decree has been made by consent, and the consent has been fraudulently obtained, the party grieved can only be relieved by original bill.

*Art. 2.—Of the frame of the bill to impeach a decree for fraud.*

4142. Such a bill must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.<sup>(b)</sup> The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court.<sup>(c)</sup>

§ 5.—Of bills to carry decrees into execution.

*Art. 1.—In what cases these bills give a proper remedy.*

4143. The necessity of this kind of bill generally arises when persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights have become embarrassed by subsequent events, and it is necessary to have a decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution; or it may be brought by or against a person claiming as assignee of a party to the decree. The court, in these cases, in general, only enforces and

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<sup>(a)</sup> See *Massie v. Matthew's Executors*, 12 Ohio, 351.

<sup>(b)</sup> *Pendleton v. Galloway*, 9 Ohio, 178.

<sup>(c)</sup> *Mitf. by Jer.* 94.

does not vary the decree ; but, under certain circumstances, it has sometimes considered the directions, and varied them in case of a mistake.(a) And it has even, on circumstances, refused to enforce the decree, though in other cases it seems to have been considered that the law of the decree ought not to be examined on a bill to carry it into execution.(b)

Such a bill may also be brought to carry into execution the judgment of an inferior court of equity, if the jurisdiction of the court is not equal to the purpose.

*Art. 2.—Of the frame of a bill to carry a decree into execution.*

4144. A bill for this purpose is, generally, partly an original bill, and partly a bill in the nature of an original bill, though not strictly original, and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The form of the bill is varied accordingly.

§ 6.—Of bills to avoid the operation of a decree.

4145. The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. An example of this is given in the English law. During the troubles after the death of Charles the First, upon a decree for a foreclosure in the case of non-payment of principal, interest and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequence of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in ; the court, upon a new bill, enlarged the time for performance of

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(a) *Este v. Strong*, 2 Ohio, 418 ; S. C. 2 Ham. 401.

(b) *Mitf. by Jer.* 95, 96. See *Attorney General v. Day*, 1 Ves. sen. 218.

the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree.(a)

§ 7.—Of original bills in the nature of bills of revivor.

*Art. 1.—Of the cases in which such a bill may be brought.*

4146. A bill in the nature of a bill of revivor is one which is filed, when the death of a party whose interest is not determined by his death, is attended with such transmission of his interest, that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of real estate, the suit is not permitted to be continued by a simple bill of revivor. An original bill, upon which the title may be litigated, must be filed, and this bill will have the effect of a bill of revivor, that if the title of the representative, by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by bill of revivor.(b)

4147. The bill is said to be original merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by a bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by, and have advantage of, the proceedings on the original bill, as if there had been such privity between him and the party to the original, claiming the same interest; and the suit is considered as pending from the filing of the original bill, so as to save

(a) *Cocker v. Bevis*, 1 Cas. in Ch. 61.

(b) 1 Vern. 427; 2 Vern. 548; 2 Vern. 672.

the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross bill, and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely.(a)

*Art 2.—Of the frame of an original bill in the nature of a bill of revivor.*

4148. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it.(b)

§ 8.—Of supplemental bills in the nature of original bills.

*Art. 1.—Of cases in which such a bill is proper.*

4149. A distinction has been made between a supplemental bill and an original bill, in the nature of a supplemental bill, which is said to be founded rather upon formal technical rules than upon any substantial difference. Indeed, the books usually confound them together. The most prominent distinction between them seems to be that a supplemental bill is applicable to cases only, where the same parties, or the same interest remains before the court; whereas, an original bill, in the nature of a supplemental bill, is properly applicable, when new parties, with new interests, arising from events which have happened since the commencement of the suit, are brought before the court.(c)

This bill, though partaking of the nature of a supplemental bill, is not an addition to the general bill,

(a) *Child v. Frederick*, 1 P. Wms. 266; Mitf. by Jer. 97, 98.

(b) Mitf. by Jer. 97.

(c) Story, Eq. Pl. § 345 to 353, and the cases there cited.

which, in its consequences, may draw to itself the advantage of the proceeding of the former bill.(a)

*Art. 2.—Of the frame of a supplemental bill in the nature of an original bill.*

4150. A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party, by or against whom the former bill was exhibited, and the manner in which the property has become vested in the person become entitled. It must show the ground upon which the court ought to grant the benefit of the former suit, to or against the person so become entitled; and pray the decree of the court, adapted to the case of the plaintiff in the new bill.(b)

SECTION 4.—OF BILLS WHICH DERIVE THEIR NAMES FROM THE OBJECT THE COMPLAINANT HAS IN VIEW.

4151. There are numerous bills which derive their names from the object which the complainant has in view. These, although classed together, are nevertheless those which might be placed under some of the heads which have been considered. The principal of these are, 1, bills of foreclosure; 2, bills of information; 3, bill to marshal assets; 4, bill for a new trial; 5, bills of peace; 6, bills *quia timet*.

§ 1.—Of the bill of foreclosure.

4152. A bill of foreclosure is one filed by a mortgagee against the mortgagor, for the purpose of barring the mortgagor's equity of redemption, or his right to redeem the mortgaged premises, so that he shall be forever foreclosed.

This bill may be filed when the mortgagor has forfeited his estate by non-payment of the money due on

(a) Mitf. by Jer. 99.

(b) Mitf. by Jer. 99.

the mortgage at the time appointed, but still retains the equity of redemption. This bill calls upon the mortgagor to redeem his estate presently, or in default thereof, to be forever closed and barred from any right of redemption.(a)

§ 2.—Of bills of information.

4153. A bill of information, or simply, an information, is a proceeding to institute a suit in chancery on behalf of the state or government, or those who partake of its prerogative, or whose rights are under its peculiar protection, as the objects of a public charity. It is commenced by information in the name of the attorney general, and differs from other bills little more than in name. If the information *immediately* concerns the rights of the state, it is generally exhibited without a relator; if it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information, and is termed a *relator*; the officers of the state, in such or the like cases, are not further concerned than as they are instructed or advised by those whose rights the state is called upon to protect and establish.(b)

4154. It sometimes happens that the relator has an interest in the matter in dispute, in connection with the government, of the injury to which interest he has a right to complain. In this case, his personal complaint being joined to, and incorporated with, the information given to the court by the officer of the government, they form together an *information and bill*, and are so termed.(c)

(a) See Story, Eq. Pl. § 199; 1 Madd. Ch. Pr. 528.

(b) Blake's Ch. Pr. 50. See Har. Ch. Pr. 151; Coop. Eq. Pl. 101; Mitf. by Jer. 22, 23; Story, Eq. Pl. § 8.

(c) See Attorney General v. Oglender, 1 Ves. jun. 247; Attorney General v. Brown, 1 Swanst. 265; Attorney General v. Heelis, 2 Sim. & Stu. 67; Attorney General v. East India Co., 11 Sim. 380.

## § 3.—Of bill to marshal assets.

4155. A *bill to marshal assets*, is one filed in favor of simple contract creditors, and of devisees, legatees or heirs, but not in favor of next of kin, to prevent specialty creditors who have a claim upon the personal and real estate of a deceased person, from exhausting the personal estate to their injury, or of being substituted in their place.(a)

## § 4.—Of a bill for a new trial.

4156. This is a bill filed in a court of equity, praying for an injunction after judgment at law, when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law; or, if he could so have availed himself, he was prevented by fraud or accident, unmixed with any fault of himself or his agent.(b) A bill of this kind is called a *bill for a new trial*.(c) These bills are not favored; indeed, of late years, they have been much discountenanced.(d)

## § 5.—Of bills of peace.

4157. A *bill of peace*, is one which is filed by a person who has a right which may be controverted by various persons, at different times, and by different actions; in such case, to prevent a multiplicity of suits, the court will direct an issue to determine the right, when a bill of this kind has been filed, and ultimately grant an injunction.(e) This subject having been fully considered when we examined the exclusive

(a) 1 Madd. Ch. Pr. 615; Jer. Eq. Jur. 528, 529.

(b) See *Dodge v. Strong*, 2 John. Ch. 228.

(c) Mitf. by Jer. 131; Story, Eq. Pl. § 887.

(d) Mitf. by Jer. 131.

(e) 1 Madd. Ch. Pr. 166; 1 Harr. Ch. Pr. 104; Blake's Ch. Pr. 48; Jer. Eq. Jur. 343; 2 Story, Eq. Jur. § 852 to 860.

jurisdiction of courts of equity, it will not be requisite here further to extend our inquiries.(a)

§ 6.—Of bills *quia timet*.

4158. A bill *quia timet*, is one which is filed when a person is entitled to property of a personal nature after another's death, *because he fears* it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable or even possible to happen, or be occasioned by the neglect, inadvertence, or culpability of another.(b)

Upon a proper case being made out, the court will, in one case, secure for the use of the party the property to secure which is the object of the bill, by compelling the person in possession of it, to guarantee the same by a proper security, entered into for that purpose, against any subsequent disposition or wilful destruction; and, in the other, they will quiet the party's apprehension of future inconvenience, by removing the causes which lead to it.(c)

The rules which relate to bills *quia timet* engaged our attention when we considered the peculiar remedies of courts of equity, so that here no further examination will be required.(d)

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CHAPTER II.—OF THE ANALYSIS OR SEVERAL PARTS OF A BILL.

4159. In substance, the bill in a suit in equity answers to the declaration in an action at common law, to the libel or *libellus articulus* of the civil and

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(a) See B. 5, part 1, t. 3, c. 1, sec. 2, § 3, n. 3820.

(b) See *Lewen v. Stone*, 3 Ala. 485; *Randolph v. Kinney*, 3 Rand. 394; *Redd v. Wood*, 2 Geo. Decis. 174; *Pebles v. Estill*, 7 J. J. Marsh. 408; *Green v. Hankinson*, Walker, 487.

(c) 1 Harr. Ch. Pr. 107; 1 Madd. Ch. Pr. 218; *Blake's Ch. Pr.* 37, 47; 2 Story, Eq. Jur. § 825 to 851.

(d) See B. 5, part 1, t. 3, c. 1, sec. 2, § 2, n. 3804.

canon law, a libel in the admiralty, or an allegation in the spiritual courts.

The *form* of a bill in equity has been greatly changed, as has already been observed, from what it was in its origin. It now consists of nine parts, which will be separately examined; and in a tenth section will be considered the necessity of the several parts of such a bill and its other requisites.

SECTION 1.—OF THE ADDRESS OF THE BILL.

4160. The first part of the bill is the *address* of the instrument to the court from which the plaintiff seeks relief. This address of course contains the appropriate and technical description of the court, as, “To the Judges of the Circuit Court of the United States for the District of New Jersey.”

SECTION 2.—OF THE NAMES AND DESCRIPTION OF THE PARTIES.

4161. The *introduction* is contained in the second part. It consists of the names of the parties complainants, and their descriptions, in which their abode is particularly required to be set forth, that the court, and the parties defendants to the bill, may know where to resort to compel obedience to the orders or process of the court, and particularly for payment of any costs, which may be awarded against the plaintiffs, or to punish them for any improper conduct in the course of the suit. The omission to state this, if it would not be ground for demurrer,<sup>(a)</sup> might subject the plaintiff to give security for costs.

This part of the bill should also show in what character the plaintiff sues, whether in his own right or *autre droit*, and such other description as is required to give the court jurisdiction. For example, when a suit is in the circuit court of the United States, the

(a) 1 Dan. Ch. Pr. 463; *Howe v. Harvey*, 8 Paige, 73.

plaintiff must allege that he is a citizen of a particular state ; as, "A B, of Trenton, and a citizen of the state of New Jersey, brings this, his bill, against C D, of New York, and a citizen of the state of New York. And thereupon your orator<sup>(a)</sup> complains and says, that," etc.<sup>(b)</sup>

The names and description of the defendants may be stated in this part of the bill, as above, or they may be named and described in the next part. The object of describing them is to know where and to whom the court and parties may resort to compel obedience to any order or process of the court.<sup>(c)</sup>

### SECTION 3.—OF THE PREMISES OR STATING PART OF THE BILL.

4162. The third part contains the case of the plaintiff, and is commonly called the *stating part* of the bill. It is a narrative of the facts and circumstances of the plaintiff's case, and of the wrong and grievance of which he complains, and the names of the persons by whom done and against whom he seeks redress.<sup>(d)</sup>

The facts which must be stated in this part of the bill may be considered with regard to those which relate to, 1, the title of the plaintiff to recover ; 2, the certainty with which they must be stated ; 3, the materiality of the plaintiff's statement ; 4, the multifariousness of the statement ; 5, the splitting of a cause of action ; 6, the statement of the jurisdiction of the court.

(a) The plaintiff entitles himself your orator, or oratrix, according to the sex.

(b) Rules of Practice for the Courts of Equity of the U. S., Rule 20.

(c) No one is considered a party defendant to a bill in chancery, except such as is described and known as such, and against whom a subpoena is prayed. *Carey v. Hillhouse*, 5 Geo. Rep. 251. See 2 John. Ch. 245 ; 2 Paige, 449, 450 ; 1 Marsh. Ken. Rep. 594.

(d) *Barton's Suit in Eq.* 27 ; *Mitf. Eq. Pl.* § 43 ; *Story, Eq. Pl.* § 27 ; *Coop. Eq. Pl.* 9 ; 1 *Dan. Ch. Pr.* 465.

§ 1.—Of the statement of the plaintiff's title.

4163. It is in general requisite that the plaintiff's equity should appear in this part,<sup>(a)</sup> and that he should show a title in himself for the thing he claims; for unless every fact essential to the plaintiff's title to maintain the suit be stated in the bill, the defect will be fatal, because no facts are at issue except those charged in the bill, and of course no evidence can be given of them. The defendant has come to answer those matters only which are charged, and on those only can the court pronounce, because its decree must be *secundum allegata et probata*.<sup>(b)</sup>

§ 2.—Of the certainty of the plaintiff's statement.

4164. The bill must state with accuracy and clearness the right, title and claim of the plaintiff; and with the same certainty the injury or grievance of which he complains, and the relief which he asks. The other material facts should be briefly and plainly alleged, with necessary and convenient certainty of the essential circumstances, time and place, and all other incidents.<sup>(c)</sup>

General certainty is sufficient in pleadings in equity; for example, in a bill for the specific performance of a contract, if it be alleged to be in writing, it is not indispensable to allege it to be signed by the party, because it will be presumed to be so signed.<sup>(d)</sup>

It is a general rule, which is founded in justice and common sense, that whatever is *essential to establish the rights of the plaintiff*, and is necessarily *within his*

(a) *Flint v. Field*, 2 Anstr 543.

(b) *Coop. Eq. Pl.* 5, 7; *Story, Eq. Pl.* § 28, 257; *Barque Chusan*, 2 *Story, R.* 469; *Boon v. Chiles*, 10 *Pet.* 177.

(c) *Mitf. by Jer* 41, 42; *Barton, Suit in Eq.* 31, note 2; *Story on Eq. Pl.* § 241.

(d) *Cozine v. Graham*, 2 *Paige*, 177; *Dunn v. Calcraft*, 1 *Sim. & Stu.* 543.

*knowledge*, must be alleged positively and with precision;(a) and it is not a sufficient averment of such a fact, in a bill, to state that the plaintiff "is so informed;" as, where a bill charges the defendant as assignee of a lease, it is not sufficient to state in the bill that the plaintiff has been informed by his steward, that the defendant is such an assignee.(b)

But, on the other hand, the claims of the defendant may be stated in general terms; and if a matter essential to the determination of the plaintiff's claim is charged to rest in the knowledge of the defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, the precise allegation is not required.(c)

With regard to the allegation of *time*, when it is material it must be alleged with such degree of accuracy, as may prevent any possibility of doubt as to the period intended.(d)

§ 3.—Of the materiality of the plaintiff's statement.

4165. Although all material facts should be alleged, yet care must be taken not to overload the bill with redundant and superfluous allegations, or unnecessary statements, or scandalous or impertinent matter. Prolixity is a fault which ought to be carefully avoided.

4166. Care must be taken to avoid the statement of any impertinence or scandal in the bill, for if the bill be scandalous or impertinent, it may on motion be referred to a master, who will inquire into the fact, and if the matter objected to be found to bear such character, it will be struck out at the cost of the party pleading it. The courts cannot permit their records to be made the vehicles of scandal, and the opposite

(a) Mitf. by Jer. 41, 42; Story, Eq. Pl. § 255; 1 Dan. Ch. Pr. 465.

(b) Lord Uxbridge *v.* Staveland, 1 Ves. sen. 56.

(c) Mitf. by Jer. 42; Coop. Eq. Pl. 6; Baring *v.* Nash, 1 V. & B. 551.

(d) 1 Dan. Ch. Pr. 477.

party is not bound to answer what is altogether irrelevant or impertinent.(a) But a few unnecessary words in a bill or answer will not be deemed impertinent, unless they will lead to the introduction of improper evidence, by putting in issue matters which are foreign to the cause; or when such words will embarrass the defendant in making his answer.(b)

4167. By *impertinent matter* is meant that which is altogether irrelevant to the case, what does not appertain or belong to it; *id est, qui ad rem non pertinet.*(c) *Scandalous matter* is a false and malicious statement of facts, not relevant to the cause. But nothing which is positively relevant, however harsh or gross the charge may be, can be considered scandalous.(d) For example, in a bill impeaching the validity of a will on the ground of undue influence over the testator, exercised by a woman who takes under such will, an allegation that prior to the date of such will she engaged in a criminal connection with him, and openly cohabited with him as if she had been his wife, is not scandalous nor impertinent.(e)

4168. There is a difference between matter merely impertinent and that which is scandalous; matter may be impertinent without being scandalous, but when it is scandalous it must be impertinent. A bill cannot by the general practice be referred for impertinence after the defendant has answered, or submitted to answer, but it may be referred for scandal, at any time, and even upon the application of a stranger to the suit, for he has the right to prevent the records of the

(a) *Lowe v. Williams*, 2 S. & S. 574; *Richards v. Attorney General*, 12 Cl. & Fin. 30.

(b) *Hawley v. Wolverton*, 5 Paige, 522.

(c) See *Gresl. Ev. ch. 3, s. 1, p. 229.*

(d) *Coop. Eq. Pl. 19*; *Mitf. by Jer. 48*; *Story, Eq. Pl. § 269*; *Fenhoullet v. Passavant*, 2 Ves. 24; *St. John v. St. John*, 11 Ves. 526; *Coffin v. Cooper*, 6 Ves. 514; *Ex parte, Simpson*, 15 Ves. 477.

(e) *Anon 1 My. & C. 78.*

court being made the vehicle of spreading slanders there against himself.(a)

The reason assigned for making a difference as to the time when the objection may be made between matters of scandal and slanderous matter is this, that mere impertinence is not in itself prejudicial to any one, it is a mere superfluity which may be waived; but scandal may do great and permanent injury to the persons whom it affects, by making the records of the courts the means of perpetuating libellous and malignant slanders. Besides, the court is bound to suppress such indecencies as may stain unjustly the reputation, and wound the feelings of the parties, their relatives or other persons.(b)

§ 4.—Of multifariousness in the statement of the plaintiff's case.

4169. Multifariousness in pleading is a fault which should be avoided, for if a bill be multifarious, it may be demurred to, or dismissed by the court of its own accord.(c) By multifariousness in a bill is understood the improperly joining in one bill distinct matters, and thereby confounding them; as for example, uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of distinct natures, against several defendants in the same bill.(d)

But to render a bill multifarious, the matters must be not only separate and distinct, but each of a character entitling the complainant to separate equitable relief. It is not multifarious, if it set up one sufficient

(a) Coop. Eq. Pl. 19.

(b) Ex parte Simpson, 15 Ves. 477.

(c) Mitf. by Jer. 181 and note.

(d) Coop. Eq. Pl. 182; Mitf. by Jer. 181; Decamp v. Decamp, 1 Green, 294, 296; Benson v. Hadfield, 5 Beav. 546; Attorney General v. Craddock, 8 Sim. 487; Bignold v. Audland, 11 Sim. 24; Plumbe v. Plumbe, 1 Y. & C. Eq. Ex. 345; Shekwell v. Macaulay, 2 S. & S. 79; Brown v. Douglass, 11 Sim. 283; Brown v. Weatherby, 12 Sim. 6.

ground for relief, and another on which no relief can be had. In such case the defendant should demur to the defective part, and answer the other, or object to the former on the hearing.

This multifariousness, which is exceptionable in pleading, may be by stating different matters in the same bill against one defendant, or by stating a claim against several defendants, who are not jointly liable.

4170. In order to prevent confusion in the pleadings and its decrees, a court of equity will anxiously discountenance this multifariousness. The following case will illustrate this doctrine; suppose an estate should be sold in lots to different persons, the purchasers could not join in exhibiting a bill against the vendor for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and therefore there should be a distinct bill upon each contract; on the other hand, the vendor in the like case, would not be allowed to file one bill for a specific performance against all the purchasers of the estate, for the same reason.(a)

Not only will multifariousness be a fault, when matters which ought not to be brought in the same bill are so brought, and for joining defendants, against whom there is no common liability; but the rule applies equally when plaintiffs unite in a bill where they have no common right; as, if two plaintiffs should, in one bill, bring a joint demand, and a several demand, against the same defendant, the bill would be defective for multifariousness, and, for this reason, liable to a demurrer.(b)

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(a) *Coop. Eq. Pl.* 182; *Brookes v. Lord Whitworth*, 1 *Madd. R.* 86; *Rayner v. Julian*, 2 *Dick. R.* 677. See, for cases of defect in pleading for multifariousness, *Salvidge v. Hyde, Jacobs*, R. 151; *S. C.* 5 *Madd.* 138; *Attorney General v. Merchant Tailors' Company*, 1 *Myl. & Keen*, 189; *Whaley v. Dawson*, 2 *Sch. & Lef.* 367; *Binkerhoff v. Brown*, 6 *John. Ch.* 139; *Fellows v. Fellows*, 4 *Cowen*, 682.

(b) *Harrison v. Hogg*, 2 *Ves. jun.* 323; *Coop. Eq. Pl.* 183.

Sometimes, when a bill contains two distinct subject matters, wholly disconnected with each other, the court has jurisdiction over one of them, and not over the other. In such case it will treat the bill as single with respect to the matter over which it has jurisdiction, as if it constituted the sole object of the bill.<sup>(a)</sup>

But to this general principle there are several exceptions, which rest upon the fact that although the plaintiffs may have several interests, yet they have a common interest touching the matter of the suit, or are consequentially interested.<sup>(b)</sup>

§ 5.—Of the splitting up of a cause of action.

4171. We have just seen that multifariousness by mixing up several things which ought to be kept separate is a fault in pleading. A fault not less illegal, is that of an undue and unlawful divisibility or splitting up of a single cause of action, the consequence of which is to multiply subjects of litigation. The rule which forbids the commission of this fault, is founded not only upon the principle that courts of equity will in all cases do complete justice, and not administer it by halves, but also on the ground that its violation would allow a multiplicity of suits which would be oppressive and unreasonable. A bill for a part of an account, therefore, will not be allowed, and the plaintiff must bring a suit for the whole or none.<sup>(c)</sup>

§ 6.—The bill must show the jurisdiction of the court.

4172. We have seen that the plaintiff must show his title or right to sue, the liability of the defendant to be sued, and that he must ask the assistance of the

(a) *Varick v. Smith*, 5 Paige, 160; *Knye v. Moore*, 1 S. & S. 61; *Varick v. Attorney General*, 5 Paige, 187.

(b) *Mitf.* by Jer. 171; *Coop. Eq. Pl.* 40, 184.

(c) *Coop. Eq. Pl.* 184; *Story, Eq. Pl.* § 287. See *Purefoy v. Purefoy*, 1 Vern. 29; *Mitf.* by Jer. 183.

court. He is required also to state in his bill that the court has jurisdiction, and that his case is one to which it ought to be applied. When this is not done, the defendant may demur.(a)

SECTION 4.—OF THE CONFEDERATING PART OF THE BILL.

4173. This part of the bill contains a general charge that the defendant “combining and confederating with divers persons, at the present unknown to the plaintiff, but whose names, when discovered, the plaintiff craves to be at liberty to insert in his bill, with apt and proper matter and words to charge and make them parties defendants to the bill,” refuses to do that justice to the plaintiff which he requires or to which he is entitled.

Although usually inserted in a bill, this charge is not necessary, and it may, and frequently is, omitted, without any inconvenience or danger; for it is now settled that a general charge of unlawful combination cannot be compelled, and a charge of lawful combination ought to be specified to render it material.(b)

But the plaintiff may in some cases charge a confederacy, and when this is intended to be relied on, as a ground of jurisdiction, the combination must be specially set out.(c)

SECTION 5.—OF THE CHARGING PART OF THE BILL.

4174. Formerly the plaintiff’s case was stated in the bill very concisely, and, if any matter was intro-

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(a) Mitf. by Jer. 141.

(b) See Lord Howard *v.* Bell, Hob. 91; Coop. Eq. Pl. 10, 11; 1 Dan. Ch. Pr. 483; Mitf. by Jer. 41. It is still usual to include such a clause in the bill. In the courts of the United States, “the plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff.” Rules of Courts, Rule 21.

(c) Mitf. by Jer. 41.

duced into the defendant's plea or answer, which became requisite to be put in issue, on his part, some additional facts in avoidance of such new matter, such new fact was placed upon the record by means of a special replication. This caused inconvenience and delay, and greatly lengthened the pleadings; to obviate this, and to enable the plaintiff to state his case, and to bring forward the matter to be alleged in reply to the defence at the same time, and that without making any admission on the part of the plaintiff of the truth of the defendant's case, led to the practice in use. Now when the plaintiff is aware, at the time of filing his bill, of any defence which may be made to it, and he has any matter to allege which may avoid the effect of such defence, it is usual to insert, after the charge of confederacy, an allegation that the defendants pretend, or set up such and such allegations by way of defence, and then to aver the matter used to avoid the charge. This is usually called the *charging part* of the bill.(a) The following example will illustrate this: if a bill is filed on any equitable ground by an heir, who apprehends his ancestor has made a will, he may state his title as heir, and, alleging the will by way of pretence of the defendant's claiming under it, make it a part of the case without admitting it.

The charging part of the bill is often omitted, and though usually inserted, it is not indispensable in any case.(b)

SECTION 6.—OF THE JURISDICTION CLAUSE IN A BILL.

4175. This clause was introduced in the bill for the purpose of showing that the court had jurisdiction of the case, by a general statement that the acts complained of are contrary to equity, and tend to the

(a) Mitf. by Jer. 43; Barton, Suit in Eq. 27; 3 Wooddes. Lect. 368; 1 Dan. Ch. Pr. 484. See Flint v. Field, 2 Anst. 543.

(b) Rules of Pr. of Courts of U. S., Rule 21; Partridge v. Haycraft, 11 Ves. 575. See Gregory v. Molesworth, 3 Atk. 626.

injury of the complainant, and that he has no remedy, or not a complete remedy, without the assistance of the court; but this averment must be supported by the cause shown in the bill, from which it must be apparent that the court has jurisdiction.

But this clause does not give the court jurisdiction. When the case made by the bill is within the jurisdiction, the court will sustain it, though the clause be omitted; when, on the contrary, the case stated in the bill is not of equitable jurisdiction, the bill will be dismissed, notwithstanding such an averment. The omission of this clause, therefore, will not render the bill defective.(a)

SECTION 7.—OF THE INTERROGATORY PART OF THE BILL.

4176. Having stated the facts requisite to maintain his suit, the plaintiff, in his bill, next prays that the party against whom he complains may answer all the matters contained in the former parts of his bill, not only according to his positive knowledge of the facts stated, but also according to his remembrance, to the information he may have received, and the belief he is enabled to form on the subject. The principal object of the answer is to procure from the defendant proof of the matters necessary to support the cause of the plaintiff; and he is required either to admit or to deny all the pertinent facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it.(b) This the defendant should do without being particularly interrogated upon

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(a) Mitf. Eq. Pl. by Jer. 44; Coop. Eq. Pl. 10; Barton, Suit in Eq. 36; 1 Mont. Eq. Pl. 78; 1 Dan. Ch. Pr. 485; Story, Eq. Pl. § 34; Rules of Courts U. S., Rule 21.

(b) Kittredge v. Claremont Bank, 1 Woodb. & M. 246; Mitf. Eq. Pl. by Jer. 44. See Brooks v. Byam, 1 Story, R. 296.

the subject. But, as experience has proved that the substance of the matters stated and charged in the bill may be frequently evaded by answering according to the letter only, it has become the practice to add to the general requisition, that the defendant should answer the contents of the bill, a repetition by way of interrogatories, of the matters most essential to be answered, adding, to the inquiry after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and to compel a full answer.<sup>(a)</sup> Another object of the interrogatories is to bring the facts to which they relate to the mind and recollection of the defendant, for without such intimation he might conscientiously answer, and inadvertently, without any intention at evasion, omit to state the information required. This is commonly called the interrogating part of the bill.

With regard to the *form and substance* of the interrogatories, it is proper to observe that they must be founded on something in the prior part of the bill, for if there be nothing there to warrant the interrogatory, the defendant is not compellable to answer. But a variety of questions may be founded on a single charge.<sup>(b)</sup>

SECTION 8.—OF THE PRAYER FOR RELIEF.

4177. The *prayer for relief*, which is the eighth part of the bill, is of two kinds, namely, a prayer for general relief, and a prayer for specific relief.

<sup>(a)</sup> Mitf. by Jer. 44.

<sup>(b)</sup> Mitf. by Jer. 45; *Jerrard v. Sanders*, 4 Bro. C. C. 322, Eden's ed. By the 71st rule of the Rules of Practice for the Courts of Equity of the United States, it is required that "the last interrogatories to take the testimony now commonly in use shall in the future be altered, and stated in substance thus: 'Do you know, or can you set forth any other matter or thing, which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.'"

4178.—1. The plaintiff usually makes a prayer for *specific* relief, and states accurately the matters he prays to be decreed, and to which he thinks himself entitled to under all the circumstances. When special orders and provisional processes are required, founded on peculiar circumstances, such as writs of injunction, writs of *ne exeat regno*, orders to transfer funds, or to preserve property pending litigation, they are usually made the subject of special prayer. In general, these things will not be granted under a general prayer, because the defendant might, by his answer, make a different case under the general prayer from what he would make if the bill prayed specially for the thing which was thus to be decreed.(a)

4179.—2. He then concludes his bill with a prayer for *general* relief. This can never be omitted with safety, because if the plaintiff should mistake the relief to which he thinks himself entitled by his special prayer, he may be relieved, when he shows a right, under his prayer for general relief, but such relief must be consistent with the special relief prayed for;(b) “as to this point the rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert special relief prayed, and, under the general prayer, ask relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the court, maintain that relief.”(c)

To entitle a plaintiff to a decree under the general

(a) *Savoŷ v. Dyer*, Ambl. 70, and note.

(b) *Soden v. Soden*, cited in *Hiern v. Mill*, 13 Ves. 119; *Grimes v. French*, 2 Atk. 141; Mitf. by Jer. 38; *Hollis v. Carr*, 2 Mod. 86; 3 Wooddes. Lect. 372; *Coop. Eq. Pl.* 14; 1 Dan. Ch. Pr. 490; *Hobson v. McArthur*, 16 Peters, 182, 195; *English v. Foxall*, 2 Peters, 595; *Colton v. Ross* 2, *Paige's Ch. R.* 396; *Pleasants v. Glasscock*, 1 Sm. & Marsh. 18, 24; *Foster v. Cook*, 1 Hawk. R. 509.

(c) *Hiern v. Mill*, 13 Ves. 119.

prayer, different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed, otherwise the court would take the defendant by surprise, which is contrary to its principles.(a)

4180.—3. When it is doubtful with the plaintiff, or those who advise him, whether he is entitled to the special relief he wishes to pray for, it is not unusual so to frame the prayer that if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a *double aspect*.(b)

SECTION 9.—OF THE PRAYER FOR PROCESS.

4181. Next after the prayer for relief follows the *prayer for process*, to compel the defendants to appear, answer the bill, and abide the determination of the court on the subject. Particular attention must be given to this part of the bill, and all persons who are intended to be made parties must here be named as such, for it is a rule that none are parties, though named in the bill, against whom process is not prayed.(c)

4182. The most ordinary process prayed for is the writ of *subpœna*, which requires the defendant to appear and answer the bill on a certain day, named in the writ, under a certain penalty; and when the attorney

(a) *Stevens v. Guppy*, 3 Russ. R. 171; 1 Dan. Ch. Pr. 492, 493.

(b) Mitf. by Jer. 39; *Bennett v. Wade*, 2 Atk. 325; 1 Dan. Ch. Pr. 496; *Barton*, Suit in Eq. 41; *Coop. Eq. Pl.* 14.

(c) *Cary v. Hillhouse*, 5 Geo. R. 251; *Coop. Eq. Pl.* 16; *Fawkes v. Pratt*, 1 P. Wms. 593; *Brasher v. Van Cortlandt*, 2 John. Ch. R. 245; 1 Smith's Ch. Pr. 45; Mitf. by Jer. 164.

general is made defendant to a bill, instead of praying process against him, prays that he may answer to it upon being attended with a copy.(a) When a corporation aggregate is defendant, the process of subpoena is the same as in ordinary cases; but sometimes the bill prays that, in case of their default to appear and answer the bill, the writ of *distringas* may issue to compel the corporators to do so.

The writ of subpoena to compel an appearance to a suit in equity, was introduced into the court of chancery by Bishop Waltham, who was chancellor in the reign of Richard II.(b)

4183. For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ; as the writ of injunction to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing an injurious act; the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demand by quitting the state; and other writs of a similar nature. When a bill seeks to obtain a special order of the court, or a provisional writ, for any of these purposes, it is usual to insert, immediately before the prayer of process, a prayer for the order or particular writ which the case requires; and from this the bill is then commonly named, as an *injunction bill* or a *bill for a writ of ne exeat regno*.(c) Sometimes the writ of injunction is sought, not as a provisional remedy merely, but a continued protection to the

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(a) In the case of a subpoena between one of the states of the Union and another, the writ is directed to be served severally on the governor of the defendant state and its attorney general. *The State of New Jersey v. The People of the State of New York*, 3 Pet. 461.

(b) 1 Spence's Eq. Jur. 369, note (d); Barton's Suit in Eq. 7, 61, note; 3 Reeves, Hist. of Law, 192.

(c) In some of the states it is not indispensable that this process should be prayed for in the bill. See Story, Eq. Pl. § 44, note 2, 4th ed.; 1 Dan. Ch. Pr. 503.

rights of the plaintiff, and the prayer of the bill must then be framed accordingly.

SECTION 10.—OF THE NECESSITY OF THE SEVERAL PARTS OF A BILL AND ITS OTHER REQUISITES.

4184. The formal parts of a bill which have just been examined, are those of an original bill as it is usually framed. Some of them are not essential, and may, as has been observed, be inserted or omitted in the discretion of the person preparing it, and in the United States courts they may be omitted by the authority of a rule of court.(a)

The indiscriminate use of these parts of a bill in all cases has been considered a common reproach to practitioners in this line, because every bill contains the same story three times told.(b) In the hurry of business it may be difficult to avoid giving ground for the reproach; but, in a bill prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operation.(c)

4185. In general, the facts contained in a bill must be verified by an affidavit attached to it as to their truth, and, in some cases, the omission of an affidavit will be good ground of demurrer.(d)

4186. For the purpose of avoiding the introduction in a bill of matter criminal, impertinent, or scandalous, it is required that every bill shall be signed by counsel; and if it contain such matter, it may be expunged, and the counsel ordered to pay the cost to the party aggrieved; but nothing relevant is considered as scandalous.(e)

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(a) Rule 21.

(b) See *Macnamara v. Sweetman*, 1 Hogan, 29.

(c) *Mitf. by Jer.* 47.

(d) 1 *Dan. Ch. Pr.* 503.

(e) *Mitf. Eq. Pl. by Jer.* 48; *Anon.* 1 *My. & C.* 78. Vide ante, n. 4167.

TITLE III.—OF THE PROCEEDINGS BETWEEN THE  
FILING OF THE BILL AND THE DEFENCE.

4187. Having considered the several kinds of bills, the cases in which they may be filed, and the several frames or forms of such bills, the next object to occupy our attention, will be to inquire into, 1, the filing of the bill and the subpoena; 2, the process to compel obedience to it; 3, bills taken pro confesso.

CHAPTER I.—OF FILING THE BILL AND THE SUBPCENA.

SECTION 1.—OF FILING THE BILL.

4188. After a bill has been prepared, according to the rules stated in the foregoing title, and affidavit has been made of the truth of the facts it contains, when such an affidavit is required, it should be signed by counsel, and taken to the office of the clerk of the court, who will issue a writ of subpoena as a matter of course. This is a prerequisite, the bill must be filed before a subpoena can issue. In this matter the proceedings differ from an action at law, where the writ of summons, *capias* or attachment issues in the first instance, and a declaration, corresponding with the bill in chancery, is afterward filed. By the rules of courts of the United States, it is directed that no process of subpoena shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.<sup>(a)</sup>

SECTION 2.—OF THE WRIT OF SUBPCENA.

4189. When the bill is filed, the clerk issues the process of subpoena, of course upon the application of

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(a) Rule 11.

the plaintiff or his attorney; this process is usually returnable on the next return day.

A writ of subpoena to appear and answer, unlike other writs, in its *form*, is addressed to the defendant instead of being addressed to the sheriff or marshal, and commands him that within a certain time, he cause an appearance to be entered for him in the court to a bill, therein described, filed against him, and that he do answer concerning such things as shall then and there be alleged against him, and that he shall observe what the said court shall direct in this behalf, upon pain of an attachment against his person and such other process as the court shall award.<sup>(a)</sup> At the bottom of the writ is placed a memorandum, that the defendant is to enter an appearance at the clerk's office, on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.<sup>(b)</sup>

SECTION 3.—OF THE SERVICE OF THE WRIT.

4190. Although the writ is not directed to the sheriff in the state courts, or the marshal when issuing from one of the courts of the United States, the writ must nevertheless be served by that officer or his deputy. The mode required by the rules of courts of the United States, is by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or in case of husband and wife, to the husband

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<sup>(a)</sup> 2 Smith's Ch. Pr. 487; 1 Dan. Ch. Pr. 556; 2 Madd. Ch. Pr. 196. The act regulating processes in the courts of the United States, provides that the forms and modes of proceeding in the courts of equity, and in those of admiralty and maritime jurisdiction, shall be according to the principles, rules and usages which belong to courts of equity and courts of admiralty, respectively, as contradistinguished from courts of common law, subject, however, to alterations by the courts. This act has been generally considered to adopt the principles of the court of chancery in England. *Vattier v. Hinde*, 7 Pet. 252.

<sup>(b)</sup> Rules of Courts of U. S., Courts of Equity, Rule 12; 2 Smith's Ch. Pr. 487; 1 Dan. Ch. Pr. 557.

personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.(a)

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

4191. The service is ordinary and extraordinary.

1. The first or *ordinary* service takes place by serving the writ *personally*, or by leaving it at his *dwelling house*, in the presence of a white member of his family, and, perhaps, in some of the free states, with one of the defendant's black servants. When the service is not personal on the defendant, it must be made at the dwelling house of the defendant; and the service at a counting house, or at a solicitor's office, is not a good service, unless the defendant is constantly in the habit of sleeping there.(c)

2. The *extraordinary* service of a *subpœna* takes place when other means of serving the writ are resorted to. This last kind of service must, in general, be warranted by a previous order of the court, upon cause shown, though sometimes when an extraordinary service has been effected, the court have considered it to be good; thus, where the officer who served the *subpœna* deposed that he hung the same upon defendant's door, and within half an hour after he saw him abroad with a writ in his hand, which he supposed to be the *subpœna*, an attachment was awarded, and the defendant committed for his non-appearance;(d) and it has been held a good service, if a person keeps the door of his house shut, and refuse

(a) Rule 13. 1 Dan. Ch. Pr. 563; 2 Madd. Ch. Pr. 200; 1 Smith's Ch. Pr. 115.

(b) Rule 14.

(c) 1 Smith's Ch. Pr. 115; 1 Dan. Ch. Pr. 564; 2 Madd. Ch. Pr. 199.

(d) *Rickers v. Stileman*, 1 Cary, 57.

to open it, to leave the writ hanging upon the door, or to put it into the house under the door, or within the windows. But none of these are good services, unless it can be proved that the *subpœna* afterward came to the defendant's hands, or he was in the house at the time, and had notice of it.(a)

When an extraordinary service is necessary, it is, however, the safest course for the plaintiff to apply in the first instance to the court, by motion, supported by an affidavit stating the circumstances, for an order that the particular mode of service required shall be a good service. Orders of this nature have been granted where infants have been secreted, or kept out of the way, so that they could not be personally served.(b) Where the defendant is a prisoner at large, the court have directed the service of a *subpœna* upon the turnkey, though, if he had been a close prisoner, such order would have been unnecessary, and the service would have been good.(c) A service has been directed to be made by sending a copy of the writ under cover to the person to whom he had directed his letters to be sent.(d) Though in general, when there are several partners defendants, the writ must be served on each of them;(e) yet, when one of the partners is abroad, out of the jurisdiction of the court, a *subpœna* has been directed to be served on the partner who was present.(f)

4192. The service of a *subpœna* upon an aggregate corporation, must be made upon such officer as by

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(a) *How v. Maddock*, Cary, 104, 115.

(b) *Smith v. Marshall*, 1 Atk. 70; *Thomson v. Jones*, 8 Ves. 141; *Baker v. Holmes*, 1 Dick. 18, 77; 1 Dan. Ch. Pr. 566. In some of the states, the *subpœna* may be served by advertising in the public newspapers, when the parties cannot be found within the jurisdiction of the court. This may be done by virtue of statutory provisions.

(c) *Anon. Mosely*, 237.

(d) *Hunt v. Lever*, 5 Ves. 147 a.

(e) *Rice v. Doniphan*, 4 B. Monr. 123.

(f) *Coles v. Gurney*, 1 Madd. R. 187.

law may be served with process, or, it is said, upon some one of the members.(a)

SECTION 4.—OF THE DEFENDANT'S APPEARANCE.

4193. Upon the return of the *subpœna*, as served and executed upon any defendant, the clerk enters the suit upon the docket of the court, as pending in the court, and the defendant is required by the return day of the writ, if he has been served with process, in proper time, according to the rules of the court, or the provisions of the law, to enter his appearance. The appearance of the defendant is a formal entry, to the effect that the party appears, made at the request of the defendant or his solicitor, by the clerk of the court.(b)

It is not required that the *subpœna* should be served on the defendant, to entitle him to enter an appearance; he may appear *voluntarily* to a bill, and, after such appearance, have it referred for impertinence,(c) or plead and answer; and he does not lose his costs by such voluntary appearance.(d)

An infant must appear by his guardian,(e) a married woman by her husband, and an idiot by his committee.

According to the English law, the defendant must enter an actual appearance; in this country, at least in some of the states of the Union, the party is considered *in court* on the return of the sheriff that he has served the *subpœna* on the defendant, which saves much trouble, and renders the writ of attachment and sequestration unnecessary.

(a) Hind. Ch. Pr. 87; 1 Dan. Ch. Pr. 564.

(b) See *Livingston v. Gibbons*, 4 John. Ch. 94.

(c) *Fell v. Master of Christ's College*, 2 Bro. C. C. 279; *Shelton v. Tiffin*, 6 How. 163, 186.

(d) *Bowhee v. Grills*, 1 Dick. 38.

(e) *Irons v. Crist*, 3 A. K. Marsh. 143; *Bradwell v. Weeks*, 1 John. Ch. 325.

## CHAPTER II.—OF PROCESS OF CONTEMPT.

4194. By the English law, when a defendant who has been duly served with a *subpœna*, neglects or refuses to appear, within the time required by law, or the rules of the court, he is said to be in *contempt*. He is also declared to be in contempt, if, having appeared, he refuses to answer or to obey any decree or order which may be made by the court touching the suit.

Contempts of this nature are styled *ordinary* contempts, or contempts of process. They are so called to distinguish them from *extraordinary* contempts, which are not a mere disobedience of process, but a resistance of the officer who serves the *subpœna*, or abusive, scandalous words respecting the court, which render the guilty party liable to attachment and imprisonment. (a)

The ordinary contempts, to which our observations in this place will be confined, relate to the transactions between party and party; the offender, in such cases, may purge his contempt, by doing whatever the act is, the non-performance of which has brought him into contempt, and paying to the other party whatever costs may have been occasioned by his conduct.

4195. Before proceeding to the examination of the remedy against natural persons for a contempt of the *subpœna*, it will be necessary to say a few words as to the manner of compelling the appearance of a *corporation aggregate*. For this purpose, a writ of *distringas* is the first process. This is a writ directed to the sheriff, commanding him to distrain the lands, goods and chattels, of the corporation, so that they may not possess them till the court shall make other order to the contrary, and that, in the mean time, he, the sheriff, do answer to the court for what he so distrains.

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(a) 1 Dan. Ch. Pr. 568, 569. In some of the United States, nothing can be considered a contempt, unless it happens in the presence of the court, or it be in disobedience of its mandates.

Under this writ, a nominal distress is made, and the writ is returned; if this prove insufficient, an *alias distringas* issues, under which a greater distress is made, and the writ is returned; if the corporation still remains disobedient, a *pluries distringas* issues. If this last writ fails of its effect, upon being returned by the sheriff, a commission of sequestration may be obtained against the corporation. When a sequestration has been made, it cannot be discharged until the corporation shall have performed what they are enjoined to do, and paid the costs of the several *distringases*, and of the sequestration. Upon the performance of all this the sequestration may be discharged upon motion.

After the sequestration has been issued against a corporation, and before it has been discharged, the plaintiff may, at his choice, set down the cause to be heard, and have the bill taken *pro confesso* against the corporation, in the same way as can be done by an ordinary person.<sup>(a)</sup>

4196. The usual processes to compel the appearance of a corporation sole, or of a natural person, are, 1, the writ of attachment; 2, the process of sequestration.

#### SECTION I.—OF THE WRIT OF ATTACHMENT.

4197. In those states where the English practice has been adopted in this respect, the first process against an individual for not appearing or not answering according to exigency of the writ of *subpœna*, is an attachment. In such case the defendant is in contempt, because he has disobeyed the order of the court commanding him to appear; and, like every other person in contempt, either in courts of law or courts of equity, is liable to an attachment.

4198. The word *attachment* is said to be derived

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<sup>(a)</sup> 1 Dan. Ch. Pr. 190. See *Cursen v. The African Company*, 1 Vern. 132; *Salmon v. The Hamborough Company*, 1 Chan. Cas. 206.

from the French word *attacher*, which signifies to bind, to tie. The writ of attachment is addressed to the sheriff, or other proper officer, commanding him to attach the defendant so that he may have him before the court to answer touching the contempt with which he is charged, as well as such other matters as shall be then and there laid to his charge. An attachment is said to differ from an arrest in this, that by *arrest* is meant the seizing of the person of another by lawful authority for the purpose of taking him before a superior officer to be disposed of forthwith; on the contrary, an attachment signifies the taking of a person and presenting him in court, at the day assigned. The true distinction between an attachment, or apprehension and arrest, is this, that one having authority may *arrest* on *civil process*, and *attach* or *apprehend* on a *criminal warrant*.

4199. To this writ of attachment the sheriff is required to make a return. When the defendant is not found within his bailiwick, he returns this fact. This is called a *non est inventus*, and upon this return further proceedings are grounded. If, on the contrary, the defendant has been found, the sheriff returns, "I have attached the within named A B, as within I am commanded." This is denominated a return of *cepi corpus*, which, when once returned, puts an end to all the ordinary process to compel an appearance.

#### SECTION 2.—OF SEQUESTRATION.

4200. After an attachment for not appearing, by the English practice, a writ of attachment, with proclamations, issues for the purpose of proceeding against the plaintiff to outlawry; the sheriff is required to make proclamations, and if the defendant does not come in under the proclamations, he is declared an *outlaw*. Then a *commission of rebellion* issues, and if he still continues to disobey, he is considered as a rebel and contemner of the laws. The next process, under the

English system, is a *sequestration*. The process of sequestration is a writ or commission directed to the sheriff, or, which is more usual, to four persons of the plaintiff's own nomination, empowering them to enter upon and sequester the estate, real and personal, of the defendant, and to keep the rents, issues and profits thereof, or pay the same in such manner and to such persons as the court may appoint, until the defendant has appeared, or perform what he has been enjoined to do, and for not doing of which he is in contempt.(a)

All these processes, which in England must be sued out, become unnecessary by our practice, where the defendant is considered in court as soon as the writ of *subpœna* has been served upon him.

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#### CHAPTER III.—OF TAKING BILLS PRO CONFESSO.

4201. After an appearance has been entered, or by the rules of court, or statutory provision, it is dispensed with, if the defendant does not demur, plead to, or answer a bill, agreeably to the rules of court, or within the time required by law, the bill will be taken as admitted. In order to render its process effectual, the court, in such case, will treat the defendant's contumacy as an admission of the plaintiff's case, by taking the bill *pro confesso*. In this case, the bill may be proceeded in *ex parte*, and the matter of the bill may be decreed by the court, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, may sue the process of attachment against the defendant to compel an answer.(b)

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(a) By the statutes 5 Geo. II., c. 25, repealed and reënacted by the 11 Geo. IV., and 1 Wm. IV., c. 36, some provisions were made to remedy the inconveniences which had been felt before.

(b) See Rules of Pr. in the Courts of United States, Rule 18.

When the bill has been taken *pro confesso*, the defendant may, in some cases, be relieved by making an early application to the court, and showing a reasonable cause, in which case, the proceeding will be set aside, and the time for answering enlarged.<sup>(a)</sup>

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#### TITLE IV.—OF THE DEFENCE.

4202. Having ascertained the rules which ought to be observed in the frame of a bill, the manner in which it ought to be filed, the nature of the subpoena, and what is an appearance, and the consequences of neglecting or refusing to appear, our next object will be an inquiry into the nature and necessity of the defence. For this purpose this title will be considered under five chapters: 1, of the nature and mode of defences; 2, of disclaimers; 3, of demurrers; 4, of pleas; 5, of answers.

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#### CHAPTER I.—OF THE NATURE AND MODE OF DEFENCE.

4203. By *defence* is meant the denial of the truth or validity of the complaint of the plaintiff. It is in general an assertion that the plaintiff has no ground for his suit. No right can be justly decided, or controversy settled, without hearing both parties, and the very *subpœna* is issued to require the defendant to set up his defence, and show just cause, if he can, why the plaintiff's claim should not be allowed. When a suit has been instituted against him, the defendant may therefore disclaim all right to the matter in dispute, or he may insist upon his right and defend it. Defence, then, may be considered, 1, as to its *nature*, or the

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(a) Rules of U. S. Courts, Rule 19.

facts of which it consists; and, 2, as to the *mode* of stating such facts.

SECTION 1.—OF THE NATURE OF THE DEFENCE.

4204. A defence in equity, as at law, may be, 1, *dilatory*, or, without impeaching the cause of complaint, suspend the suit until some obstacle to the plaintiff's recovery has been removed; or, 2, *peremptory* or *permanent*, which goes to the foundation of the suit, and when established is a complete bar to the plaintiff's claim.

§ 1.—Of dilatory defences.

4205. Dilatory defences are of various kinds. Though not favored by the courts, still they are valid to suspend the proceedings when well founded. The principal of these are the following:

4206.—1. Defences to the *jurisdiction*, which do not dispute the rights of the plaintiff in the subject of the suit, but rest simply upon the fact, that the court in which the suit is instituted is not the proper court to take cognizance of those rights. When this want of jurisdiction is apparent upon the face of the bill, as where in the courts of the United States, the plaintiff and defendants are citizens of the same state, and the courts have no jurisdiction unless they are citizens of different states, the defendant may demur to the jurisdiction of the court.

4207.—2. Another ground of defence is to the *person of the plaintiff*. In this case the defendant does not deny the validity of the rights which are claimed, nor that the court has jurisdiction, but simply that the plaintiff is disabled to sue by reason of some personal disability, either, first, absolutely, which extends to the whole bill, or *sub modo*; or, secondly, that he is not the person he pretends to be, or does not sustain the character he assumes; as, for example, when a person sues alone in a case when he has no right so to sue, as

in the case of an infant, a married woman or a lunatic. If, in such case, the objection is apparent on the face of the record, the defendant may successfully demur.

4208.—3. A third dilatory defence *to the form of the proceedings* is, that the suit is irregularly brought, or defective in its appropriate allegations and parties. If, for example, a bill, which is not a bill of review, nor in the nature of a bill of review, is brought to vary a decree not impeached for fraud, and the defect of course appears upon the proceedings, demurrer lies. (a)

4209.—4. Another dilatory defence is, the *pending of another suit* between the parties, for the same cause of action. (b)

§ 2.—Of peremptory or permanent defences.

4210. The peremptory or permanent defences are of two kinds, namely: 1, those which insist that the plaintiff never had the right to institute the suit; 2, those which insist that the original right, if any, is extinguished or determined.

*Art. 1.—Where the plaintiff never had any interest.*

4211. These cases are of three kinds:

1. When the plaintiff has not a superior right to that of the defendant; as where a bill is filed to set aside a deed of trust, by a person who claims to be executor of the grantor; or where the defendant is a purchaser for a valuable consideration, without notice.

2. When the defendant has no interest, in which he disclaims all right.

3. When the plaintiff has not a right, because he has no interest; as where to entitle himself he must have complied with a provision of a statute, and he has failed to do so; for example, where a party sues on a contract within the statute of frauds, when the provisions of that statute have been disregarded.

(a) Mitf. by Jer. 206.

(b) 1 Mont. Eq. Pl. 88, 89.

4. Where there is no privity between the plaintiff and defendant, or any other right to maintain the suit.

*Art. 2.—Of the defence when the plaintiff's right is determined.*

4212. Sometimes a right may have existed, but, by acts of the parties or by operation of law, it may have become void or determined. These cases are the following :

1. When the parties themselves have altered the contract, or done some act by which the right to recover upon it has been determined. This may be, 1, by express agreement, as by an account stated or a release ; or, 2, by implication, as by the statute of limitations.

2. When there has been a decision of the matters in dispute between the same parties, as in the case of a judgment of a court or tribunal of competent jurisdiction ; an award of arbitrators lawfully appointed ; or a decree of a court of equity, or of one which exercises equitable jurisdiction.

#### SECTION 2.—OF THE MODE OF DEFENCE.

4213. Having considered the nature of a defence, let us next examine the mode in which it is to be made. The modes of defence are of five sorts, namely :

1. By *disclaimer*, which seeks at once to terminate the suit, by the defendant's disclaiming all right in the matter sought by the bill.

2. By *demurrer*, by which the defendant demands the judgment of the court, whether, in consequence of the alleged defects in the bill, he is bound to answer the bill or not.

3. By *plea*, which shows some cause why the suit should be dismissed, delayed or barred.

4. By *answer*, which either, first, controverts the case stated in the bill, confesses and avoids it ; or,

secondly, admitting the case stated in the bill, submits to the judgment of the court upon it; or, thirdly, relies upon a new case, or new matter stated in the answer, or upon both.(a)

5. By a *compound defence*, or the union of two or more of these simple modes.(b)

4214. In some cases the defence can be made only by demurrer, then that must be adopted; in others, none is proper but by plea; and in others the answer is the proper defence. In many cases, however, the same matter may be insisted on as a defence, either by demurrer, plea or answer. Sometimes a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim to another;(c) but all these defences must clearly refer to separate and distinct parts of the bill. For the defendant cannot plead to that part to which he has demurred; neither can he answer to any part to which he has either demurred or pleaded, the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant by answer claim what by disclaimer he has declared he had no right to. A plea or answer will, therefore, overrule a demurrer; and an answer, a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.(d)

In the following chapters will be considered separately the cases where a defence may be made by demurrer, plea, or answer.

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(a) Mitf. by Jer. 106.

(b) Vide, as to these several modes of defence, Mitf. by Jer. 12, 13, 14; Story, Eq. Pl. § 435 to 438; Welf. Eq. Pl. 252.

(c) Robertson v. Bingley, 1 McCord, Ch. 352.

(d) Mitf. by Jer. 319, 320; Story, Eq. Pl. § 439; Beauchamp v. Gibbs, 1 Bibb, 481.

## CHAPTER II.—OF DISCLAIMERS.

4215. A disclaimer, in chancery pleading, is the renunciation of the defendant to all claims to the subject matter of the demand made by the plaintiff's bill. A disclaimer is distinct in substance from an answer, though sometimes confounded with it, but it seldom can be put in without an answer, for if the defendant has been made a party by mistake, having had an interest which he has parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not.(a)

4216. The *form* of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient. The forms given in the books of practice, however, are of an answer and disclaimer.

4217. The disclaimer *puts an end* to all the pleadings, and the plaintiff ought not to reply.

4218. When the defendant disclaims, the court will in general dismiss the bill with *costs*; but this is not universally the case.(b)

## CHAPTER III.—OF DEMURRERS.

4219. A demurrer, in equity pleading, is an allegation of a defendant, which, admitting the matters of fact alleged in the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or by the omission of some matter which

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(a) Mitf. by Jer. 318, 319; *Glassington v. Thwaites*, 2 Russ. 458; *Ellsworth v. Curtis*, 10 Paige, 105, 107. See *Graham v. Coape*, 3 My. & C. 638.

(b) Mitf. by Jer. 319.

ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. Or, a demurrer, from the Latin *moratur* or *demoratur in lege*, or the old French *demorrer*, to wait or stay, in pleading, signifies, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side in support of the suit; but will wait the judgment of the court whether he is bound to answer.(a)

4220. A demurrer differs from a plea in this, that the former is an objection to matter apparent upon the bill itself, either from what is contained in it, or from a defect of its frame; whereas a plea is the objection to the plaintiff's/recovery, because of some fact *dehors* and which does not, of course, appear upon the face of the bill. The causes of a demurrer are, therefore, upon matter in the bill, or upon the omission of matter which ought to be therein or attendant upon it, and not upon foreign matter alleged by the defendant.(b)

4221. The principal ends of a demurrer are to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use for a demurrer.(c)

Bills have already been considered under three general heads: 1, original bills; 2, bills not original; and, 3, bills in the nature of original bills; the several bills ranged under the second and third heads being consequences of bills treated of under the first head.

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(a) Co. Litt. 71 b; Steph. Pl. 61; Story, Eq. Pl. § 440; Mitf. Eq. Pl. 107, 108; Coop. Eq. Pl. 110.

(b) Alderson v. Biggars, 4 H. & M. 473; Harris v. Thomas, 1 H. & M. 18; Mitchell v. Lennox, 2 Paige, 280; Smets v. Williams, 4 Paige, 364.

(c) Mont. by Jer. 108; Story, Eq. Pl. § 447.

The defence which may be made to original bills in its variety comprehends the several defences which may be made to every other kind of bill, except such as arise from the peculiar form and object of each kind. In treating of demurrers, therefore, it will be convenient to consider, 1, demurrers to original bills; 2, demurrers to bills not original; 3, the effect of demurrers.

SECTION 1.—OF DEMURRERS TO ORIGINAL BILLS.

4222. Under this head many of the rules which apply to demurrers will be mentioned and explained, and this will greatly abridge our labors when we come to consider the rules which apply to demurrers in other cases.

In treating of original bills, they have been divided into those praying relief, and into those not praying relief, and, it will be recollected, that both require a discovery from the party against whom they are exhibited.

Demurrers to the original bills may be considered under two heads, namely: 1, demurrers to bills praying relief; 2, demurrers to original bills not praying relief.

§ 1.—Of demurrers to original bills praying relief.

4223. Demurrers of this kind frequently include demurrers to discovery, though sometimes they do not. They are divisible into three classes: 1, to the jurisdiction; 2, to the person of the plaintiff; 3, to the matter of the bill.

*Art. 1.—Of demurrers to the jurisdiction.(a)*

4224. A demurrer to the jurisdiction may be, 1, because the subject is not cognizable by any munici-

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(a) See, as to pleas to the jurisdiction, post, n. 4301.

pal court of justice; 2, because the subject is not within the jurisdiction of a court of equity; 3, because some other court possesses jurisdiction.

1. *Of demurrer, because the subject is not cognizable in any court of justice.*

4225. There are some matters of a political nature which are so entirely fit for negotiation or treaty by the executive department of the government, that courts of justice cannot undertake to redress wrongs which have been committed in relation to them. A political treaty made between two independent nations, relating to national affairs, cannot be enforced in the courts of law or equity. But a distinction must be made between a treaty of this nature and one which provides for the assertion of private rights, or for objects which may properly be redressed in courts of justice, and which have no connection with, or involve the rights of sovereignty.

4226. As an example of the first kind, where the courts have no jurisdiction, may be mentioned the case of the treaty between the United States and France,<sup>(a)</sup> by which the latter granted the territory of Louisiana to the United States, in which is contained a stipulation for the admission of the territory and its inhabitants into the Union as an independent state. The violation of this provision, if it had happened, certainly could not be redressed in any court.

4227. As an instance of the second rule, or the exception to the first, the case of the Florida treaty with Spain may be given,<sup>(b)</sup> by which titles to lands in the territory were expressly confirmed. In this case, one whose rights under the treaty had been violated, may enforce those rights in the courts.<sup>(c)</sup> Prize

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<sup>(a)</sup> Treaty of 1803, art. 3.

<sup>(b)</sup> Treaty of 1819.

<sup>(c)</sup> See *Conrad v. Banks*, 10 Wheat. 181; *Soulard v. United States*, 4 Pet. 511.

courts, also, will restore captured property, at the suit of the party entitled, where the case has been provided for by treaty, although the capture may have been lawful.(a)

2. *Of demurrers because the subject is not cognizable in a court of equity.*

4228. When considering the jurisdiction of a court of equity, in the first part of this book, much was anticipated of what might properly occupy our attention in this place.(b)

In general, when the plaintiff can have a remedy at law, as effectual as the one he seeks in equity, and that remedy is direct, certain and adequate, a court of equity has no jurisdiction, and, therefore, a demurrer to the jurisdiction will be sustained. If, for example, the sole object of a bill be to decide upon the validity of will of real estate, no other equity being shown, a general demurrer will lie, because a court of law can do the plaintiff ample justice.(c)

For the same reason, when matters of defence are good at law, they are not sustainable in equity. Thus, a bill founded on an allegation that a judgment had been obtained against the plaintiff in the bill, for goods for which he was not personally liable, because in the purchase he had acted as an agent of the government, would be liable to a demurrer, because the matter stated in the bill would be a defence at law.(d)

But a demurrer lies not only in cases where the plaintiff in the bill has a complete remedy at law; a demurrer will also lie in cases where there is no remedy at law, or in equity;(e) or where there is no

(a) *United States v. The Peggy*, 1 Cranch, 103; *United States v. Percheman*, 7 Peters, 51.

(b) Ante, B. 5, part 1, tit. 3.

(c) *Jones v. Jones*, 3 Meriv. 161; *Jones v. Frost*, Jacob, R. 466; S. C. 3 Madd. 1.

(d) *Coop. Eq. Pl.* 94; *Story, Eq. Pl.* § 481.

(e) *Kemp v. Pryor*, 7 Ves. 237, 250.

remedy in equity, although there may be one at law,(a)

3. *Of demurrers because some other court possesses jurisdiction.*

4229. Demurrers will be sustained where another court has *exclusive* jurisdiction of the matter complained of in the bill, because then the court of equity has no jurisdiction whatever; as, for example, a court of equity will not entertain a suit respecting the validity of a will of personal estate, because the exclusive cognizance of such case is vested in the probate court, register's court, or other court exercising similar jurisdiction.(b)

4230. Under the constitution and laws of the United States, the circuit courts have jurisdiction only between citizens of different states, or between a citizen and an alien, and perhaps a few other exceptions; when a suit is instituted in any of these courts, it is required not only that the subject matter of the bill should appear to be within the jurisdiction of the court, but it must appear, on the face of the bill, that the parties, both plaintiffs and defendants, are competent to sue or be sued in these courts; and, if the bill be defective in this respect, the defendant may demur.(c)

*Art. 2.—Of demurrers to the person.*

4231. Demurrers to the person either relate to the incapacity of the plaintiff to sue, or to his want of title to the character he assumes as plaintiff. These objections are somewhat analogous to a plea in abatement at common law, and whenever such defect appears upon the face of the bill, advantage of it may be taken by demurrer; on the contrary, when it does not so appear, it is proper to take advantage of it by plea.

(a) *Cholmondeley v. Clinton*, 1 Turn. & Russ. 107; *Hardy v. Reeves*, 4 Ves. 479.

(b) *Mitf. by Jer.* 125, 126.

(c) *Jackson v. Ashton*, 8 Pet. 148.

4232.—1. When the *personal* disability of the plaintiff appears on the face of the bill, as where it appears that an infant, or a married woman, or a person *non compos mentis*, exhibits such a bill, and no next friend or committee is named in it, the defendant may demur; but unless the incapacity appears on the face of the bill, the defendant must take advantage of the disability by plea.(a)

4233.—2. When it appears by the bill that there is a *defect of the title of the plaintiff to the character in which he sues*, the defendant may demur; as when the plaintiff sues as administrator under letters of administration granted in a foreign country, for then it appears that under that administration he has no right to sue in our courts; or when persons who are merely partners sue as a corporation.(b)

*Art. 3.—Of demurrers to the matter of the bill.*

4234. Having in the two preceding articles considered the cases where a demurrer may be sustained to the jurisdiction of the court, and when it may be maintained on account of the incapacity of the plaintiff, or because there is an apparent defect of title to the character he assumes, let us examine, under this article, the cases where there may be a successful demurrer to the matters of the bill, either as to substance or to form.

*1. Of demurrers to the substance of the bill.*

4235. Some of the causes of demurrer to an original bill praying relief, have already been considered, particularly when we were treating of the proper form and structure of bills, so that here it will not be required to go farther into an examination of this

(a) Story, Eq. Pl. § 496; Mitf. by Jer. 153; Coop. Eq. Pl. 163.

(b) Mitf. by Jer. 155; Story, Conf. of Laws, § 512, 518; Coop. Eq. Pl. 164.

subject, than briefly to state for what causes a demurrer will lie to such bill.

4236.—1. A demurrer will lie when it is apparent upon the face of the bill, that *the plaintiff has no interest* in the subject matter of the suit, or any right or title concerning it; as if a plaintiff should found his right to recover on a contract, which, by his own showing, was made without consideration, a demurrer would lie.(a) And when there are several plaintiffs, and one or more of them has no interest, and this circumstance appears upon the face of the bill, the defendant may demur.(b)

4237.—2. Though the plaintiff may have a title to sue, yet, if the *defendant is not answerable*, he may demur. This may arise from a want of privity between the plaintiff and defendant,(c) but it is not necessarily confined to such cases, nor, indeed, does the rule apply to all cases where there is a want of privity.(d) An unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demands in due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate, for the purpose of compelling them to pay their debts in satisfaction of his legacy,(e) for there is no privity between the creditor and the legatee.

In some cases there is no privity between the parties created by any contract between them, but such privity sometimes arises by operation of law. For example, a sale by an agent or factor, will create a

(a) *Cozine v. Graham* 2 Paige, 177; *Mitf. by Jer.* 154; *Story, Eq. Pl.* § 503; *Coop. Eq. Pl.* 166, 167.

(b) *Page v. Townsend*, 5 Sim. 395; *Delondre v. Shaw*, 2 Sim. 237; *The King of Spain v. Machado*, 4 Russ. 225; *Clarkson v. De Peyster*, 3 Paige, 336; *Makepeace v. Haythorne*, 4 Russ. R. 244; *Cholmondeley v. Clinton*, 1 T. & Russ. 116.

(c) *Mitf. by Jer.* 158.

(d) *Coop. Eq. Pl.* 174; *Story, Eq. Pl.* § 513; 1 *Mont. Eq. Pl.* 44, 115.

(e) *Mitf. by Jer.* 158; *Coop. Eq. Pl.* 175.

privity between the purchaser and his principal, upon which a suit may be maintained at law as well as in equity.(a)

4238.—3. A demurrer may be sustained, if it does not appear upon the face of the bill that the defendant has *some interest in the subject of the suit*, which can make him liable to the plaintiff's demands.(b) When, therefore, a mere witness, or an arbitrator, is made a party, he may demur, if that fact appear upon the bill, and there are no other circumstances; but, whenever a person has by his conduct so involved himself in a transaction, he may be held liable for costs; in such case, he cannot demur to the bill, if fraudulent or improper conduct be charged, and the costs be prayed against him.(c)

4239.—4. The defendant may demur when the plaintiff does not show by the bill that *he is entitled to the relief for which he prays*. There are many grounds of demurrers of this kind; a single example will show the use of the rule. If a creditor of an insolvent debtor should file a bill against another, to deprive him of a priority, which he had lawfully obtained without any fraud, a demurrer would be sustained, because there would be no ground to interfere, since all creditors, under such circumstances, stand upon an equality of right.(d)

4240.—5. When it appears on the face of the bill, that the object of the plaintiff is to enforce a *penalty or a forfeiture*, the defendant may demur, because a court of equity never lends its aid for this purpose, leaving the parties to seek their remedy at law.

But to this general rule, there are some exceptions, among which are the following:

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(a) Mitf. by Jer. 159, 160; Coop. Eq. Pl. 176.

(b) Mitf. by Jer. 160; Plumbe v. Plumbe, 4 Y. & C. 345.

(c) Le Texier v. Margravine of Anspach, 15 Ves. 159; Bowles v. Stewart, 1 Sch. & Lef. 209.

(d) Mitf. by Jer. 163; Story, Eq. Pl. § 505; Coop. Eq. Pl. 167.

1. When the plaintiff who seeks a remedy is solely entitled to take advantage of the penalty or forfeiture, and he expressly waives any right to the penalty or forfeiture, the bill may be maintained, because then the plaintiff proceeds upon other grounds.(a)

2. When a person by his own agreement subjects himself to the payment of a penalty, if he does a particular act, a demurrer to discovery of that act will not hold.(b)

The objection to a bill to enforce a penalty or a forfeiture, applies with equal force to a particular interrogatory in a bill, otherwise unexceptionable, which may expose the defendant to a penalty or forfeiture.(c)

It is a rule of law that no man is bound to accuse himself of a crime; a bill which requires the discovery of a crime, is therefore within the rule, and may be the subject of a demurrer. But this objection is strictly confined to the point of the discovery sought, and does not affect the jurisdiction of the court to grant relief.(d)

4241.—6. A demurrer will lie to a bill on the ground of the *triviality* of the matter in dispute, as being below the dignity of the court. This rule was adopted for the double purpose of preventing a multiplicity of trivial suits, and to save the time of the court for more important matters. In England, agreeably to Lord Bacon's ordinances, it is the rule to dismiss a bill, when the matter in controversy is below ten pounds in value. In this country the same rule has been adopted, but the amount is not perhaps exactly fixed.(e)

(a) Mitf. by Jer. 195.

(b) *Morse v. Buckworth*, 2 Vern. 443; *East Ind. Co. v. Neave*, 5 Ves. 173; Mitf. by Jer. 195, 196; Hare on Disc. 139.

(c) *Chauncey v. Tabourden*, 2 Atk. 392; Hare on Disc. 133; Beam, Pl. in Eq. 260; *Parkhurst v. Lowten*, 1 Meriv. 391.

(d) Mitf. by Jer. 196; Story, Eq. Pl. § 525.

(e) *Vredenburgh v. Johnson*, Hopk. 112; *Moore v. Lyttle*, 4 John. Ch. 183; *Smetz v. Williams*, 4 Paige, 364.

2. *Of demurrers to the frame of the bill.*

4242. Defects in the frame of a bill for which a demurrer will lie, are, 1, defects in the form; 2, on account of its multifariousness; 3, the want of proper parties.

1<sup>o</sup> *Demurrers for defect of form.*

4243. A demurrer, in its *form*, must express the several causes on which it is founded, and when it does not go to the whole bill, it must clearly express the particular parts of the bill to which it applies. When the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it will be generally considered that the demurrer being entire must be overruled; for as a general rule, a demurrer bad in part is void *in toto*; (a) but there are instances of allowing a demurrer in part; and a defendant may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. Because, frequently, the same ground of demurrer will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled upon argument and another allowed. (b)

The demurrer must be to facts appearing upon the face of the record, and not upon facts *dehors* the record; these latter must be taken advantage of by plea. Care must be taken not to make the demurrer in its form what is technically called a *speaking demurrer*, that is, a demurrer which contains an argument in the body of it; as, for instance, when a demurrer says, “in or

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(a) *Verplanck v. Caines*, 1 John. Ch. 57. But see *Pope v. Stansbury*, 2 Bibb, 484.

(b) *Anon. Mosely*, 301; *Anon.* 9 Ves. 221; *Little v. Archer*, 1 Hogan, 55; *Pope v. Stansbury*, 2 Bibb, 484; *Mitf. by Jer.* 214, 215.

about the year 1770, *which is upward of twenty years before the bill filed.*"(a)

4244. When the plaintiff conceives that there is not sufficient cause apparent on the bill to support a demurrer put in to it, or that the demurrer is too extensive, or otherwise improper, he may take the judgment of the court upon it; and if he conceives that by amending his bill, he can remove the ground of demurrer, he may do so, before the demurrer is argued, on payment of costs, which vary according to the state of the proceedings. But after a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and, therefore, cannot be regularly amended. To avoid this consequence, sometimes, instead of deciding upon the demurrer, the court has given the plaintiff liberty to amend his bill, by paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties.(b) When a demurrer leaves any part of the bill untouched, the whole may be amended, notwithstanding the allowance of the demurrer; for, in that case, the suit continues in court, the want of which circumstance seems to be the reason of a contrary practice where the demurrer to the whole of a bill has been allowed.(c)

4245. If, on argument, the demurrer should be overruled, because the facts do not sufficiently appear on the face of the bill, the defence may be made by plea, stating the facts necessary to bring the case truly before the court. After a demurrer has been overruled, a second demurrer will not be allowed, for, in effect that would be to rehear the case on the first demurrer, as, on an argument of a demurrer, any cause of

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(a) *Edsell v. Buchanan*, 2 Ves. jun. 83; S. C. 4 Bro. C. C. 254; 2 Ves. 245; *Cawthorn v. Charlie*, 3 Sim. & Stu. 129; *Davis v. Williams*, 1 Sim. 8; *Brooks v. Gibbons*, 4 Paige, 374.

(b) See *Mayor of London v. Levy*, 8 Ves. 398; *Edwards v. Edwards*, 6 Madd. 255.

(c) Mitf. by Jer. 215, 216.

demurrer, though not shown in that filed, may be alleged at the bar, and, if good, will support the demurrer.(a)

4246. A demurrer is composed of five parts, which will be here briefly considered.

1. The *title* of the demurrer, which is usually in this form: "The demurrer of A B, (or of A B and C D,) to the bill of complaint of E F." If it be accompanied by a plea, or by an answer, the form is then changed to correspond, as, "the demurrer and plea," or "the demurrer and answer." When it is to an amended bill, it need not be expressed in the title to be a demurrer to the original and amended bill; a demurrer to the amended bill is sufficient.(b)

2. Although a demurrer confesses the matter of fact stated in the bill to be true, it is still preceded by a general *protestation* against the truth of the matters contained in it, a practice observed probably to avoid conclusion in another suit, or in the suit in which it is put in, should the demurrer be overruled.(c)

3. The *statement* of the cause of demurrer must be clear and explicit, it may be general or special. 1. Demurrers are *general* when no particular cause is assigned, except the usual formulary that there is no equity in the bill; this will be sufficient when the bill is defective in substance, though in such cases, special causes are usually stated.(d) 2. Demurrers are *special*, when the particular defects of the bill, or the objections to it, are pointed out. This is indispensable when the objection is to the defect of the bill in point of form.(e)

(a) See, as to demurrers *ore tenus*, *Pyle v. Price*, 6 Ves. 779; 8 Ves. 408; *Dummer v. Chipenham*, 14 Ves. 245; *Attorney General v. Moses*, 2 Madd. 294; *Attorney General v. Brown*. 1 Swanst. 288, and note (a); Mitf. by Jer. 217; *Cartwright v. Green*, 8 Ves. 405; *Story, Eq. Pl.* § 464.

(b) *Smith v. Bryon*, 3 Madd. 428.

(c) Mitf. by Jer. 212.

(d) For a form of a general demurrer, see *Barton's Suit in Equity*, 107.

(e) For a form, see *Barton's Suit in Eq.* 107; 2 *Harr. Ch. Pr. by Newl.* 607; *Van Heyth. Eq. Draftsm.* 419.

As to its extent, the demurrer may be to the whole or to a part only of the bill, and the defendant may assign as many causes of demurrer as he pleases. If one of the causes of demurrer assigned be sufficient, the demurrer will be allowed.(a) Even at the hearing of the demurrer, the defendant may orally assign another cause of demurrer, different or in addition to those assigned upon the record, which, when valid, will support the demurrer, although the causes of demurrer, stated in the demurrer itself, are held to be invalid. This oral statement of a cause of demurrer, at the bar, is technically called a *demurrer ore tenus*. This kind of demurrer will never be allowed unless there is a demurrer on record; for if there is only a plea and that is disallowed, a demurrer *ore tenus* will also be disallowed.(b) Whenever such a demurrer is permitted, it must be for some cause, which covers the whole extent of the demurrer; and it has been held that the right to put in such demurrer, *ore tenus*, applies only to those cases where the demurrer is to the whole bill, and not to cases where it is to part only, notwithstanding it is coëxtensive with the demurrer to that part.(c)

4. Having assigned the cause or causes of demurrer, the demurrer then proceeds to *demand judgment* of the court, whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such parts thereof, as is specified as being the subject of the demurrer, and concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained.

5. As the demurrer does not assert any fact, it is

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(a) *Harrison v. Hogg*, 2 Ves. jun. 323; *Jones v. Frost*, 3 Madd. 1; S. C. Jac. R. 466.

(b) 2 Dan. Ch. Pr. 73, 74; *Coop. Eq. Pl.* 112; *Durdant v. Redman*, 1 Vern. 78, and note by Raithby.

(c) *Shepherd v. Lloyd*, 2 Y. & Jer. 490; 2 Dan. Ch. Pr. 73; *Story, Eq. Pl.* § 464.

not necessary that it should be put in on oath, but, to prevent the abuse of putting in frivolous demurrers, it is required that the demurrer should be signed by counsel.

*2° Of demurrers on account of multifariousness.*

4247. When considering the nature of a bill we took occasion to explain the nature of multifariousness, and gave some examples of that fault.(a) It is not easy to lay down any rule as to multifariousness, which shall be universally applicable, nor to say what constitutes this fault, as an abstract proposition. "The result of the principles to be extracted from the cases, on this subject," says Judge Story,(b) "seems to be that where there is a common liability, and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims of property, at least if the subjects are such as may without convenience be joined, may be united in one and the same suit."(c)

A demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill; and if the demurrer is allowed, the bill will be dismissed as to the party who demurs;(d) such a bill cannot be made the foundation of partial relief.(e)

*3° Of demurrer for want of proper parties.*

4248. We have seen, when treating of parties to a bill in equity,(f) that it is the constant aim of a court

(a) Ante, B. 5, p. 2, t. 2, c. 2, s. 3, § 4.

(b) Story, Eq. Pl. § 533.

(c) *Campbell v. Mackay*, 1 Mylne & Craig, 603, 623. See *Dimmock v. Bixby*, 20 Pick. 368; *Avery v. Kellogg*, 11 Conn. 562; *Daniel v. Morrison's Ex'r*, 6 Dana, 186; *Murphy v. Clarke*, 1 Sm. & Marsh. 221; *Donaldson's adm. v. Posey*, 13 Ala. 752; *Nelson v. Hill*, 5 Howard, 127; *Newland v. Rogers*, 3 Barb. Ch. R. 432; *Varrick v. Smith*, 5 Paige, 137; *Mitf. by Jer.* 181; *Coop. Eq. Pl.* 181.

(d) *Boyd v. Hoyt*, 5 Paige, 65.

(e) *Gibbs v. Claggett*, 2 Gill & John. 14.

(f) B. 5, part 2, t. 1.

of equity to do complete justice, by deciding upon and settling all the rights of all persons interested in the subject of the suit, to make the performance of the order of the court safe to those who are compelled to obey it, and to prevent future litigation. Whenever the want of proper parties appears on the face of the bill, there is a good cause of demurrer. Indeed, when the persons are not brought before the court who ought to have been made parties, and no proper decree can be made, the exception may also be insisted upon in the answer and at the hearing.<sup>(a)</sup> But when the parties omitted are merely formal parties, unless the objection be taken by demurrer or by plea, it cannot be made at the hearing; and, if the court can do so, it will dispose of the cause upon its merits, without requiring such formal parties to be joined.

When the misjoinder of parties is of parties plaintiffs, all the defendants may demur; if of parties defendants, only those can demur who are improperly joined.

If the demurrer is for want of proper parties, it must show who are the proper parties, from the facts stated in the bill, not indeed by name, for that might be impossible, but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by making proper parties.<sup>(b)</sup>

§ 2.—Of demurrers to original bills not praying relief.

4249. Under the preceding head, (§ 1,) we have considered the grounds upon which a demurrer to a bill praying for relief must rest, and a demurrer to a bill for a discovery has not been examined further than as it is incidental to relief. It is now proposed to treat of demurrers to original bills not praying relief, the

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<sup>(a)</sup> Story, Eq. Pl. § 541; Mitf. by Jer. 180.

<sup>(b)</sup> Mitf. by Jer. 180; Pyle v. Price, 6 Ves. 780; Attorney General v. Jackson, 11 Ves. 369; 1 Dan. Ch. Pr. 385; Coop. Eq. Pl. 187; Story, Eq. Pl. § 543.

principal one of which is the demurrer to a bill of discovery; our attention in this head will be confined to that alone.

When the bill is for discovery and relief, the defendant has the option to demur to the relief and answer the discovery; but, in general, he cannot reverse this order, demur to the discovery alone and not to the relief, when the discovery is merely incidental to the relief; for that would be to demur, not to the thing required, but to the means by which it was to be obtained.<sup>(a)</sup> There are cases, however, in which a defendant may demur to the discovery sought by the bill, although such demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself. These cases chiefly occur when there is any thing in the situation of the defendant which renders it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains and penalties, or because it may render him liable to some forfeiture, or to something in the nature of a forfeiture.

There are many grounds of demurrer which are common to bills praying for relief, and those not praying for relief.<sup>(b)</sup> There are other cases where the grounds of demurrer are peculiarly appropriate to bills of discovery; these will be briefly considered. They are, 1, when the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery; 2, when the plaintiff has no interest in the subject, or not such interest as entitles him to call on

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<sup>(a)</sup> Story, Eq. Pl. § 312, 546.

<sup>(b)</sup> Such, for example, as that the subject is not one over which any court has jurisdiction; that the court has not jurisdiction of the case; that the plaintiff has no title, or the defendant is not liable; the plaintiff has no interest in the subject matter; that the object of the bill is to enforce a forfeiture, and the like.

the defendant for a discovery; 3, when the defendant has no interest to entitle the plaintiff to institute a suit against him, even for the purpose of discovery; 4, when there is no privity between the parties; 5, when the discovery, if obtained, cannot be material; 6, when the situation of a defendant renders it improper for him to make a discovery; 7, when the equity of the defendant is equal to that of the plaintiff.

*Art. 1.—Of demurrer to a discovery on account of jurisdiction.*

4250. A bill of discovery must show upon its face that the court has jurisdiction. When a bill prays for relief, if the discovery is material to the relief, it is incidental to it, and when the plaintiff shows a title to the relief, he also shows a case in which a court of equity will compel a discovery, unless some circumstance in the situation of the defendant renders it improper. But when the bill is a bill of discovery merely, it is necessary for the plaintiff to show by his bill a case in which a court of equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction is also exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the same court or some other court.(a)

When the bill of discovery is brought to aid the prosecution or defence of a suit in another court, it must clearly appear, upon the face of the bill, that the suit is of such a nature, for such objects, and for such circumstances, as will justify the interposition of the court. It must appear, 1, that the case is of a civil nature; 2, that when commenced in another court, that court has not the power to enforce the remedy sought; 3, that the action is not against public policy.

1. *The claim must be of a civil nature.*

4251. A court of equity will lend its aid to obtain

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(a) *Mitf. by Jer. 185, 186.*

a discovery, only in cases of a purely civil nature; if the discovery sought is of a criminal nature or relating to criminal proceedings, a discovery will not be compelled, and if this appears, a demurrer will lie.<sup>(a)</sup> A bill of discovery to aid a *mandamus*, or a *quo warranto*, or of a prohibition; an information or an indictment, are examples of this kind.<sup>(b)</sup>

It is not necessary to the validity of an objection that the discovery sought relates to a criminal matter, that the facts inquired after should have an immediate tendency to criminate the defendant; he may equally object to answering the circumstances though they have not such an immediate tendency.<sup>(c)</sup> "In no stage of the proceedings in this court," says Lord Eldon,<sup>(d)</sup> "can a party be compelled to answer any question accusing himself, or any one, in a series of questions that has a tendency to that effect; the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him, except one link in a chain of proof that is to affect him."

2. *When discovery will be compelled in aid of another jurisdiction.*

4252. When the suit is pending in another court of ordinary jurisdiction, if it appears that that court itself can compel a discovery, the defendant may demur; for in that case, the remedy elsewhere is complete, and the interference of a court of equity is unnecessary and vexatious.<sup>(e)</sup> And courts of equity will not enforce

<sup>(a)</sup> Mitf. by Jer. 186.

<sup>(b)</sup> Wigr. on Disc. 4, 5; *Montague v. Dudman*, 2 Ves. 298; *Attorney General v. Reynolds*, 1 Eq. Abr. 601.

<sup>(c)</sup> *E. I. Company v. Campbell*, 1 Ves. 246.

<sup>(d)</sup> *Paxton v. Douglass*, 19 Ves. 225. See *MacCallum v. Turton*, 2 Y. & J. 183.

<sup>(e)</sup> Mitf. by Jer. 186; *Dunn v. Coates*, 1 Atk. 288.

a discovery unless the rights of the parties are litigated in the ordinary tribunals. A bill of discovery for the prosecution or defence of a controversy before arbitrators, who are judges of the parties own choosing, will not be supported, and if the facts appear upon its face, the defendant may demur.(a)

3. *When the action is against public policy.*

4253. Equity will never aid another court to support an action against public policy; when it appears on the face of the bill that the discovery sought is to support an action against public policy, the defendant may demur. Thus, for example, where an action was brought to recover the expenses of an entertainment given by the plaintiff, at the request of the defendant, under an agreement that the former should introduce to him a woman of fortune, with a view to marriage; and a discovery was sought in that action for the purpose of enforcing this contract, a demurrer to the bill was allowed, because the contract was against public policy.(b)

*Art. 2.—Of demurrer to discovery when the plaintiff has no interest in the suit.*

4254. A bill must show an interest in the plaintiff in the subject to which the required discovery relates, and such interest as to entitle him to call on the defendant for the discovery. Therefore where a plaintiff filed a bill for a discovery merely to support an action which he alleged by his bill he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet the court being of opinion that the case stated by the bill

(a) Story, Eq. Jur. § 1495; Story, Eq. Pl. § 554; Hare on Disc. 119.

(b) King v. Burr, 3 Meriv. 693. See Coop. Eq. Pl. 194, 195; Wallis v. Duke of Portland, 3 Ves. 493.

was not such as would support an action, a demurrer was allowed; for unless the plaintiff had a right to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case; (a) for the right of a plaintiff in equity to the benefit of a defendant's oath, is limited to the discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence. (b)

*Art. 3.—Of demurrer to discovery when the defendant has no interest in the suit.*

4255. A defendant who has no interest in the suit, and who may be examined as a witness, cannot be compelled to answer a bill of discovery; for such a bill can only be to gain evidence, and the answer of defendant cannot be read against any other person, not even against another defendant in the same bill. (c) But although the defendant may have no interest, if the bill states that he has or claims an interest, a demurrer which admits the bill to be true, will not be sustained; and he then can avoid it only by a plea or disclaimer. (d)

4256. But to this rule there are some exceptions:

1. When a corporation is made a defendant, and it is necessary to discover certain entries made in the books of the corporation, their secretary, book-keeper, or clerk, may be made a party, because a corporation does not answer under oath, but simply under seal,

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(a) Mitf. by Jer. 187; Angell v. Draper, 1 Vern. 399.

(b) Wigr. on Discov. 90.

(c) 2 Vern. 380; Crane v. Deming, 7 Day, 387.

(d) Mitf. by Jer. 188; Story, Eq. Pl. § 569.

and not being liable to a prosecution for perjury, their officers are allowed to be made parties from necessity.(a) A demurrer because the bill showed no claim of interest in the defendant, has in such case been overruled.(b)

2. And where a party has by his conduct so mixed up himself with the transaction, as to be charged as a party to a fraud, he may be made defendant, and may also be liable for costs.(c)

*Art. 4.—Of demurrers to bills of discovery, when there is no privity between the parties.*

4257. Although both the plaintiff and defendant may have an interest in the subject, to which the discovery required is supposed to relate, yet there may not be that privity of title between them which can give the plaintiff a right of discovery.(d)

*Art. 5.—Of the immateriality of the discovery.*

4258. The object of a bill of discovery is to enable the court to decide on matters in dispute between the parties; the discovery sought must, therefore, be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays for relief; or does not show a title to sue the defendant in some other court; or that he is actually involved in litigation with the defendant, or liable to be so, and does not show that the discovery which he prays is material to enable him to support or defend a suit, he shows no

(a) Anon. 1 Vern. 117. See *Vermilyea v. The Fulton Bank*, 1 Paige, 37.

(b) *Wych v. Meal*, 3 P. Wms. 310; *Gibbons v. Waterloo Bridge Co.*, 5 Price, 491.

(c) *Bennet v. Vade*, 2 Atk. 324; *Fenwick v. Reed*, 1 Meriv. 11.

(d) *Mitf. by Jer.* 189; 2 Dan. Ch. Pr. 61, 62.

title to the discovery, and consequently a demurrer will hold. Therefore, where a bill filed by a mortgagor against a mortgagee to redeem, sought a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed; because as there was no trust declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the defendant or not.(a)

*Art. 6.—When the situation of the defendant renders a bill of discovery improper.*

4259. Sometimes the situation of a defendant may render it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of a forfeiture. This subject has already been sufficiently considered.(b)

A bill of discovery may be resisted by demurrer when it seeks the discovery of a fact from one whose knowledge of that fact, as appears on the face of the bill, was derived from confidence reposed in him, as counsel, attorney, solicitor, or arbitrator.(c)

*Art. 7.—Of demurrers when the equity of the defendant is equal to that of the plaintiff.*

4260. A demurrer will lie to a bill of discovery when the defendant has an equal equity with the plaintiff, and is therefore entitled to be protected from a discovery, which will endanger, disturb, or destroy his present rights. If the matter appear clearly on the face of the bill, a demurrer will hold, although the defendant is not clothed with a perfect legal title, for the court will not compel a discovery by which the

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(a) *Harvey v. Morris*, Rep. temp. Finch, 214; Mitf. by Jer. 192; 2 Dan. Ch. Pr. 55.

(b) Ante, n. 4240.

(c) Mitf. by Jer. 288; Story Eq. Pl. § 599; 2 Dan. Ch. Pr. 56, 57.

defendant may hazard his title; (a) as, for example, where one man becomes a purchaser for a valuable consideration, without notice of the plaintiff's claim.

SECTION 2.—OF DEMURRERS TO BILLS NOT ORIGINAL.

4261. In the preceding section our attention has been confined to the consideration of demurrers to original bills, first, those which pray for relief, and, secondly, those which do not, or bills of discovery. As every other bill is a consequence of an original bill, it will readily be perceived that many causes of demurrer which will apply to an original bill, will also apply to every other kind; but still the peculiar form and object of each kind afford distinct causes of demurrer to each. (b)

§ 1.—Of demurrers to bills of revivor.

4262. A bill of revivor, or a bill in the nature of a bill of revivor, must show a right in the plaintiff to revive the suit; if it does not show a sufficient ground for reviving the suit, or any part of it, either by or against the person, by or against whom it is brought, the defendant may demur, and thus show cause against the revival. The demurrer to such a bill may be upon three distinct grounds: 1, for want of privity; 2, for want of sufficient interest in the party; or, 3, for some imperfection in the frame of the bill. (c)

*Art. 1.—For want of privity.*

4263. A bill of revivor is brought when the original bill has abated by the death of one of the parties, and his interest becomes vested in his representatives. The interest in the personalty vests by death in the

(a) Mitf. by Jer. 199, 274, 288; 2 Dan. Ch. Pr. 55; Story, Eq. Pl. § 603.

(b) Mitf. by Jer. 201.

(c) Coop. Eq. Pl. 210.

executor or administrator, and in the realty in the heir. In these cases the privity is cast on them *by the law*. The bill of revivor must therefore show the title by which the plaintiff claims; when an executor or administrator brings the bill, he shows a sufficient title and privity by showing his appointment as such. But should an administrator *de bonis non*, by a pure bill of revivor, attempt to revive a decree, obtained by a former administrator, a demurrer would lie, because there is no privity between an administrator *de bonis non* and the former administrator who obtained the decree; the administrator *de bonis non* holds purely as the representative of the intestate, and paramount to the former administrator.(a)

There are cases where the privity is acquired *by the act of the parties*; as where a transfer or conveyance of a man's right is made to another, and then the assignor dies; in such case the bill of revivor will not lie by such person; the proper remedy is by a bill in the nature of a bill of revivor.

In both these cases, if the appropriate bill is not brought by the parties seeking to revive, a demurrer will lie.(b)

*Art. 2.—For want of interest.*

4264. A bill of revivor will not lie unless the plaintiff has some interest in the revival, and when he has no such interest, the defendant may demur. Where the defendant has no other interest in the prosecution of the suit, than to dissolve an injunction and proceed at law, a bill of revivor cannot be sustained by him, and a demurrer to such a bill has been held good.(c) A demurrer will also hold to a bill of revivor brought singly for costs, when they have not

(a) Coop. Eq. Pl. 210.

(b) Story, Eq. Pl. § 618.

(c) Horwood *v.* Schmedes, 12 Ves. 311; Coop. Eq. Pl. 212.

been taxed before the abatement happened; but if the costs were then taxed, a bill of revivor may be maintained.(a)

*Art. 3.—Demurrer for a defect in the frame of the bill.*

4265. If the bill of revivor is imperfect in its frame, the defendant may demur, as where there is a want of proper parties; as, if there is a suit by tenants in common, and one of them dies, the representatives of the deceased tenant in common cannot exhibit a bill of revivor without making the surviving tenant in common a party to the bill of revivor, either as a co-plaintiff or a defendant.(b)

A demurrer will also be supported, when it appears on the face of the bill that material facts are not stated; as, where a person, seeking to revive as administrator, does not state that he has taken out letters of administration, for then he shows no title to revive; or when the plaintiff, a widow, suing as executrix of her husband, did not charge that she had proved her husband's will.(c)

§ 2.—Of demurrers to supplemental bills.

4266. A demurrer to a supplemental bill, or to a bill in the nature of a supplemental bill, may be filed whenever it appears upon the face of the bill, that the plaintiff had no right to that species of bill, either from want of title or from mistake in pleading.(d)

As it is a general rule that the court will not permit a supplemental bill to be filed but upon new matter, because the same end can generally be answered by amendment of the original bill, if a supplemental bill is brought upon matter arising before the filing of the

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(a) Mift. by Jer. 202.

(b) *Fellowes v. Williamson*, 11 Ves. 306, 313.

(c) *Humphreys v. Ingledon*, 1 P. Wms. 753; S. C. 1 Dick. 38.

(d) *Coop. Eq. Pl.* 212.

original bill, when the suit is in that stage of the proceedings in which an amendment will be allowed, the defendant may demur.(a)

If a bill is brought as a supplemental bill upon matters arising subsequent to the time of filing the original bill, against a person who claims no interest arising out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may also demur, especially if the bill prays that he may answer the matters charged in the former bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy than from his being without one.(b)

§ 3.—Of demurrer to bills of revivor and supplement.

4267. As bills of revivor and supplement are liable to the same objections as may be made to the two species of bills of which they partake, it will be unnecessary, here, to repeat the grounds of demurrer which may be made to these bills.(c)

§ 4.—Of demurrers to cross bills.

4268. A cross bill having nothing in its nature different from an original bill, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems to be no cause of demurrer to such bill which will not equally hold to an original bill. As a cross bill is generally considered as a defence, it is not necessary that it should show that the plaintiff has an equity, because being drawn into court by the plaintiff in the original bill, the party may avail himself of the assistance of the court, without being put to show a ground of equity to support its jurisdiction.(d)

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(a) *Baldwin v. Macknown*, 3 Atk. 817.

(b) *Mitf. by Jer.* 202, 203.

(c) *Mitf. by Jer.* 206; *Coop. Eq. Pl.* 214; *Story, Eq. Pl.* § 627.

(d) *Doble v. Potman*, *Hardr.* 160; *Mitf. by Jer.* 203.

When a bill, purporting to be a cross bill, brings before the court other distinct matters and rights than those contained in the original bill, it is no longer to be deemed a cross bill, but an original suit, and subject to all the rules of an original bill.(a)

A cross bill, filed by special direction of the court, for the purpose of obtaining its decree touching some matter not in issue by a former bill, or not in issue between the proper parties, is not liable to demurrer.(b)

§ 5.—Of demurrers to bills of review.

4269. The constant defence to a bill of review for error apparent upon the decree has been said to be by plea of the decree, and demurrer against opening the enrolment. There seems, however, no necessity for pleading the decree, if fairly stated in the bill.(c)

The bill of review for errors apparent upon the face of the record must be brought within the time prescribed for the bringing of writs of error; for it is governed by analogy to the statute of limitations of writs of error at law. In the computation, the time is to be counted, not from the enrolment of the decree, but from the time of pronouncing it. When this fact appears upon the record, the defendant may demur.(d)

(a) Story, Eq. Pl. § 631. See *Galalian v. Erwin*, Hopk. R. 49, 59; S. C. 8 Cowen, 561.

(b) Mitf. by Jer. 203.

(c) Mitf. by Jer. 203. See *Webb v. Pell*, 3 Paige, 368.

(d) Mitf. by Jer. 204. Mr. Cooper, Eq. Pl. 216, says such objection must be taken by plea, and not by demurrer. Upon this, Judge Story, Eq. Pl. § 635, very justly observes, "It has been said that this objection must be taken by plea to the bill of review, even if it is apparent on the face of the bill, that it is brought after the prescribed period; for that, otherwise, the plaintiff would not be enabled to avail himself of the exceptions provided by the statute for cases of disability, such as infancy, coverture, or the like. But there is great reason to doubt the propriety of this doctrine; and the more reasonable doctrine is, that a demurrer will lie in such a case; and if such exception exists, it is the duty of the plaintiff to set it forth in his bill of review, in order to repel the objection." See Mitf. by Jer. 205, note (b).

Bills in the nature of bills of review do not appear subject to any particular cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill.(a)

§ 6.—Of demurrers to a bill to carry a decree into execution.

4270. If, upon the face of a bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.(b) When a decree is erroneous it will not be enforced by the court, as a matter of course, particularly if the enforcement of it would be prejudicial to the rights and interests of third persons, who ought to have been made parties, but who were not, to the original decree. It is a rule, that, when a party comes into equity to have the benefit of a former decree, he is bound to show that, upon its face, it was a right decree; for when it is palpably erroneous, it ought not to be carried into execution.(c)

§ 7.—Of demurrers to bills to suspend the operation of a decree.

4271. Demurrers to bills of this kind are of very rare occurrence, because the bills themselves are seldom brought. Cases of this kind depend so much upon circumstances of a very peculiar nature, that it is impossible to lay down any rules as to demurrers to them.

§ 8.—Of demurrers to bills to set aside a decree for fraud.

4272. If a bill is filed for this object, and the circumstances stated in the bill do not amount to a fraud, or if it is alleged that the decree was obtained without

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(a) Mitf. by Jer. 205.

(b) Mitf. by Jer. 206.

(c) Attorney General v. Day, 1 Ves. 218; Mitf. by Jer. 96; Story, Eq. Pl. § 641.

making parties to the suit those whose rights are affected by it, and is, therefore, fraudulent, but it appears on the face of the bill that sufficient parties were before the court to bind all other persons interested, as a first tenant in tail, or the like, the defendant may demur.(a)

SECTION 3.—OF THE EFFECT OF DEMURRERS.

4273. Having examined the cases in which a demurrer will lie, and the grounds upon which it may be maintained, in this section it will be proper to take a brief view of the effect of a demurrer. But before proceeding to the consideration of this subject, it will be well to remark that in addition to the several particular causes of demurrer, applicable to the several kinds of bills, the defendant may take advantage of any irregularity in the frame of the bill; as if a bill be brought contrary to the usual course of the court, a demurrer will hold.(b)

As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true; thus, if a demurrer is to the whole bill, the whole is taken for true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill, to ground the relief prayed, is considered as true.

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CHAPTER IV.—OF PLEAS.

4274. This chapter will be divided into four sections, in which will be considered, 1, the general

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(a) Coop. Eq. Pl. 217.

(b) Mitf. by Jer. 206; Worley v. Birkhead, 3 Atk. 809, 811, arg.; Fletcher v. Tollet, 5 Ves. 3.

nature of pleas ; 2, the particular requisites of pleas ; 3, pleas to original bills ; 4, pleas to bills not original.

SECTION 1.—OF THE GENERAL NATURE OF PLEAS.

4275. When the objection to a bill is apparent upon its face, the proper defence is to demur to it ; and this may be either from matter contained in it, or from the defects of its frame, or because the case made out by it is not sufficient in law. But when the objection is not so apparent, but is *dehors* the bill, the only way to take advantage of it is by plea or answer. A *plea* is defined to be a special answer showing or relying upon one or more things why the cause should be either dismissed, delayed or barred.(a) It differs from an answer in the common form in this, that it demands judgment of the court in the first instance, whether the matter urged by it did not debar the plaintiff from his title to that answer which the bill required.(b)

4276. A plea bears a resemblance to an exception in the civil law : the exception has thus been called as being a species of exclusion, or a bar opposed to the demand which is made against the exceptor, so as to destroy the intention of the plaintiff and to avoid the condemnation. *Exceptio dicta est quasi quaedam exclusio, quæ inter opponi actioni cujusque rei solet ad excludendum id quod in intentionem condemnationemve deductum est.*(c)

4277. The defence proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part to which it applies. It has been observed that

(a) Mitf. by Jer. 219 ; Lubé on Pl. 238 ; Coop. Eq. Pl. 219 ; Wyatt Pr. Reg. 324 ; Story, Eq. Pl. § 649 ; Carroll v. Waring, 3 Gill. & John. 491 ; Beam. Pl. in Eq. 1.

(b) Roche v. Morgell, 2 Sch. & Lef. 721.

(c) Dig. 44, 1, 2.

the end of a plea is to save to the parties the expense of an examination of witnesses at large; and that therefore it is not every good defence in equity that is good as a plea; for when a defence consists of a variety of circumstances, there is no use of a plea, as the examination must still be at large; and the effect of allowing a plea would be, that the court would give judgment on the circumstances of the case before they were made out by proof.(a)

The plea must reduce the case or some part of it to a *single* point; for this reason a plea ought not to contain more defences than one, and a double plea is considered informal, multifarious, and therefore improper; but a variety of facts may be pleaded in one plea when they are all conducive to a single point.(b)

Pleas, in their nature, are considered as pure pleas, and pleas not pure or anomalous.

§ 1.—Of pure pleas.

4278. Pure pleas are those which rely wholly on some matters *dehors* the bill, as for example, pleas of a release or of a settled account. A pure plea in bar, if not in every instance, yet generally, admits all the facts of the bill,(c) interposing, however, new matter, which, if true, destroys the effect of all the facts stated in the bill.

§ 2.—Of pleas not pure, or anomalous pleas.

4279. Pleas of this kind are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. They consist mainly of

(a) Mitf. by Jer. 219.

(b) See *Whitbread v. Brockhurst*, 1 Bro. Ch. R. 404, 415, note by Belt; S. C. 2 V. & B. 154; *London v. Liverpool*, 3 Anstr. 738. See, as to duplicity in pleading in equity, Story, Eq. Pl. § 653 to 657; Coop. Eq. Pl. 224; Beam. Pl. in Eq. 10.

(c) A plea of purchase for a valuable consideration, without notice, is, perhaps, to some extent, an exception to the rule.

denials of the substantial matters set forth in the bill. For example, should a bill admit a release to have been made by the plaintiff, or an account to have been settled, and should aver that either was procured by fraud, the defendant may plead the release or account settled in bar, negating in his plea the averment of fraud, and supporting the plea by an answer, denying all the facts and circumstances, charged as matters of fraud in the bill.<sup>(a)</sup>

SECTION 2.—OF THE PARTICULAR REQUISITES, FRAME, AND EFFECT OF PLEAS.

§ 1.—Of the chief requisites of pure pleas.

4280. The chief requisites of a pure plea in equity, are, 1, that it consists of new matter; 2, that it be single; 3, that it be material; 4, that it be direct and positive; 5, that it aver a complete equitable defence to the case made by the bill; 6, that it follow the bill.

*Art. 1.—The plea must consist of new matter.*

4281. The first and most important requisite of a pure plea is, that it brings, generally speaking, new matter before the court. A plea in equity must state this new matter, not found in the bill, as a special plea at law is required “always to advance some new fact not mentioned in the declaration.” Relying upon the new matter it contains, as a defence which displaces the equity of the bill, generally speaking, a plea does not deny that equity; in other words, a plea is intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts

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<sup>(a)</sup> Story, Eq. Pl. § 651; Beam. Pl. in Eq. 2 to 7; Bayley v. Adams, 6 Ves. 594.

contained in the bill, so far as they are not controverted by the matter contained in the plea.(a)

A mere denial of facts, although very proper for an answer, is insufficient for a plea; and therefore, a plea in bar to a bill in equity, merely denying part of the material facts stated in the bill, is insufficient.(b)

*Art. 2.—Pleas must be single.*

4282. In general, a plea in bar ought not to contain more defences than one; it must reduce the cause to a single point, constituting a ground why the suit should be dismissed, delayed, or barred.(c) For as it has been properly observed that if two matters of defence could be offered by way of plea, any number of defences might be tendered in the same way, which would be productive of all the delay, expense, and inconvenience, which pleas in equity are expressly intended to prevent.(d) A plea of, first, an accord and compromise of a disputed right, and, secondly, prescription or an unmolested possession from the time of the agreement, is multifarious.(e)

Whether it be in the affirmative or negative, in order to be good, a plea must be either an allegation or a denial of some leading fact, or of matters, which taken collectively make out some general fact, which is a complete defence. But, although a defence, offered by way of plea, should consist of a variety of circumstances, yet if they all tend to a single point, the plea may be good.(f)

(a) Mitf. by Jer. 14.

(b) Milligan v. Milledge, 3 Cranch, 220.

(c) Goodrich v. Pendleton, 3 John. Ch. 384; Chapman v. Turner, 1 Atk. 54; Moreton v. Harrison, 1 Bland, 496; Rhode Island v. Massachusetts, 14 Pet. 211.

(d) Mitf. by Jer. 296, 297.

(e) Rhode Island v. Massachusetts, 14 Pet. 211. See Taylor v. Luther, 2 Sumn. 230; Didier v. Davison, 10 Paige, 515.

(f) Mitf. by Jer. 296; Coop. Eq. Pl. 225; Bogardus v. Trinity Church, 4 Paige, 178.

The objection is still stronger, where two facts are pleaded, which are inconsistent with each other.(a)

*Art. 3.—Pleas must be material.*

4283. Not only must the plea reduce the cause to a single point on which the plaintiff may take issue, but it must be such an issue as is material to delay, dismiss or bar the bill; and the issue as to the truth of the plea, is to be referred to the state of the facts at the time the plea is filed.(b) If the point tendered by the plea is not material, it cannot in equity, any more than at law, constitute an issue.(c)

*Art. 4.—Pleas must be direct and positive.*

4284. Every plea in equity should be direct and positive and not by way of argument, inference and conclusion, which have a tendency to create unnecessary prolixity and expense. Upon this ground where there was a charge of constructive notice in a bill, and the defendant in his plea averred that there was not any notice, either constructive or actual, the plea was held bad, because the defendant should have denied the facts charged in the bill, from which the constructive notice was deducible.(d)

But though, in general, a plea must be positive and direct, yet sometimes a defendant is allowed to aver according to the best of his knowledge and belief; as that an account is just and true; and in all cases of negative averments, and of averment of facts not within the defendant's immediate knowledge, he can scarcely ever make a positive assertion.(e) Unless,

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(a) Coop. Eq. Pl. 224.

(b) Cook v. Mancius, 4 John. Ch. 166.

(c) Co. Litt. 126 a; Morrison v. Turner, 18 Ves. 175.

(d) Beam. Pl. in Eq. 22.

(e) See Kirkman v. Andrews, 4 Beav. 554; Small v. Attwood, 1 Y. & C. Eq. Ex. 39.

however the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it; and the conscience of the defendant is saved by the nature of the oath administered, which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true.(a)

*Art. 5.—The plea must aver a complete equitable defence to the case, or a part of it, made out by the bill.*

4285. A plea must distinctly aver all the facts necessary to render a plea a complete and equitable defence to the case made by the bill, so far as the plea extends; so that, if he chooses, the plaintiff may take issue upon it. Averments are likewise necessary to exclude intendments, which would otherwise be made against the pleader; and the averments must be sufficient to support the plea.(b) This rule is, in its principles, analogous to that prevailing at law, when, as every man is supposed to make the best of his own case, a defendant's plea, when it can be taken in two intents, shall always be construed most strongly against himself: *ambiguitas placitum interpretari debet contra proferentem.*(c)

*Art. 6.—The plea must follow the bill.*

4286. A plea in bar must follow the bill and not evade it; it may be to the whole bill or to a part only. When it is to the whole bill, but it does not extend to, or as it is technically expressed, cover the whole, the plea is bad. When the plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and, therefore, a general plea to such parts of the bill as are not answered by the defendant,

(a) Mitf. by Jer. 297, 298.

(b) Mitf. by Jer. 298.

(c) Co. Litt. 303 b; Beam. Pl. in Eq. 27, 28.

is too general, and will be overruled. For the same reason, if parts of the bill to which the plea extends, are not clearly and precisely expressed, the plea will be bad; as, if the plea is general, with the exception of matters after mentioned, and it is accompanied by an answer. The court cannot, in this case, judge what the plea covers without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered.(a)

§ 2.—Of the chief requisites of pleas not pure, or anomalous pleas.

4287. Pleas not pure, or anomalous pleas, are so designated, because they differ from pure pleas in this, that whereas, pure pleas rely for a defence upon matters altogether *dehors* the bill; pleas not pure, on the contrary, rest altogether upon matters stated in the record, and upon denials and negations of matters of facts contained in it, which denials and negations, if true, constitute a sufficient defence against further proceedings in the suit, either peremptorily, or at least in its present form.(b)

In the consideration of this kind of pleas, let us inquire, 1, into the allegations which the plea must contain, or omit; and, secondly, when an answer is required to accompany the plea, and what such answer should contain.

*Art. 1.—What a plea, not pure, should contain or omit.*

4288. When a bill admits a good bar or defence to exist to the suit, as where it admits the plaintiff gave the defendant a release, and then states facts and circumstances in avoidance of such bar or defence, as where it states the release was obtained by fraud, the plea,

(a) Mitf. by Jer. 294. See *Howe v. Duppa*, 1 Ves. & B. 514.

(b) Story, Eq. Pl. § 667.

as well as the answer, should negative those circumstances, so set up in avoidance of the bar or defence.(a)

*Art. 2.—Of the answer required to support the plea.*

1. *In what cases required.*

4289. In general, an answer is not required to support a plea, unless fraud or notice, or some other equitable ground of avoiding the bar, is charged in the bill, for, when there is no such charge, the plea alone will be sufficient.(b) Neither will an answer be required to support a plea when the defendant pleads that he will criminate himself, or expose himself to pains and penalties, by the discovery called for.

There must be some specific facts charged in the bill, which are equitable circumstances in favor of the plaintiff's case against the matter pleaded, as fraud or notice of title, in order to require or even to justify an answer to accompany or support the plea.

4290. In those cases where it is necessary, an answer seems to be required in support of the plea, on several grounds:

1. First, with a view to benefit the plaintiff, either in aid of proof, or in order to give him an opportunity of obviating the bar to be set up, or in other words, to enable him to except to the traverse of the facts charged in the bill. If these facts were merely denied by way of averment in the plea, as the plaintiff could not except to such averment, he would be precluded from objecting to the insufficiency of that denial, however general in its terms.

2. Secondly, with a view beneficial to the defendant, in order to give him an opportunity of excluding intendments, which might otherwise be made against him; because, upon argument of a plea, every fact

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(a) Story, Eq. Pl. 680; Mitf. Eq. Pl. 240, 241.

(b) Mitf. by Jer. 298, 299.

stated in the bill, and not denied by the answer in support of the plea, must be taken to be true.(a)

Whenever an answer is required to accompany a plea, the plea should not cover the whole bill; it should cover so much only, as does not relate to the discovery of the particular facts, to which the plaintiff has a right to require an answer, in support of the plea. If it covers such discovery, it will be bad, because the defendant is bound to make that discovery.(b)

When an answer is necessary, it must be full and clear, or it will not support the plea. But the pleader must be careful not to extend the answer beyond the facts and circumstances which are necessary to be discovered in support of the plea, and are not covered by the plea; for, if a plea is coupled with an answer to any part of the bill covered by the plea, and which by the plea, the defendant consequently declines to answer, upon argument, the plea will be overruled.(c)

For the same reason, a plea will be overruled when it is accompanied by an answer, and the facts charged in the bill are not such as require an answer to accompany the plea; for, in such case, an answer is impertinent and overrules the plea. An answer extending to any part of the bill covered by the plea, is fatal to the plea on the argument.(d) The reason of this is, that pleas are to be put in *ante litem contestatum*, because they are pleas only why the defendant should not answer; if, therefore, he does answer to any thing, to which he may plead, he overrules his plea; for the plea is assigned as a reason why he should not answer; and if he does answer, he waives the objection, and of course his plea.

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(a) Beam. Pl. in Eq. 34, 35; 2 Sch. & Lef. 727.

(b) Portarlington v. Solby, 6 Sim. 356.

(c) Mitf. by Jer. 299; Beam. Pl. in Eq. 36, 38; Bolton v. Gardner, 3 Paige, 273; Ferguson v. O'Hara, 1 Pet. C. C. 493.

(d) Dobbyn v. Barker, 5 Bro. P. C. 573.

2. *Of the frame or form of the plea and answer to support it.*

4291. Much of the matter which might be arranged under this head, has been anticipated when considering the cases in which an answer is required to support a plea.

4292.—1. The plea should not cover more ground than to introduce new facts which do not appear upon the face of the bill; but as a plea, unlike a demurrer, which cannot be good in part and bad in part, may be pleaded to the whole or only to a part of it, and, if it should cover too much, the court will allow it to stand for the part which it properly covers. (a)

4293.—2. When a plea is pleaded to one part of the bill, and an answer is made to another, if one defence is made by the answer and another by the plea, the plea will be ordered to stand for an answer. And if a plea is bad in form only, but good in substance as to the whole or any part of the relief sought by the bill, it will be permitted to stand as a part of the defendant's answer, or the defendant may be permitted to insist upon the same matters in the answer. (b)

4294.—3. In *form*, (c) like a demurrer, the plea is always prefaced by a protestation against any confession or admission of the facts stated in the bill; but the only use of this seems to be to prevent any conclu-

(a) *Beam. Pl. in Eq.* 44, 45; *French v. Shotwell*, 20 *John.* 668; *S. C.* 5 *John. Ch.* 555; *Kirke v. White*, 4 *Wash. C. C.* 595.

(b) *Souzer v. De Meyer*, 2 *Paige*, 574.

(c) Lord Thurlow seems to have entertained the idea that the form of a plea and the substance of it were the same thing. 1 *Ves. jun.* 388; and 3 *Bro. C. C.* 301. It is only necessary to say that the cases are very numerous in which they have been treated as essentially different, and the doctrine of amending pleas seems founded upon their difference; it being as true with respect to a plea in equity, as it is with regard to a plea at law, that there requires in every plea two things, the one that it be sufficient in matter, the other that it be deduced and expressed according to the terms of the law. *Syst. of Pl.* 331.

sion against the defendant in another suit ; because for deciding the validity of the plea, so far as it is not contradicted, the bill is admitted to be true. Next follows the extent to which the plea goes, as whether it is to the whole or a part of the bill, and when it is only to a part, then to what part it is intended to apply. The substance of the plea, or matter relied on, follows next ; as, an objection to the jurisdiction of the court ; to the person of the plaintiff or defendant ; or in bar of the suit ; together with the averments requisite to support it. The conclusion of the plea is a repetition, that the matters so offered are relied upon ; praying the judgment of the court, whether the defendant ought to be compelled to make any further or other answer to the bill, or to the part of it, to which the plea is offered.(a)

An answer accompanying the plea and in support of it, is prefaced with an averment that the defendant does not thereby waive his plea, but relies wholly upon it. And when the plea is not to the whole bill, but only to part, the answer begins with the same protestation against a waiver of the plea, and with a declaration that it is intended to be only in answer to the rest of the bill, not covered by the plea.(b)

4295. A plea is filed, like a demurrer, in the proper office. Pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself, or of any other court, need not be under oath.(c) But pleas in bar consisting of matters *in pays* must be upon oath or affirmation of the defendant.(d)

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(a) Beam. Pl. in Eq. 48, 49.

(b) Mitf. by Jer. 300, 301 ; Coop. Eq. Pl. 234 ; Story, Eq. Pl. 695 ; Beam. Pl. in Eq. 53.

(c) Mitf. by Jer. 301 ; Carroll v. Waring, 3 Gill & John. 491.

(d) Pract. Reg. 325, Wy. ed. ; Coop. Eq. Pl. 231 ; Beam. Pl. in Eq. 323.

## § 3.—Of the effect of the plea.

4296. If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. The defendant, on his part, may take the same proceeding. Upon argument of a plea, it may either be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer. In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the necessary averments to support it, be true. If, therefore, when a plea is allowed upon argument, or, without argument, the plaintiff thinks it not true in point of fact, though good in form and substance, he may take issue upon it, and proceed to disprove the facts upon which it is endeavored to be supported. For when the plea is upon argument held to be good, or the plaintiff admits it to be so by replying to it, its truth is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in it, as to so much of the bill as the plea covers, is in issue between the parties. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests. If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, and the plea extends to discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the court will order the defendant to be examined on interrogatories, to supply the defect. If, on the contrary, the defendant proves the truth of the matters pleaded, the suit is barred, as far as the plea extends, even though the plea is not good in point of form or substance. Therefore, where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the plaintiff replied, it was determined that the plea, although irregular, had been admitted by the replication to be

good; and that the fact of the notice not being in issue, the defendant proving what he had pleaded, was entitled to have the bill dismissed.<sup>(a)</sup>

4297. Upon argument, if the benefit of a plea is saved to the hearing, it is considered that so far as it appears to the court, it may be a defence; but that there may be matter disclosed by the evidence, which would avoid it, supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question.<sup>(b)</sup>

4298. Sometimes a plea is ordered to stand for an answer, when it is bad in form only, but good in substance as to the whole or any part of the relief sought by the bill.<sup>(c)</sup> When a plea is so ordered to stand for an answer, it is merely determined that it contains matter which may be a defence, or part of a defence, but, that it is not a full defence, or it has not been properly supported by the answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea, the answer may be read to counter-prove the plea; and if the defendant appears not to have sufficiently supported his plea by the answer, the plea must be overruled, or ordered to stand for an answer only.<sup>(d)</sup> A plea is usually ordered to stand for an answer, when it states matter which may be a defence to the bill, though not perhaps proper for a plea, or when it is informally pleaded.<sup>(e)</sup> When the plea states nothing which can be a defence, it is merely overruled.<sup>(f)</sup> In such case the same may afterward be insisted on by way

<sup>(a)</sup> Mitf. by Jer. 301 to 303; Coop. Eq. Pl. 232; *Bogardus v. Trinity Church*, 4 Paige, 178; *Harris v. Ingledew*, 3 P. Wms. 94.

<sup>(b)</sup> Mitf. by Jer. 303; Coop. 233; Story, Eq. Pl. § 698. See *Rowley v. Eccles*, 1 Sim. & S. 511.

<sup>(c)</sup> *Souzer v. De Meyer*, 2 Paige, 274.

<sup>(d)</sup> See *Hildyard v. Cressy*, 3 Atk. 304, (1); *Kirby v. Taylor*, 6 John. Ch. 242.

<sup>(e)</sup> See *Moore v. Hart*, 1 Vern. 110; *Orcutt v. Orms*, 3 Paige, 459; *Wood v. Strickland*, 2 V. & B. 150.

<sup>(f)</sup> *Orcutt v. Orms*, 3 Paige, 459.

of answer; (a) this rule does not, however, extend to a plea of the statute of limitations. (b) If the plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the order, liberty is given to except. But that liberty, when given, may be qualified so as to protect the defendant from any particular discovery which he ought not to be compelled to make. When the plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the plea. (c)

When defective, pleas in some cases may be amended, but before leave is allowed to make an amendment, the defendant must show what the amendment is to be, and how the slip happened. (d)

SECTION 3.—OF PLEAS TO ORIGINAL BILLS.

4299. Pleas to original bills are to those praying for relief, and to those not praying for relief.

§ 1.—Of pleas to original bills praying for relief.

4300. In considering pleas of this kind, it will be proper to classify them into four kinds, namely: 1, pleas to the jurisdiction; 2, pleas to the person; 3, pleas to the frame or form of the bill; and, 4, pleas in bar of the bill.

*Art. 1.—Of pleas to the jurisdiction.*

4301. We will here follow the same division on this subject which we observed in the preceding chapter in

(a) *Goodrich v. Pendleton*, 4 John. Ch. 549.

(b) *Carter v. Murray*, 7 John. Ch. 167.

(c) *Mitf. by Jer.* 303, 304.

(d) *Coop. Eq. Pl.* 234; *Merriwether v. Mellish*, 13 Ves. 435; *Newman v. Wallis*, 2 Bro. Ch. 143, 147.

relation to demurrers to the jurisdiction.(a) Pleas to the jurisdiction in cases of original bills praying relief, may be, 1, because the subject is not cognizable in any municipal court of justice; 2, because it is not within the jurisdiction of a court of equity; 3, because some other court possesses the jurisdiction.

1. *Of pleas because the subject matter is not cognizable in any court of justice.*

4302. Much of the matter which might be properly arranged under this head has already been examined in another place.(b) When it appears upon the face of the bill that the subject is not cognizable in any court of justice, the objection must be taken by demurrer. But if the bill should be so framed that the objection would not be apparent upon the face of it, the only way to take advantage of it is by a plea. As this plea would not point out some other court, capable of exercising jurisdiction in the case, it would not be a plea in abatement but a plea in bar.(c)

2. *Of pleas because the court has not jurisdiction.*

4303. When the want of jurisdiction appears upon the face of the bill, the proper way to take advantage of it is by demurrer; but when it does not so appear the objection must be made by plea.(d) Cases of this kind can seldom appear in practice.

3. *Of pleas to the jurisdiction because other courts possess such jurisdiction.*

4304. Courts of equity have no jurisdiction, when the subject matter is exclusively to be tried and decided by other tribunals; they cannot, therefore, entertain a suit when a court of common law, or a court of admiralty, or any other court has the exclu-

(a) Ante, n. 4223.

(b) Ante, n. 4225.

(c) Coop. Eq. Pl. 238.

(d) Mitf. by Jer. 222.

sive jurisdiction of the subject matter. When the objection appears upon the face of the bill, advantage must be taken of it by demurrer; but when it does not so appear, the proper mode of objecting to it is by plea.

4305. The courts of the United States, it will be remembered, have no jurisdiction except in certain enumerated cases between citizens. They must reside in different states, and it must appear upon the face of the bill that such is the fact; for if it do not so appear, the defendant may demur, or apply to the court to dismiss the bill, upon motion. But should it be stated in the bill that the plaintiff is a resident citizen of one state, and the defendant is a resident citizen of another state, so that upon the face of the bill the jurisdiction attaches, and the defendant means to contest the alleged citizenship, he must do it by plea to the jurisdiction; because he is not allowed to put the citizenship in issue by a general answer, for such an answer admits the jurisdiction of the court.<sup>(a)</sup>

*Art. 2.—Of pleas to the person.*

4306. Pleas to the person are entered for the purpose of objecting to the ability of the plaintiff to sue, or to the liability of the defendant to be sued. They are therefore of two kinds: 1, pleas to the person of the plaintiff; and, 2, pleas to the person of the defendant.

*1. Of pleas to the person of the plaintiff.*

4307. According to the English law, pleas of outlawry, of excommunication, of popish recusancy, and of attainder, are classed under this head; these pleas are not common in England, and generally unknown in the United States. The pleas to the person of the

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<sup>(a)</sup> *Livingston v. Story*, 11 Pet. 351, 393; *Dodge v. Perkins*, 4 Mason, 435. See *Sullivan v. Fulton Steamboat Company*, 6 Wheat. 650; *Capron v. Van Norden*, 2 Cranch, 126; *Binham v. Cabot*, 3 Dall. 382.

plaintiff may therefore be reduced to the following: pleas, 1, of infancy; 2, of coverture; 3, of idiocy and lunacy; 4, of bankruptcy or insolvency; 5, of alienage; 6, of the want of the character in which the party sues.

4308.—1, 2, and 3. Whenever it appears upon the face of the bill that it has been brought by an *infant*, a *feme covert*, or a *lunatic*, so found by inquisition, the defendant must take advantage of the objection by demurrer; but whenever the plaintiff labors under either of such disabilities, and the fact does not appear upon the face of the bill, the defendant must plead the fact as a disability, in abatement of the suit.<sup>(a)</sup>

4309.—4. When the plaintiff is a *bankrupt* or *insolvent*, and he sues on a right which has passed to his assignees, if his want of title does not appear upon the face of his bill, the defendant may plead such a matter. This is sometimes classed among the pleas in abatement, but, in effect, it is a plea in bar, so far as the plaintiff is concerned; with regard to others, it is not a bar, and it does not dispute the validity of the right vested in the assignees.<sup>(b)</sup>

4310.—5. *Alienage* may in some cases be pleaded in abatement; this is the case generally when the plaintiff is an alien enemy, whatever may be subject matter of the suit; and whether he be an alien enemy or not, when the suit concerns the recovery of land, in those states where aliens are not allowed to hold land.

4311.—6. When a plaintiff sues in a *character which he assumes, and to which he is not entitled*, the defendant may plead in abatement, though this is only a negative plea; as where a plaintiff falsely entitles himself as executor or administrator. Thus if a plain-

<sup>(a)</sup> Mitf. by Jer. 229, 230; *Wartnaby v. Wartnaby*, 1 Jac. R. 377.

<sup>(b)</sup> Beam. Pl. in Eq. 121, 122; Mitf. by Jer. 229; Coop. Eq. Pl. 249; Story, Eq. Pl. § 726.

tiff sues as administrator, the defendant may plead that he is not administrator, or that the supposed intestate is living.<sup>(a)</sup> Numerous other instances might be mentioned. If a woman were to sue for her dower as widow of Peter, the plea of *ne unques accouple* would be a good plea; so, if a *feme covert* should sue alone, her coverture might be pleaded in abatement; or if a plaintiff was dead at the time of the commencement of the suit, this matter might be pleaded in abatement. The reason why these pleas are allowed is, that the plaintiff has title to sue in the character he has assumed. But when the reason for the objection is apparent on the face of the bill, advantage may be taken of it by demurrer.

2. *Of pleas to the person of the defendant.*

4312. A plea that the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear, will be sustained; as if a defendant is sued as a *feme sole* when she is under coverture, or as a *feme covert* when she is sole; when a person is sued as an heir, or executor or administrator, or as a partner; when the defendant does not bear the character in which he is sued, he may plead the matter in abatement. But it seems to have been considered as more convenient for a defendant under these circumstances, to put in an answer alleging the mistake in the bill, and praying the judgment of the court whether he should be compelled further to answer the bill; but this in fact amounts to a plea, though it may not bear that title, and a plea has been considered the proper defence.<sup>(b)</sup>

4313. For the same reason, when the defendant has not that interest in the subject matter of a suit

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<sup>(a)</sup> Mitf. by Jer. 230; *Ord v. Huddleston*, 2 Dick. 510; S. C. cited in 1 Cox, R. 198.

<sup>(b)</sup> Mitf. by Jer. 234, 235; Story, Eq. Pl. § 733.

which can make him liable to the demand of the plaintiff, and the bill alleging that he has or claims an interest avoids a demurrer, because upon the face of the bill it appears that he is liable, yet he may plead the matter necessary to show that he has no interest, if the case is not such that, by a general disclaimer, he can satisfy the suit.(a) Thus, where a mere witness to a will was made a party to a bill brought by the heir at law, to discover the circumstances attending the execution, Lord Hardwicke decided that he must make his objection by plea and not by demurrer.(b) When the fact that such defendant is a mere witness appears on the face of the bill, the defendant may demur.(c)

*Art. 3.—Of pleas to the frame or form of the bill.*

4314. Pleas which apply to the relief sought by the original bill differ from those to the jurisdiction, as they tacitly admit the power of the court to take cognizance of the subject matter of the suit; and they differ from pleas to the person because they admit the plaintiff's ability to sue, and the defendant's liability to be sued, though they object to the suit as framed, and contend that the right ought not to be canvassed on the existing record. They are unlike pleas in bar, because they do not deny the validity of the right, which is made the subject of the suit. They seem to bear a strong resemblance to those pleas at law which are to the action of the writ, of which the following are instances: that there is another action pending for the same cause; that the action is prematurely brought; and that the action is misconceived.(d)

(a) See *Turner v. Robinson*, 1 Sim. & Stu. 3.

(b) Mitf. by Jer. 235; Beam. Pl. in Eq. 131; *Plummer v. May*, 1 Ves. 426.

(c) Beam. Pl. in Eq. 134; *Cookson v. Ellison*, 2 Bro. Ch. R. 252, and Belt's note.

(d) Beam. Pl. in Eq. 136.

These pleas may be classified as follows: 1, plea that another suit is depending in another court of equity for the same matter between the same parties; 2, plea of want of proper parties; 3, plea of multiplicity of suits; 4, plea of multifariousness.

1. *Of the plea of another suit depending.*

4315. When a suit seeks relief, the defendant may plead that there is another suit depending in this or another court of equity for the same matter, between the same parties, or those who represent them. (a) This plea bears a strong analogy to the *exceptio litis pendentis* of the civilians; (b) it is similar to the plea at common law that there is another action depending, and it is governed by the same principles. (c)

4316. A plea of this kind should state the several matters, which are essential to its sufficiency, the principal of which are the following:

1. The plea should set forth with certainty, the commencement of the former suit, its general nature, character and objects, and the relief prayed. (d)

2. It should aver truly, that the second suit is for the same matter as the first. (e)

3. It should also aver that there have been proceedings in the suit, such as an appearance, or at least, process requiring an appearance. (f)

4. It should aver that the former suit is still depending; for this seems an essential ingredient to the validity of the plea. (g)

(a) Ord. Ch. (Ed. Beam.) 26, 176, and notes.

(b) Beam. Pl. in Eq. 137; Voet, Ad Pand. lib. 44, tit. 1, § 3.

(c) Beam. Pl. in Eq. 137-152; Bouv. L. D. *Lis pendens*, Mitf. by Jer. 46.

(d) *Foster v. Vassall*, 3 Atk. 589.

(e) *Devie v. Brownloe*, 2 Dick. 611; Mitf. by Jer. 246.

(f) This is analogous to the rule in the civil law, as to what constitutes the pendency of a suit. Voet, ad Pand. lib. 44, t. 1, § 3. In support of the text, see *Moor v. Welsh Copper Company*, 1 Eq. Ab. 39, p. 14; Coop. Eq. Pl. 272.

(g) Mitf. by Jer. 247; Coop. Eq. Pl. 272; Beam. Pl. in Eq. 138.

5. A plea of proceedings in another court must show not only that the subject matter is the same, and the issue is the same, but that the object is the same; and that the court is a court of competent jurisdiction; and that the proceedings therein would be conclusive, so as to bind every other court.(a)

4317. But it is not necessary to the sufficiency of the plea, that the former suit should be precisely between the same parties as the latter; for, if a man institutes a suit, and afterward sells a part of the same property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending, touching the whole property, will hold.(b)

4318. Nor can a plea that a former suit for the same matter still pending always apply; for, when the effect of a second suit cannot be had in the former, this plea will be ineffectual; nor when the second suit is brought by a different person, although for the same matter, as far as concerns the foundation of the demand, is for a different equity; nor where, though the second suit is brought for the same purpose, it is brought in a different right.(c)

4319. Sometimes an action is brought at law, and a suit in equity, for the same matter, by the same person, against the same defendant, at the same time. In such a case, after answer put in, the defendant may, in general, apply to the court that the plaintiff make his election where he will proceed;(d) but he cannot plead the pendency of the suit at common law in bar of the suit in equity;(e) and the reason of this

(a) Behrens v. Shiveking, M. & C. 602.

(b) Moor v. Welsh Copper Company, 1 Eq. Cas. Ab. 39; Mitf. by Jer. 248; Beam. Pl. in Eq. 143.

(c) Beam. Pl. in Eq. 144; Mitf. by Jer. 248, 249.

(d) In some cases, however, he may proceed simultaneously both at law and in equity; as when the creditor has a bond and mortgage, he may sue at law on a bond, and on the mortgage in equity. Schoole v. Sall, 1 Sch. & Lef. 176.

(e) 3 P. Wms. 90.

is, that the remedy at law is not as extensive as that in equity. When the plaintiff selects to proceed in equity, then he will be enjoined from proceeding at law, and, when he elects to proceed at law, then the bill will be dismissed.(a)

2. *Of the plea of want of proper parties.*

4320. We have seen who are to be made parties to a suit in equity; when it does not appear upon the face of the bill, that there is a defect in this respect, the defendant may show it by his plea. A plea of the want of parties goes both to the discovery and relief, where relief is prayed, though the want of parties is no objection to a bill for a discovery merely.(b)

3. *Of the plea of multiplicity of suits.*

4321. A court of equity will not allow of a multiplicity of suits; the defendant, therefore, may plead that the plaintiff has split up his cause of action. This is not a plea in bar, because it does not deny the existence of the right made the subject of the suit, but tacitly admits that right; nor is it a plea to the jurisdiction of the court or to the person. It is simply a plea in abatement of the bill, as framed.(c)

4. *Of the plea of multifariousness.*

4322. When there is a joining and confounding distinct matters in one bill, which creates the fault of multifariousness, if the defect is apparent on the face of the bill, it should be taken advantage of by demurrer.(d) But if the defect do not appear upon the face of the bill, the defendant may take advantage of it by setting it out by a special plea.(e)

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(a) Mitf. by Jer. 249, 250; Beam. Pl. in Eq. 151.

(b) Mitf. by Jer. 280.

(c) Beam. Pl. in Eq. 160.

(d) Mitf. by Jer. 221; Beam. Pl. in Eq. 162.

(e) Beam Pl. in Eq. 161, 162. Vide ante, n. 4169.

*Art. 4—Of pleas in bar to relief sought by original bill.*

4323. Having examined the pleas dilatory and declinatory, our attention will next be called to the consideration of pleas in bar to the relief sought by an original bill. A plea in bar to relief, is commonly described as an allegation of foreign matter, whereby, supposing the bill so far as it is not contradicted by the plea to be true, yet the suit, or the part of it to which the plea extends, is barred ;(a) or it is the statement of some matter by the defendant which shows that the plaintiff is not entitled to the relief he claims. The term *bar* is a metaphorical expression to designate that an obstacle is interposed to the recovery of the plaintiff. Pleas in bar are in the nature of special pleas in bar at law, and will, in most instances, be found strongly analogous to them; though, in some cases, there is an exception, as for instance, the plea of purchase for a valuable consideration without notice, and some other pleas of an incongruous nature. The matter thus pleaded, is something which does not appear upon the face of the bill. Pleas in bar to relief are founded, 1, on some statute which bars the plaintiff's right; 2, on matter of record; and, 3, on matter *in pays*, that is, on matter of fact, not of record.

*1. Of pleas of statutes, when a bar.*

4324. Pleas in bar to relief, made so by statute, separately considered, are those, 1, of the statute of limitations; 2, of the statute for preventing of frauds and perjuries; 3, of any other statute, public or private, which creates a bar.

*1° Of the plea of the statute of limitations.*

4325. The statute of limitations is a good plea in bar to the relief sought by a bill in equity, as it is a

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(a) Mitf. by Jer. 221.

good special plea in bar to an action at law ; indeed, it will ordinarily bar both the claim of the debt and the discovery when the debt became due.(a) Although courts of equity are not within the words of the statute of limitations, yet those courts generally adopt it as a positive rule, and by parity of reason, apply it to cases not within the letter.(b) When, therefore, the statute would be a bar at law, the same rule is applied in equity in cases of concurrent jurisdiction.(c)

It is a general rule, that unless the defendant claims the benefit of the statute by plea or answer, he cannot insist upon it in bar of the plaintiff's demand ; but in cases which will allow of the exercise of discretion, the courts will use the statute as a rule to guide that discretion ; and they will also, sometimes, resort to the policy of the ancient law, which in many cases limited the demand of accruing profits to the commencement of the suit.(d)

In some cases, the statute of limitations will not be allowed, in analogy to similar cases at law. It cannot be pleaded when the case falls directly within the exceptions of the statute itself, such as infancy, coverture, insanity, being imprisoned, or out of the jurisdiction or state.

4326. To render the plea of the statute of limitation effectual to bar relief, there are certain averments required in particular cases, which will now claim our attention.

1. When the bill charges a fraud, and the fraud was not discovered till within six years before filing the bill, the statute is not a good plea, unless the defendant

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(a) *Sutton v. Scarborough*, 9 Ves. 71 ; *Cork v. Wilcock*, 5 Madd. 328.

(b) *Breckenbridge v. Churchill*, 3 J. J. Marsh. 15 ; *Frame v. Kenny*, 2 A. K. Marsh. 145 ; *McDowell v. Heath*, 3 A. K. Marsh. 223 ; *Thompson v. Blair*, 3 Murph. 583 ; *Hawley v. Cramer*, 4 Cowen, 718 ; *Taylor v. Bate*, 4 Dana, 200.

(c) *Rhode Island v. Massachusetts*, 15 Pet. 233 ; *Pratt v. Wortham*, 5 Mason, 112 ; *Humbert v. Trinity Church*, 24 Wend. 587.

(d) See *Pulteney v. Warren*, 6 Ves. 73 ; *Petteward v. Prescott*, 7 Ves. 541.

denies the fraud, or avers that the fraud, if any, was discovered six years before filing the bill.(a)

2. When a particular special promise is charged to avoid the operation of the statute, the defendant must deny the promise charged by the averment in the plea, as well as by an answer in support of the plea.(b)

3. When the demand is of any thing executory, as a note for the payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action has not accrued within six years; because the statute bars only as to what was actually due six years before the action was brought.(c)

4. Where, in order to avoid the operation of the statute, fraud is charged, the defendant must answer to the fraud, otherwise the plea of the statute will not avail.(d) It may be here remarked that the statute of limitations runs only from the time the fraud is discovered; but if the time limited by the statute have expired after the fraud discovered, the statute becomes a bar, whatever the older cases assert to the contrary.(e)

4327. There are numerous cases where the statute of limitations is not a bar, and others where, probably, it would not be considered a bar, the principal of which we will now proceed to notice.

1. The statute is not a good plea to an "open account,"(f) and when there are mutual accounts, not merchants' accounts, for any item of which credit has been given within six years, this is evidence of an

(a) *The South Sea Company v. Wymondsell*, 3 P. Wms. 143. See, as to the extent of this rule in actions at law, *The Massachusetts Turnpike Company v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. 435; *Jones v. Conaway*, 4 Yeates, 109; *Troup v. Smith*, 20 John. 47.

(b) Mitf. by Jer. 271.

(c) *Anon.* 3 Atk. 79; *Coop. Eq. Pl.* 252; *Gould v. Johnson*, Salk. 422.

(d) *Bicknell v. Gough*, 3 Atk. 558.

(e) Vide *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607; *Smith v. Clay*, Amb. 645; *Mitchell v. Thompson*, 1 McLean, 104; *Humbert v. Trinity Church*, 24 Wend. 605.

(f) *Coop. Eq. Pl.* 253; *Beam. Pl. in Eq.* 172.

acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations;(a) but when all the items are on one side, as in an account between a tradesman and his customers, the last item which happens to be within six years does not draw after it those of longer standing.

2. The statute is no bar to a legal rent charge, either at law or in equity, as the statute only concerns customary rent between landlord and tenant, and does not extend to any rent that commences by grant, or of which the commencement may be shown; but, in such case the demand may be excluded by presumption from time and acquiescence.(b)

3. Nor is the statute a bar to an equitable charge or technical trust, at least between the trustee and the *cestui que trust*,(c) and interest will be decreed after great length of time, if there be not sufficient ground for presuming a release. But this must be understood of trust purely technical, express, or equitable,(d) for implied trusts constitute no exception to the operation of the statute.(e)

4. It seems that the statute is no bar to a legacy or distributive share of an intestate's estate,(f) but, acting upon principle, after a lapse of time, the court will presume payment.(g) Presumption of payment

(a) 6 T. R. 189; *Coster v. Murray*, 5 John. Ch. 224; *Sumpter's adm. v. Morse*, 2 Hill, 92. See *McLin v. McNamara*, 1 Ired. Eq. R. 75; 2 Dev. & Bat. 82.

(b) *Collins v. Goodall*, 2 Vern. 235.

(c) *Heath v. Henley*, 1 Ch. Cas. 20; *Overstreet v. Bate*, 1 J. J. Marsh. 370; *Peigh's heirs v. Bell's heirs*, 1 J. J. Marsh. 401; *Coster v. Murray*, 4 John. Ch. 224; *Stephen v. Yandle*, 2 Hayw. 221; *Ramsay v. Deas*, 2 Desaus. 238; *Gist v. Heirs of Cattell*, 2 Desaus. 53; *Walton v. Coulson*, 1 McLean, 132.

(d) Ang. on Lim. 136; *Porter v. Porter*, 3 Hump. Tenn. R. 586.

(e) *Joyce v. Gunnels*, 2 Richard. Eq. 259; *Raymond v. Simonson*, 4 Blackf. 77.

(f) *Stewart v. Waterhouse*, 10 Yerg. 94.

(g) Anon. 2 Freem. 22.

founded on lapse of time, however, is matter of evidence, and, in most cases, not *proprio jure*, matter of plea in bar.(a)

5. When there is no one to represent the deceased debtor, as where he died intestate, and no administration has been raised, the statute will not be a good plea, because no laches can be imputed to the plaintiff for not suing; but when the defendant had become an executor *de son tort*, by intermeddling with the estate of the deceased, and he might have been sued as such, the statute would be a good plea.(b)

2° *Of the plea of the statute of frauds and perjuries.*

4328. The statute for the prevention of frauds and perjuries may be pleaded in bar of a suit to which the provisions of that act apply.(c) For example, to a bill for the specific performance of a contract respecting lands, the defendant may plead the statute, and by negative averments insist that there has been no contract in writing signed by the parties. Therefore, where a bill stated a parol agreement for the sale of lands, and that five guineas were paid in part of the purchase money, and the defendant pleaded the statute of frauds, it was allowed;(d) for though payment of a substantial part of the purchase money will take the case out of the statute, on the ground of part performance, yet the payment of a small part, like that stated in the bill, would not.(e) So to a parol variation of a contract, the statute may be pleaded, if the variation is essential.(f)

This plea of the statute of frauds and perjuries, extends to the discovery of the parol agreement, as

(a) *Giles v. Baremore*, 5 John. Ch. 545.

(b) *Webster v. Webster*, 10 Ves. 93.

(c) *Mitf. by Jer.* 265; *Coop. Eq. Pl.* 255.

(d) *Main v. Matthews*, 4 Ves. 720.

(e) *Coop. Eq. Pl.* 256; 2 *Story, Eq. Jur.* § 760.

(f) *Jordan v. Sawkins*, 1 Ves. jun. 402; *S. C.* 3 Bro. Ch. R. 388; *Brodie v. St. Paul*, 1 Ves. jun. 326; *Coop. Eq. Pl.* 256.

well as to the performance of it; though the defendant may be required, it is said, to admit or deny the parol agreement stated in the bill. This, however, seems unimportant, because if the defendant should by his answer admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission.<sup>(a)</sup> But an admission of the parol agreement, without insisting upon the statute, will be no bar to the plaintiff's recovery.<sup>(b)</sup>

When in cases of this kind any matter is charged in the bill, which may avoid the bar created by the statute, such as acts of part performance, or fraud, then the plea ceases to be a pure plea; and that matter must be denied by way of averment in the plea, and must also be denied precisely and particularly in the answer to support the plea.<sup>(c)</sup>

To a bill for the discovery and execution of a trust, the statute of frauds and perjuries may be pleaded, with an averment that there was no declaration of trust in writing. But when circumstances of fraud are alleged in the bill, which, if true, would avoid the bar, the plea as to them ceases to be a pure plea, and the allegation must be met, as in similar cases, by an averment in the plea, denying the fraud; and there must also be an answer to support the plea, denying the circumstances of fraud so charged.<sup>(d)</sup>

Whenever the bill sets up a parol trust, the non-performance of which would be a fraud upon the plaintiff; or where a parol trust is a secret trust, alleged to be in fraud of the public policy of the country, a pure plea of the statute will not prevail, for the statute made to prevent frauds will never be allowed

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<sup>(a)</sup> Story, Eq. Pl. § 763.

<sup>(b)</sup> Coop. Eq. Pl. 256; Mitf. by Jer. 266—268.

<sup>(c)</sup> Mitf. by Jer. 266, 267; Coop. Eq. Pl. 256; Story, Eq. Pl. § 764.

<sup>(d)</sup> Story, Eq. Pl. § 765.

to cover fraud. In such cases, the plea must contain averments denying the fraud, and also be supported by an answer, discovering and denying all the circumstances relied on to establish it.(a)

3° *Of the plea of other statutes.*

4329. Any statute whatever, public or private, which destroys the demand of the plaintiff, may be pleaded; but it must be accompanied with the averments necessary to bring the case of the defendant within such statute, and to avoid any equity set up against the bar created by the statute.(b)

2. *Of pleas of records, or of matter as of record.*

4330. Before proceeding to the consideration of this subject, it will be well to remember that all courts are not courts of record. At common law, courts are divided into courts of record, and courts not of record; this distinction, however, is purely technical. Among the former may be classed the superior courts of common law; courts of chancery, which exercise only equity jurisdiction, and courts of admiralty, are deemed courts not of record.(c) The proceedings of the former class of courts are considered as matters of record; those of the latter, not strictly as matters of record, but as matters *as of record*, that is, they are deemed to be of the same validity as if they were records.

(a) Coop. Eq. Pl. 257.

(b) Story, Eq. Pl. 679; Beam. Pl. in Eq. 188; Coop. Eq. Pl. 259. 260.

(c) In the United States, courts of equity are generally, if not universally, considered as courts of record; and the federal courts are all courts of record. Not unfrequently the statute creating a court declares that it shall be considered as a court of record. The act of Congress to establish a uniform rule of naturalization, approved April 14, 1802, enacts that for the purpose of admitting aliens to become citizens, that any court of any individual state, having common law jurisdiction and a seal, and a clerk or prothonotary, shall be considered as a district court within the meaning of the act. At common law, any jurisdiction which has the power to fine and imprison is a court of record, and courts not possessing this power are not courts of record. Bac. Ab. Fines and Amerciaments, A.

1° *Of pleas of matter of record.*

4331. Pleas of matters of record, technically so called, are chiefly the following :

1. The defendant in equity may plead a common recovery, duly suffered, with a deed to lead to uses, in bar to a bill asserting a claim under an entail, if the estate limited to the plaintiff, or under which he claims, is destroyed by it.(*a*)

2. A defendant in equity may in general plead in bar, the judgment of an ordinary court of common law, when that judgment has finally determined the rights of the parties.(*b*) When the record is general, and does not disclose the ground of decision, the bar created by it is as general ; but when the record leads to the ground of the decision, it is no further a bar than as to that ground ; for that is all that has been decided, and so far, and no farther, it is a bar.(*c*) The plea is good also, not only when it is founded on the same original cause of action, but when it prays to set aside a verdict and judgment, as obtained against conscience, unless it contains some allegations of fact, impeachment of the verdict and judgment, which would avoid it, and require an answer.(*d*)

2° *Of pleas of matter as of record.*

(1.) *Of sentences and judgments of foreign courts, and courts not of record.*

4332. The sentence and judgment of a foreign court, which at common law is deemed a court not of record,(*e*) upon the same matter put in controversy by

(*a*) Beam. Pl. in Eq. 201 : Coop. Eq. Pl. 264 ; Mitf. by Jer. 253.

(*b*) Mitf. by Jer. 253, and the cases cited ; Hughes v. Blake, 6 Wheat. 453 ; S. C. 1 Mason, 515.

(*c*) Saunders v. Marshall, 4 Hen. & Munf. 458. See Hawkins v. Defriest, 4 Munf. 469.

(*d*) Mitf. by Jer. 255.

(*e*) In the United States the states are considered so far foreign that a judgment obtained in one of them is a foreign judgment in another. But by a provision in the national constitution, the records and judgments of one state are to have full force and credit in all the others.

the bill, may be pleaded in bar, subject to the same objections which might be made to a similar judgment, rendered in a domestic tribunal.(a)

But when there is any charge of fraud, or when other circumstances are shown by the bill as a ground of relief, the judgment cannot be pleaded, for if there was fraud, the judgment is void, and if there are equitable grounds of relief, the court has jurisdiction. In such case the judgment cannot be pleaded by a pure plea in bar of the bill. The plea must, beside setting up the sentence or judgment, proceed by proper averments to deny the fraud, or the equitable circumstances upon which the sentence or judgment is sought to be impeached, and thus put them in issue by the plea. It must also be supported by a full answer to the special charges in the bill, as is required in the cases of other anomalous pleas or those which are not pure.(b)

4333. Upon the same principle, that a verdict and judgment constitute a good bar, when a court not only possesses jurisdiction over a particular cause, but that jurisdiction is of a peculiar and exclusive nature, its sentence or decree, *ex directo*, in a matter properly cognizable there, is conclusive whenever the same matter shall come in question collaterally in any other court, whether it be a court of common law or a court of equity. Therefore, a will proved in a probate court, or other court exercising exclusive and competent jurisdiction of the subject, is a good bar, and may be pleaded as such, to a bill of persons claiming as next of kin to the deceased, who is alleged in the bill to have died intestate; for the probate of the will is in the nature of a sentence, and is conclusive at least with regard to the personal estate, as to the title of the

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(a) Mitf. by Jer. 256.

(b) Mitf. by Jer. 256; Coop. Eq. Pl. 267; Story, Eq. Pl. § 783.

executor.(a) And, contrary to the general rule, even if fraud in obtaining a will of personal property be charged in a bill, that will be insufficient to impeach the probate, or its validity, in a court of equity; because if there be fraud in the probate of the will, the probate court has competent jurisdiction, and it alone can take cognizance of it, and recall the probate.

4334. But to this may be mentioned an exception. When the fraud practised does not extend to the whole will, but to some particular clause only, or a fraud has been practised to obtain the consent of the next of kin to the probate. In such cases the courts of equity will declare the executor as trustee for the next of kin. And, for the same reason, when a fraud has been committed in a will of real estate, where the fraud does not vitiate the whole will, but only affects a particular clause or a particular party, courts of equity will exercise jurisdiction, and relieve against the fraud.(b)

(2.) *Of pleading the decree of a court of equity.*

4335. A decree of a court of equity is, for most purposes, if not for all, equal to a judgment at law, as a bar; and whether it be a decree in the same court, or in another court of equity, it is immaterial. To entitle a decree to be pleaded to a new bill for the same matter, it must be a decree signed and enrolled, for the same matter, and substantially between the same parties.(c) But until the decree is signed and enrolled, it cannot properly be pleaded in bar of another suit, though it may be insisted on, by way of answer, as a good defence.(d) The decree enrolled

(a) Mitf. by Jer. 257; Coop. Eq. Pl. 268; Story, Eq. Pl. § 786; Beam. Pl. in Eq. 207.

(b) Mitf. by Jer. 257; Barnesley v. Powell, 1 Ves. 284.

(c) Beam. Pl. in Eq. 211.

(d) Mitf. by Jer. 239; Coop. Eq. Pl. 269; Beam. Pl. in Eq. 211; Davoue v. Fanning, 4 John. Ch. 199.

cannot be altered except by bill of review, while before it is enrolled, it can be altered only upon re-hearing.(a)

It is not sufficient that the decree has been made and enrolled, to entitle it to be pleaded, it must also be in its nature final, or afterward made so by order, or it will not be a bar. Therefore, a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem, unless there is a final order of foreclosure.(b) Nor can a decree which has been made upon default of the defendant in not appearing at the hearing, be pleaded without an order making the decree absolute.(c)

When the bill charges fraud in obtaining the decree, and seeks to impeach it upon that ground, the plea of the decree signed and enrolled, must be a plea not pure, and must negative the charges of fraud, and be supported by a full answer denying them.(d)

### 3. *Of pleas of matter purely in pays.*

4336. Pleas in bar of matters *in pays* go sometimes both to the discovery sought, and to the relief prayed by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief or part of the relief.(e) Pleas of this nature are principally, 1, a plea of a stated account; 2, of an award; 3, a release; 4, a plea of purchase for a valuable consideration; 5, the plea of title in the defendant.

#### 1° *Plea of a stated account.*

4337. A plea of a stated account, is a good bar to a

(a) Mitf. by Jer. 237.

(b) *Senhouse v. Earle*, 2 Ves. 450.

(c) Mitf. by Jer. 237.

(d) *Story*, Eq. Pl. § 794.

(e) Mitf. by Jer. 258.

bill for an account. It must show that the account was in writing, or at least, it must set forth the balance, and that the settlement was final. If the bill charges that the plaintiff has no counterpart of the account, a correct copy of it should be annexed by way of schedule to the answer, that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out.(a) The defendant should also by his plea aver that the account stated is just and true to the best of his knowledge and belief. When error or fraud is charged, it must be denied by the plea as well as by the answer.(b)

2° *Plea of an award.*

4338. An award may be pleaded to a bill to set aside the award and open the account. This plea is not only good to the merits of the case, but also to the discovery sought by the bill. When fraud or partiality is charged against the arbitrators, the charge must not only be denied by way of averment in the plea, but the plea must be supported by an answer, showing the arbitrators to have acted fairly, and not to have been corrupt or partial. Whatever other matter may be stated in the bill, as a ground for the impeachment of the award, must be denied in the same manner.(c)

3° *Of the plea of a release.*

4339. When a plaintiff, or a person under whom he claims, has released the subject of his demand, the defendant may plead the release in bar of the bill, and

(a) *Hankey v. Simpson*, 3 Atk. 303.

(b) *Mitf. by Jer.* 260.

(c) *Mitf. by Jer.* 260, 261. See *Henrick v. Blair*, 1 John. Ch. 101; *Shepard v. Merrill*, 2 John. Ch. 276; *Underhill v. Van Cortlandt*, 2 John. Ch. 339; *Bouck v. Wilber*, 4 John. Ch. 405; *Toppan v. Heath*, 1 Paige, 293; *Campbell v. Western*, 3 John Ch. 124; *Davy's Executors v. Shaw*, 7 Cranch, 171; *Shermer v. Beale*, 1 Wash. 11; *Fitzpatrick v. Smith*, 1 Desaus. 245; *Atwyn v. Perkins*, 2 Desaus. 297; *Pleasants v. Ross*, 1 Wash. 156; *Morris v. Ross*, 2 Hen. & Munf. 408.

this will apply to a bill praying that the release may be set aside.(a)

In a plea of a release, the defendant must set out the consideration upon which the promise was made; a plea of a release cannot therefore extend to a discovery of the consideration, and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached.(b)

A release, when pleaded to a bill for an account, must be under seal, and ought to be so stated in the plea; though this is the proper mode, it seems it is not indispensable.(c) A release not under seal, must be pleaded as an account stated only.

*4° Of a plea of a purchase for a valuable consideration.*

4340. Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title; yet, if the latter have an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his rights, the court will not interfere on either side. This is particularly the case, when the defendant claims under a mortgage or a purchase for valuable consideration without notice of the plaintiff's title, which may be pleaded in bar of the suit.(d)

(a) *Pusey v. Desbouverie*, 3 P. Wms. 315; *Parker v. Alcock*, 1 Y. & J. 432; *Coop. Eq. Pl.* 276.

(b) *Mitf. by Jer.* 261. See *Allen v. Randolph*, 4 John. Ch. 693; *Bolton v. Gardner*, 3 Paige, 273; *Fish v. Miller*, 3 Paige, 26; *Roche v. Morgell*, 2 Sch. & Lef. 727.

(c) *Phelps v. Sproule*, 1 Mylne & Keen, 231.

(d) *Mitf. by Jer.* 274; *Beam. Pl. in Eq.* 241; *Story, Eq. Pl.* § 805; *Coop. Eq. Pl.* 281. Notice to an agent, is notice to the principal; when, therefore, a person having notice purchased in the name of another, who had no notice, and knew nothing of the purchase, but afterward approved it, and without notice paid the purchase money, and procured a conveyance, the person first contracting was considered, from the beginning, as the agent of the actual purchaser, and the latter was held affected with the

4341. In its *form*, this plea must aver that the person who conveyed or mortgaged to the defendant, was seised of the fee, or pretended to be so seised, and was in possession, if the conveyance purported an immediate transfer of the possession at the time he executed the purchase or mortgage deed. It must aver a conveyance and not articles merely, for if there are articles only, and the defendant is injured, he must sue at law upon the covenants in the articles. It must aver a consideration and the actual payment of it, for a consideration secured to be paid, is not sufficient. The plea must also deny notice of the plaintiff's title or claim, previous to the execution of the deeds and payment of the consideration; and the notice so denied must be of the existence of the plaintiff's title, and not merely notice of the existence of the person who would claim under that title; and the defendant must deny the notice, even though it be not charged, and the denial must be made positively and not evasively, and he must deny fully and in the most precise terms, every circumstance from which notice could be inferred.(a)

Every plea of this kind seems to admit that the defendant has no legal title. The plea is purely a bar to an equitable and not to a legal claim;(b) a purchaser for a valuable consideration without notice, is so highly favored in equity, that it is said a plea will hold to a bill to perpetuate the testimony of witnesses,(c) though there are few cases in which the

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notice. *Jennings v. Moore*, 2 Vern. 609; S. C. under the name of *Bleakarne v. Jennens*, 2 Bro. C. C. 278, Toml. ed.—A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser; because his vendor's title was perfect, and he purchased all his rights. *Brandlyn v. Ord*, 1 Atk. 571; *Lowther v. Carlton*, 2 Atk. 139; *Beam. Pl. in Eq.* 251.

(a) *Wilson v. Hillyer*, Saxt. (N. J.) Ch R. 63; *Beam. Pl. in Eq.* 247.

(b) *Williams v. Lamb*, 3 Bro. C. C. 264.

(c) *Bochinall v. Arnold*, 1 Vern. 354; but see *Ross v. Close*, 5 Bro. P. C. 562, Mr. Tomlin's note; *Mitf. by Jer.* 279, 280; *Beam. Eq. Pl.* 251.

court will not give that assistance to the furtherance of justice.

5° *Of the plea of title in the defendant.*

4342. The defendant may plead as a defence to the plaintiff's bill, his title to the property claimed; in general this must be a good equitable title, and not that of a mere volunteer, or of a conveyance to him, without a valuable consideration. But a volunteer may, in some instances, plead his title against a bill brought against him; for his title may have been aided by other circumstances. This plea of title in the defendant is founded, 1, on a long peaceable possession; 2, a will; or 3, a conveyance.

4343.—1. As at law *length of time* raises a presumption against claims the most solemnly established, so, in equity, a long peaceable possession may be pleaded in bar to the relief.(a) The policy of the law is to give quiet and repose to titles, and the courts of justice do not countenance laches or long delays on the part of claimants.(b) Where, therefore, a bill was filed for the payment of a rent charge, and the defendant pleaded the possession of the premises for twenty-six years, without accounting for, or paying over to the plaintiff any part of the rents and profits, the plea was allowed.(c)

4344.—2. To a bill brought upon a ground of equity by an heir at law against a devisee, to turn him out of possession, the devisee may plead *his title under the will*, and that it was duly executed.(d) But in cases of this kind, where the bill has also prayed a receiver, a plea extending to that part of the bill has been so

(a) Beam. Pl. in Eq. 255.

(b) Cholmondeley v. Clinton, 2 Jac. & Walk. 1, 163; Elmendorf v. Taylor, 10 Wheat. 152; Blewitt v. Thomas, 2 Ves. jun. 669; Coop. Eq. Pl. 288.

(c) Baldwin v. Peach, 1 Yo. & Col. 453.

(d) Anon. 3 Atk. 17.

far overruled, as it might be necessary for the court in the progress of the cause to appoint a receiver.(a)

4345.—3. Upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead *the conveyance in bar of the suit*.(b) And to a bill brought to set aside a deed for fraud, a plea of a title paramount, under a former conveyance, may be pleaded by the defendant as a bar.(c)

§ 2.—Of pleas to original bills not praying relief.

4346. Original bills not praying relief are bills of discovery, strictly so called, which ask no relief. The objections to these bills, which may be taken advantage of by pleas, are nearly the same for which a demurrer, to a bill of discovery, when the objection appears on the face of the bill, will be sustained; the difference is this, that a plea must be pleaded to bring the objection before the court, when the cause of such objection does not appear upon the face of the bill, and when it does, the defendant may demur. The pleas to bills of discovery are either, 1, to the jurisdiction; 2, to the person; 3, to the bill, or frame of the bill; or 4, pleas in bar.

*Art. 1.—Of pleas to the jurisdiction.*

4347. When a bill seeks a discovery merely, if the plaintiff's case is not such as entitles a court of equity, in the exercise of its jurisdiction, to compel a discovery in his favor, though he falsely state a different case in his bill, and by that means avoid a demurrer, the defendant may by his plea bring forward the matter necessary to show the precise truth to the court.(d)

(a) Mitf. by Jer. 263.

(b) Ib.

(c) *Howe v. Duppa*, 1 V. & B. 511; Beam. Pl. in Eq. 257.

(d) Mitf. by Jer. 282; Coop. Eq. Pl. 291.

*Art. 2.—Of pleas to the person.*

4348. These pleas relate to the person of the plaintiff or the person of the defendant.

1. A plea may be entered that the *plaintiff* has no right, title or ability to call on the defendant for a discovery, which may involve him in difficulties and expense, or perhaps be prejudicial to him in other cases. Thus if a person states himself to be heir or administrator of a person dead intestate, and assumes a character which does not belong to him, the defendant may plead that another person is the heir or personal representative, or that the person alleged to be dead is living; (*a*) or, if the fact be so; he may plead that the plaintiff is an alien enemy, or an infant, or a *feme covert*, or an idiot, or a lunatic disabled to sue. (*b*)

2. A *defendant* may also protect himself by plea, by showing that he has no interest in the subject matter of the bill, when that fact does not appear on the face of that instrument, for if the objection be apparent there, he can protect himself by demurrer. He may plead to the discovery that he is a mere witness; or that he does not sustain the character in which he is sued, such as executor, administrator, heir, partner or creditor; or that there is a want of privity between the plaintiff and himself, to sustain the bill. (*c*)

*Art. 3.—Of pleas to the frame of the bill.*

4349. But a few objections can be taken advantage of by plea as to the frame of the bill; the principal seem to be that the value of the matter in controversy is beneath the dignity of the court; (*d*) that the parties are not the same in equity, as in the suit at law, in

(*a*) Mitf. by Jer. 283.

(*b*) Mitf. by Jer. 232.

(*c*) Mitf. by Jer. 283; Hare on Disc. 63; Coop. Eq. Pl. 294; Story, Eq. Pl. § 819; Beam. Pl. in Eq. 264.

(*d*) Coop. Eq. Pl. 193; Smets v. Williams, 4 Paige, 364.

aid of which the discovery is sought, if not apparent on the face of the bill; or if the defendant was not a party to the suit at law, because, in that case, the discovery would be immaterial.(a)

*Art. 4.—Of pleas to discovery in bar.*

4350. We have seen that, when the objection appears on the face of the bill of discovery, the defendant may demur; but when it does not so appear, advantage of the defect must be taken by plea; thus, for example, a former judgment, a former decree upon the merits, the statute of frauds and perjuries, the statute of limitations, a release, an account stated, or an award may be so pleaded. But, in such cases, the plea would be applicable only when no circumstances were stated in the bill to avoid the effect of the bar.(b)

When the defendant has a perfect title to the premises in himself, he may plead it in bar of any discovery sought by a bill in relation to it.(c)

A bill of discovery is filed for the purpose of ascertaining facts; when the discovery sought appears to be a mere question of law, it may be pleaded in bar of a discovery of any facts, which might, if the pleadings had terminated in an issue in fact, have been important at the trial.(d)

The situation of the defendant may sometimes render it improper for a court of equity to compel a discovery. Most of the cases of this nature have already been considered under different heads. In these cases, the defendant may plead such matters in bar to a discovery. These pleas are,

(a) Story, Eq. Pl. § 820.

(b) Upon this subject opinions vary. See Beam. Pl. in Eq. 282; Hindman v. Taylor, 2 Bro. C. C. 7, note by Belt; Mitf. by Jer. 187; Story, Eq. Pl. § 822, n.

(c) Gait v. Osbaldiston, 1 Russ. R. 158, reversing the same case in 5 Madd. R. 428.

(d) Stewart v. Nugent, 1 Keen, R. 201.

1. That the discovery may subject the defendant to pains, or penalties, or a criminal prosecution.
2. That it will subject him to a forfeiture.
3. That it will betray confidence reposed in him as counsel, attorney, solicitor, or arbitrator.
4. That he is a purchaser for a valuable consideration, without notice of the plaintiff's title.(a)

SECTION 4.—OF PLEAS TO BILLS NOT ORIGINAL.

4351. Having considered the nature of pleas to original bills generally, as well in cases where relief is prayed as in those where none is sought, it remains to be ascertained in what cases pleas may be put in when the bill is not original. It may be observed that the same grounds of pleas will in many cases be valid in these bills, according to their respective nature, as are sufficient in original bills. It is only when the defence is peculiar that it will be here noticed.(b)

§ 1.—Of pleas to bills of revivor.

4352. When a plea of revivor is brought without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him. Or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by plea.(c)

When there is a want of proper parties, and the objection does not appear upon the face of the bill, the defendant may take advantage of it by plea; as when a suit is brought by tenants in common, and

(a) Mitf. by Jer. 284; Story, Eq. Pl. § 825; Beam. Pl. in Eq. 266 to 281.

(b) Mitf. by Jer. 289.

(c) Mitf. by Jer. 289.

after decree one dies, and the survivor alone brings a bill of revivor, the defendant may plead the non-joinder of the representatives of the deceased.(a)

If a person entitled to revive a suit does not proceed in due time, he may be barred by the statute for the limitation of actions, which may be pleaded to a bill of revivor afterward filed.(b)

§ 2.—Of pleas to supplemental bills.

4353. When the plaintiff is not entitled to a supplemental bill, if his defect of title does not appear upon the face of the bill, the defendant may plead the matter, so as to show the objection to the court; as if a supplemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact.(c)

Matter which arose before the original bill was filed may be made the subject of an amendment, but not matter which arose since. If the bill is amended by stating a matter which has arisen subsequent to the filing of the bill, and, consequently, ought to have been the subject of a supplemental bill, advantage of the irregularity may be taken by way of plea, if it does not sufficiently appear upon the face of the bill to found a demurrer; but if the defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing.(d)

§ 3.—Of pleas to cross bills.

4354. Cross bills are liable to all the pleas in bar, to which original bills are subject, because they differ

(a) Story, Eq. Pl. § 830.

(b) Mitf. by Jer. 290.

(c) See *Lewellen v. Macworth*, 2 Atk. 40; *Baldwin v. Mackown*, 3 Atk. 817.

(d) Mitf. by Jer. 290; Coop. Eq. Pl. 303; Story, Eq. Pl. § 828; Beam. Pl. in Eq. 306.

in nothing from original bills, except that they are occasioned by former bills; and they are not liable to any plea which will not hold to the first species of bills. Pleas to the jurisdiction and to the person cannot be pleaded to a cross bill, because, by pleading to the original bill the defendant has affirmed the sufficiency of the jurisdiction, and of the right of the parties to sue and to be sued; unless the cross bill is exhibited in the name of some person alone, who, alone is incapable of instituting a suit, as an infant, a *feme covert*, an idiot, or a lunatic.(a)

§ 4.—Of pleas to bills of review.

4355. The constant defence to a bill of review for error apparent upon the decree, is by plea of the decree. But when any matter beyond the decree, as a purchase for valuable consideration, or any other matter, is offered against opening the enrolment, that must be pleaded. If a demurrer to a bill of review has been allowed, and the order allowing it is enrolled, it is an effectual bar to a new bill of review on the same grounds, and may be pleaded accordingly. To a bill of review of a decree for the payment of money, it has been objected by plea that according to the rule of the court the money decreed ought to have been first paid, but the rule appears to have been dispensed with on security given; and as the bill of review would not stay the process for compelling the payment of the money, it may be doubted whether the objection was properly made.(b)

A bill of review upon the discovery of new matter seems to be liable to any plea which would have avoided the effect of that matter, if charged in the original bill.(c)

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(a) Mitf. by Jer. 291; Beam. Pl. in Eq. 310.

(b) Mitf. by Jer. 291, 292.

(c) Mitf. by Jer. 292.

Upon a supplemental bill in the nature of a bill of review, of a decree not signed and enrolled, upon the alleged discovery of new matter, it has been said that if the defendant can show the allegation is false, he must do so by plea, and that it is too late to insist upon it by answer; but as the bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should seem that it is equally liable to traverse by answer, and by evidence, as any other fact stated in the bill.(a)

§ 5.—Of pleas to bills to impeach a decree for fraud.

4356. If it is sought to impeach a decree on the ground of fraud, the proper defence seems to be a plea of the decree accompanied by a denial of the fraud charged.(b)

§ 6.—Of pleas to bills to carry decrees into execution.

4357. Any person, interested under a decree, may bring a bill to carry it into execution. Upon the same principle, any creditor may prosecute a decree for an account. But when the plaintiff, who has filed a bill to carry a decree into execution, happens to have no right or interest, and such fact is not so apparent on the bill as to admit of a demurrer, the defendant may offer the objection by way of a plea.(c)

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CHAPTER V.—OF ANSWERS.

4358. Having considered in the preceding chapters the effects of disclaimers, demurrers and pleas, and shown how far a defendant may protect himself from answering by adopting one or other of these modes of defence, it will now be proper to consider the fourth

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(a) Mitf. by Jer. 293.

(b) *Wichalse v. Short*, 3 Bro. P. C. 558, Toml. ed.

(c) Mitf. by Jer. 294; Coop. Eq. Pl. 305; Story, Eq. Pl. § 837.

and last manner of defeating the plaintiff's claim, when unfounded. If the defendant has been unable, either wholly or partially, to defend himself from the charges in the plaintiff's bill, by disclaimer, demurrer, or plea, he must answer the whole bill, if he has not disclaimed, demurred or pleaded to any part of it; and if he has so defended himself as to a part, he must answer that part to which he has not demurred or pleaded.

4359. In general the plaintiff has a right to be informed by the defendant's answer, of the nature of the defence to be set up, and this right is not confined to the points as to which the defendant intends to produce evidence, but he may insist, even when the facts are uncontroverted, to have notice upon the record, in a precise and unambiguous manner, of the nature of the conclusions to be drawn from them.<sup>(a)</sup> Besides these reasons, the plaintiff may require the discovery he seeks, either because he cannot prove the facts, or in aid of proof and to avoid expense. When he is not protected by either disclaimer, demurrer, or plea, he is compelled to answer, and this answer must, in general, be full to all the charges in the bill not so covered.

4360. To this general rule, there are some exceptions :

1. He is not bound to answer matters which are purely scandalous, impertinent, immaterial or irrelevant.<sup>(b)</sup>

2. He is not bound to answer any thing which may subject him to any penalty, forfeiture, or punishment.

3. He is not bound to answer what would involve a breach of professional confidence.

4. He is not bound to discover the facts respecting

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<sup>(a)</sup> 2 Dan. Eq. Pr. 240.

<sup>(b)</sup> Gresl. Ev. 17; Mitf. by Jer. 307.

his own title, but merely those which respect the title of the plaintiff.

4361. In most other cases when the defendant answers, he must answer fully. He may, in general, avail himself of, and insist upon, every ground of defence which he could use by way of demurrer, or of plea to the bill; but this is not perhaps universally true.(a) If his plea has been overruled, the defendant may, nevertheless, insist upon the same matter by way of answer.(b)

Having taken these general views, let us next consider the rules which regulate the manner of making answers. These relate to, 1, the general nature of the answers; 2, their form; 3, their sufficiency and deficiency; 4, further answers, and answers to amended bills; 5, the effect of an answer.

#### SECTION 1.—OF THE GENERAL NATURE OF ANSWERS.

4362. An answer is a defence in writing, made by a defendant, to the charges contained in a bill or information, filed in a court of equity by the plaintiff against him. The word *answer* involves an ambiguity; it is one thing when it applies to a question, another when it meets a charge; the answer in equity includes both senses, and may be divided into an examination and a defence. In that part which consists of an examination, a direct and full answer or reply, must in general be given to every question asked. In that part which consists of a defence, the defendant must state his case distinctly, but he is not required to give information respecting the proofs which are to maintain it.(c)

There are many cases in which it is difficult, if not

(a) Story, Eq. Pl. § 847, n.

(b) Mitf. by Jer. 306.

(c) Gresl. Eq. Ev. 16; Wigram on Discov. 11; Story, Eq. Pl. § 850; Welf. Eq. Pl. 358.

impossible, to set up a full defence except by answer. When the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of a plea, or if it be doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill. Or if the defendant can offer matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he deems favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favor, which he cannot set forth by way of plea, or of answer, to support a plea, as the expending a considerable sum of money in improvements, with the knowledge of the plaintiff, it may be more prudent to set out the whole, by way of answer, than to rely on the single defence, by way of plea, unless it is material to prevent a disclosure of any circumstance attending the title; for a defence, which, if insisted on by plea, would protect a defendant from a discovery, will not in general do so, if offered by way of answer.<sup>(a)</sup>

4363. The answer must be *full and perfect* to all the allegations in the bill not covered by demurrer or by plea, subject to the exceptions already mentioned. It must contain facts, and not arguments. It is not sufficient that it contains a general denial of the matters charged, but there must be an answer to the sifting inquiries upon the general subject; for when the defendant answers, he must answer fully, and to so much of the bill as it is necessary and material for the defendant to answer; he must speak directly, and

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(a) Mitf. by Jer. 309, 310; Wigr. on Discov. 193, 194.

without evasion. He must not only answer the several charges literally, but he must confess or traverse the substance of each charge.<sup>(a)</sup> Wherever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges. Thus, where a bill required a general account, and, at the same time, called upon the defendant to set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts such sums had been received, it was determined that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all money received by the defendant, was not sufficient, and the plaintiff having excepted to the answer on that account, the exception was allowed; the court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally, that he had in the schedule set forth the sums received by him.<sup>(b)</sup>

4364. The answer must be full to the *material* charges made in the bill. Whether the charge is material depends mainly upon the fact whether, if the defendant's answer should be in the affirmative, the admission would be of any use to the plaintiff in the cause, either to assist his equity or to advance his claim to relief. If it would, it must be answered, for it is material; if not, it is immaterial, and need not be answered.<sup>(c)</sup>

4365. In general, when the bill charges a fact as being within the knowledge of the defendant, as if

<sup>(a)</sup> *Tipping v. Clark*, 2 Hare, 390.

<sup>(b)</sup> *Mitf. by Jer.* 309, 310; *Coop. Eq. Pl.* 313, 314; *Story, Eq. Pl.* § 852.

<sup>(c)</sup> *Hirst v. Pierce*, 4 Price, 344. See *Bally v. Kenrick*, 13 Price, 291; *Jones v. Wiggins*, 2 Y. & J. 385.

done by himself, the answer must be *positive*, and the defendant must not merely state his remembrance and belief, if it is stated to have happened within six years before. But as to facts which have not happened within his own knowledge, he must answer as to his information and belief, and not to his information merely, without stating any belief either one way or the other; and when he answers in general terms as to a certain fact, that "he has been informed and believes it to be true," without adding a qualification, such as that "he does not know it of his own knowledge to be so, and, therefore, does not admit the same," it will be considered as an admission of the fact. (a)

4366. As to *recent facts* within his own knowledge, he must answer positively, and not on his belief, though not so as to the result of a conversation. (b) It is not always easy to obviate the difficulties which arise on this subject, though the answer must, in some way or other, meet every statement in the bill, and the defendant is required to speak "to the best of his knowledge, remembrance, information and belief," yet there will be partial admissions and denials of every shade and character; some delivered in terms of uncertainty, some mixed up with explanatory or qualifying circumstances. (c)

#### SECTION 2.—OF THE FORM OF THE ANSWER.

4367. The answer usually consists of seven parts, which will be separately considered. They relate to 1, the title; 2, the reservations; 3, the charges in the bill; 4, the denial of combination; 5, the signature of the defendant; 6, the oath of the defendant; 7, the signature of counsel.

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(a) Beam. Ord. 28, and the notes there.

(b) Coop. Eq. Pl. 314.

(c) Gresl. Eq. Ev. 20.

## § 1.—Of the title of the answer.

4368. An answer always begins with its title, stating whose answer it is, whether of a sole defendant or of several defendants, and the names of the plaintiffs in the cause in which it is filed as an answer. Two or more persons may join in the same answer, and when their interests are the same, and they appear by the same solicitor, they ought to do so, unless some good reason exists for answering separately. An answer purporting to be the joint answer of five defendants, cannot be sworn to as the answer of three only.

The title of the answer is according to the following formula: "The answer of A B, the defendant, to the bill of complaint of C D, complainant." If two or more defendants join in the answer, it is entitled "The joint and several answer," etc., unless it be the answer of a man and his wife, in which case, it is called "The joint answer." The answer of an infant, or other person answering by guardian, or of an idiot or lunatic, answering by his committee, is so entitled.

An answer misnaming the plaintiff is considered as no answer, and the defendant is not bound by it. If there is an immaterial mistake in the name, the answer may be taken off the file, and resworn.<sup>(a)</sup>

## § 2.—Of the reservations of the answer.

4369. After the title, the answer proceeds to the reservations usually made by the defendant of all advantages which may be taken by exception to the bill, a form which is conjectured to have been intended to prevent a conclusion, that the defendant having admitted to answer the bill, admitted every thing which the answer did not expressly controvert, especially such matter as he might have objected to by

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(a) *Griffiths v. Wood*, 11 Ves. 62.

demurrer or plea.(a) The probability of this conjecture is strengthened by the fact, that the general saving is usually left out of the answer of infants, because they are entitled to the benefit of every exception which can be taken to a bill without expressly saving it.(b)

According to the civil law, the answer begins, *sub protestatione de nimia generalitate, ineptitudine, obscuritate, multitate, et indebita specificatione dicti libelli*,(c) in imitation of which the answer in equity claims the right of taking all advantages by exception of "all errors, uncertainties, insufficiencies and imperfections," in the bill contained.

§ 3.—Of the answer to the charges contained in the bill.

4370. The answer to the charges in the bill should be full to all the interrogatories, unless they are clearly immaterial; it should also be certain in its allegations, as far as practicable. But when the defendant has answered all the circumstances of his own case, and as far as he has any concern in the bill, he will not be required to answer the further matters or circumstances of the bill; yet, if he does answer part of the circumstances, or state part of a conversation, he will be compelled to state the whole.(d)

4371. With regard to papers and documents called for by the bill, the plaintiff is not entitled as a matter of right to the discovery and production of any documents and papers called for by the bill, other than those which appertain to his own case, or title made out by the bill. Documents and papers, which wholly and solely respect the defendant's title or defence, he is not compellable by his answer to discover or to

(a) Mitf. by Jer. 314.

(b) Mitf. by Jer. 314.

(c) Gilb. For. Rom. 90.

(d) Coop. Eq. Pl. 315; *Cookson v. Ellison*, 2 Bro. Ch. R. 252.

produce; for the plaintiff must establish his right by the strength of his own title, and not the weakness of that of his adversary.(a)

In a case seeking for the discovery of a correspondence, if the defendant sets forth extracts of letters, and swears that those are the only parts of the correspondence upon that subject, it is sufficient. When such reference is made to extracts from books of accounts, the practice is to have those parts, which the defendant swears to be immaterial, sealed up.

Though papers, specifically referred to, and admitted to be in the defendant's custody, may be inspected by the plaintiff upon an order of the court, which in such case will be granted; yet, if an answer admits the execution of an instrument, craving leave to refer to it, when produced, it is not a sufficient ground to apply to the court for its production.(b)

The effect of setting forth the contents of an instrument, in an answer, and referring to the instrument for the truth of the statement, is to make the instrument a part of the answer. But the court will not order the production of an instrument which the defendant only mentions as being in his custody, when such instrument destroys the plaintiff's claim; as for example, a release.(c)

4372. In answering the charges of the bill, care must be taken not to put in the answer any matter which is scandalous or impertinent; for if the answer is scandalous, the scandal will be expunged by order of the court. But nothing will be deemed scandalous which may have an influence on the decision of the suit, whatever its nature may be.(d) If the answer

(a) Wigr. on Discov. 18, 111 to 146. Sometimes difficulties arise as to the liability of the defendant to produce such documents and papers for the inspection of the plaintiff. See *Hardman v. Ellames*, 2 Myl. & K. 755; Coop. Eq. Pl. 317; Story, Eq. Pl. § 859; Gresl. Ev. 25 to 37.

(b) Story, Eq. Pl. § 860.

(c) Coop. Eq. Pl. 317, 318.

(d) Coop. Eq. Pl. 318; Mitf. by Jer. 313.

goes out of the bill to state some matter not material to the defendant's case, it will be deemed impertinent, and the matter, upon application to the court, will be expunged.(a) The test to ascertain whether matter is impertinent, is to consider whether in the decision of the suit it can have any influence either as to the subject matter of the controversy, the particular relief to be given, or as to the cost; when it may have influence in either of these respects, it is not impertinent.(b) Another test has been suggested; it is to consider whether the subject of the allegation could be put in issue, or be given in evidence between the parties.(c)

§ 4.—Of the denial of combination and a general traverse.

4373.—1. When there is a *general* charge of combination in the bill, the defendant need not answer it, though this is usually done. An answer to a charge of unlawful combination cannot be compelled; and a charge of lawful combination ought to be specific to make it material. But, on the contrary, when a *particular* combination is charged in a bill, a particular answer must be given, and a general denial will be insufficient.(d)

4374.—2. It is the usual practice to add, by way of conclusion, a *general traverse*, or denial of all matters in the bill. This practice is said to have obtained when it was usual for the defendant merely to set forth his case, without answering every clause in the bill; and the form, though rather impertinent, when the bill has been fully answered, is still continued in practice.(e)

(a) *Alsager v. Johnson*, 4 Ves. 217; *Norway v. Rowe*, 1 Meriv. 347; *Curtes v. Master*, 11 Paige, 15; *Hood v. Hinman*, 4 John. Ch. 437; *Woods v. Morrell*, 1 John. Ch. 103.

(b) *Rensselaer v. Brice*, 4 Paine's C. R. 174.

(c) *Woods v. Morrell*, 1 John. Ch. 103.

(d) Mitf. by Jer. 41; 1 Dan. Ch. Pr. 483.

(e) Mitf. by Jer. 314; 2 Dan. Ch. Pr. 268.

§ 5.—Of the signature of the defendant to the answer.

4375. The answer must be signed by the defendant or defendants putting it in, unless an order has been obtained to put it in without a signature.<sup>(a)</sup> When the answer is put in by guardian or committee, the guardian or committee is alone required to sign it. The object of obtaining the signature of the defendant is to identify the instrument to which he has given the sanction of his oath, for the purpose of rendering a conviction of perjury more easy.<sup>(b)</sup>

§ 6.—Of the oath of the defendant to the answer.

4376. An answer must always be under oath or affirmation, unless the plaintiff chooses to dispense with it; and, in such case, the court will order the answer of the defendant to be taken without oath. By waiving the oath, the complainant relinquishes the right of applying to the court to take the answer off the file, on the ground that it is false.<sup>(c)</sup> Persons who are conscientiously scrupulous against taking an oath, may in general be affirmed. A Jew is sworn on the Pentateuch, and generally with his hat on, and other persons according to the forms and ceremonies of their religion. In the case of a defendant who is unacquainted with the English language, an order must be obtained for an interpreter, and the answer being engrossed in the language of the defendant, a translation must be made by the interpreter, and such translation must be annexed. The defendant is then sworn to his answer; the interpreter attending is then sworn to interpret truly, conveys to the defendant the language of the oath, and at the same time, he swears to the translation as just and true to the best of his ability.<sup>(d)</sup>

<sup>(a)</sup> *Dennisson v. Bassford*, 7 Paige, 370.

<sup>(b)</sup> 1 Har. Ch. Pr. by Newl. 170.

<sup>(c)</sup> *Dennisson v. Bassford*, 7 Paige, 370. See 2 Bland's Ch. R. 285.

<sup>(d)</sup> Coop. Eq. Pl. 325, 326; 3 Bro. C. C. 263; 4 Bro. C. C. 90.

4377. A corporation, when defendant, makes the answer under the common seal of the corporation.(a)

§ 7.—Of the signature of counsel to the answer.

4378. An answer must in general be signed by counsel, unless, according to the English practice, it is taken by commissioners in the country, under the authority of a commission issued for the purpose, in which case the signature of the counsel is not required, the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant. When it is not signed by counsel, the answer will be taken off the file on the application of the plaintiff.(b)

SECTION 3.—OF THE SUFFICIENCY AND INSUFFICIENCY OF THE ANSWER.

4379. It is not always easy to say when an answer is sufficient, or when it is not. If the defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject. But if in doing so he gives an answer which is not precise, with reference to the matters on which he is interrogated, and then endeavors to shelter himself, under a general denial, coupled with the words "except as aforesaid," or similar expressions, he often makes it difficult to decide whether the answer is sufficient or not. The rule seems to be that whenever the defendant denies the bill to be true, "except as aforesaid," or "except as appears by the other parts of this answer," if there be not found in the answer a clear and sufficient statement, which, to

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(a) To obviate the inconvenience of not having an oath, the plaintiff not unfrequently includes some of the officers of the corporation, or sometimes a mere corporator, as a defendant, for the purpose of obtaining a discovery. *Wright v. Dane*, 1 Metc. 237.

(b) *Wall v. Stubbs*, 2 V. & B. 358; *Coop. Eq. Pl.* 327; *Mitf. by Jer.* 315; 2 *Dan. Ch. Pr.* 268; *Story Eq. Pl.* § 876.

a reasonable extent, meets the whole case, the answer is deemed to be evasive.(a)

An answer will be insufficient when the defendant excuses himself from answering; when he has good ground for not answering, he must take advantage of it by demurrer or by plea, for it is a general rule of pleading in chancery, that a defendant cannot by answer excuse himself from answering; and when he attempts to answer, he must answer all the charges contained in the bill, and all the interrogatories properly founded upon them, as far as they are necessary to enable the complainant to have a complete decree, in case he succeeds in the suit. To this rule, however, there are some exceptions, already noticed, that defendant is not compellable to answer matter which will render him liable to criminal punishment, or a forfeiture, or subject him to expose the weakness of his own title, and others, which have been the subject of our inquiries.(b)

If a plaintiff conceives an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer. These exceptions must be signed by counsel.

If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer, and the exceptions, and to certify whether the answer is sufficient in the points excepted to or not. If the master reports the answer insufficient in any of the points excepted to, the defendant

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(a) *Tipping v. Clark*, 2 Hare, R. 383. See *Stafford v. Brown*, 4 Paige, 88; *Hodgson v. Butterfield*, 2 Sim. & Stu. 236; *Bogart v. Henry*, 1 Edw. V. C. Rep. 7.

(b) *Bank of Utica v. Messereau*, 7 Paige 517.

must answer again to these parts of the bill in which the master conceives the answer to be insufficient; unless, by excepting to the master's report,(a) he brings the matter before the court, and there obtains a different judgment.(b)

When a defendant has insisted on a matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer, and taking the opinion of the court, whether he ought to be compelled to answer further to that point or not.(c)

Scandal and impertinence in an answer must be disposed of, before the reference is made as to the insufficiency of the answer, for such impertinence and scandal are waived by a reference for sufficiency.(d)

When the defendant pleads or demurs to any part of the *discovery* sought by the bill, and also answers, if the plaintiff takes exception to the answer before the plea or demurrer has been signed, he admits the plea or demurrer to be good; for, unless he admits it to be good, it is impossible to determine whether the answer is good or not. But if the plea or demurrer is only to the *relief* prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer has been argued.(e)

When the demurrer is accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer is overruled, the plaintiff must except to the answer as insufficient.(f) But if a plea or demurrer is filed without an answer, and is overruled, the plaintiff need not take exceptions,

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(a) As to the form and effect of exceptions to a master's report, see *Story v. Livingston*, 13 Peters, 359.

(b) Mitf. by Jer. 316.

(c) Mitf. by Jer. 316, 317.

(d) Coop. Eq. Pl. 322.

(e) Mitf. by Jer. 317.

(f) *Cotes v. Turner*, Bunb. 123.

and the defendant must answer the whole bill as if no defence had been made.(a)

SECTION 4.—OF FURTHER ANSWERS, AND ANSWERS TO AMENDED BILLS.

4380. When a further answer is required, it is in every respect similar to, and indeed it is considered as forming part of the first answer; and an answer to an amended bill is considered as part of the answer to the original bill. Therefore, if the defendant in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition will be considered as impertinent, unless it varies the defence in point of substance, or is otherwise necessary or expedient; and if, upon a reference to the master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer.(b)

SECTION 5.—OF THE EFFECT OF AN ANSWER.

4381. The effect of an answer upon a *defendant* is, that it is taken to be true, and if false, he may be indicted for perjury; yet there are many cases in which an individual is allowed, on application to the court, to reform his answer, and, in some instances, to take it off the file; but that can be done only by a special application, satisfying the conscience of the court how it comes that a document which stands in the place of a solemn deposition, is now alleged to be founded in mistake.(c)

4382. The facts which he admits by his answer, are binding upon the defendant; but when there are several defendants, the answer of one is not, in general,

(a) Mitf. by Jer. 317.

(b) Mitf. by Jer. 318.

(c) *East India Company v. Keighley*, 4 Madd. R. 27.

evidence *against the others*;(a) such answer is considered evidence for and against himself only. The reason of this is, that there is no issue between the parties, and there has been no opportunity for cross-examination.(b) Where, however, a defendant, in his answer, said his memory was impaired by age, and referred to another person as having been his agent, and as possessing a more perfect knowledge of the matters inquired after than himself, the agent was made a party, and his answer was allowed to be read against the principal.(c)

4383. Formerly, when a material fact was put in issue by the answer, the courts of equity followed the maxim of the civil law, *responsio unius non omnino audiatur*, and required the evidence of two witnesses as the foundation for a decree. But, of late years, the rule has been referred more closely to the equity on which it is grounded, namely, the equal right to credit which a defendant, when his oath, "positively, clearly and precisely" given, and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness. When this is the case, some corroboration is required, either the testimony of a second witness, or any circumstances which may give a turn to the balance;(d) because, so far as the answer of the defendant is strictly responsible to the bill, it is admitted as evidence in his favor, as well as against him. The reason is, that the plaintiff, by appealing to the

(a) *Hayden v. McIlvain*, 4 Bibb. 57.

(b) *Chevet v. Jones*, 6 Madd. 248; *Morse v. Royal*, 12 Ves. 355.

(c) *Anon.* 1 P. Wms. 100. See *Wood v. Braddick*, 1 Taunt. 104; *Pritchard v. Draper*, 1 Russ & M. 191.

(d) *Gresl. Eq. Ev.* 4; *Walton v. Hobbs*, 2 Atk. 19; *Cooke v. Clayworth*, 18 Ves. 17; *Toole v. Medicott*, 1 B. & B. 402; *Morphett v. Jones*, 1 Swanst. 172; *Kemeys v. Proctor*, 3 Ves. & B. 58; *Biddulph v. St. John*, 2 Sch. & Lef. 532. But two witnesses are not required to overturn the answer of a defendant, as to a fact of which he professes ignorance only, and calls for proof, but which might exist and not be known to him. *Young v. Hopkins*, 6 Monroe, 22. See *Cochran v. Evans*, adm'r, 1 Harr. 200.

conscience of the defendant, admits that the answer is worthy of credit, as to the matter of the inquiry.(a)

But, although the answer of the defendant is evidence in his favor as well as against him, this must be understood subject to this qualification, that when the answer of the defendant admits a fact, but insists on matter of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance.(b)

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TITLE V.—OF REPLICATIONS AND THEIR CONSEQUENCES.

4384. The plea and answer of the defendant are intended to set up a defence for him, against the charges of the plaintiff, as contained in his bill, or the answer may admit the charges in the bill to be true. In this last case there is no occasion for any altercation between the parties. If, on the contrary, the defendant denies the right of the plaintiff to relief or a discovery, the latter should consider, first, whether the answer is sufficient in point of law or not. If insufficient, the objection ought to be made before any replication, because, by replying, the plaintiff admits the sufficiency of the answer, however imperfect it may be; secondly, if the answer is sufficient to defeat the plaintiff, he should ask leave of the court to amend his bill; and to this amended bill, the defendant may make such defence as he shall think proper, whether required by the plaintiff to answer it or not.(c) In some cases, however, the court will allow the plaintiff to withdraw his replication, he paying the costs which have been incurred.

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(a) 2 Story, Eq. Jur. § 1528; Clark v. Reimsdyk, 9 Cranch, 166.

(b) Clark v. White. 12 Peters, 178.

(c) Mitf. by Jer. 323.

4385. Formerly, replications were either general or special, but in modern times, special replications have been altogether disused,<sup>(a)</sup> and, of course, rejoinders, surrejoinders, etc., have fallen with them. A general replication, is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it, to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill.

4386. The effect of a replication is to put the cause completely at issue. After the cause has come to a hearing, and the pleadings are carefully examined, it is sometimes found that a replication has never been filed; in such case, the court will permit the plaintiff to file a replication *nunc pro tunc*.<sup>(b)</sup>

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TITLE VI.—OF INCIDENTS TO PLEADINGS IN GENERAL.

4387. Having considered the nature of the pleadings used in the equitable jurisdiction of courts of chancery, and the manner in which they are brought to a termination, it will next be requisite to ascertain what will be the effect of any error or mistake which may have occurred in the course of such proceedings. It would be contrary to the nature of equity, if a party were to lose his suit in consequence of a mistake made in the course of pleadings; for this reason, matters of form are never allowed to prejudice a party, the real and substantial merits of the cause are always looked to. When an error has been discovered, and it is insisted on, the courts will either permit an amendment of the pleadings, that is, the correction of the error, or wholly overlook it, as being waived by the party making the objection, by not excepting to it in proper

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<sup>(a)</sup> Mitf. by Jer. 321; Storms v. Storms, 1 Edwards. 358; Story, Eq. Pl. § 878.

<sup>(b)</sup> Rodney v. Hare, Mosely, 396; Mitf. by Jer. 323.

time. The subject will be considered in three chapters, in which will be examined, 1, the time when an amendment may be made; 2, amendments by the plaintiff; and, 3, amendments by the defendant.

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CHAPTER I.—WHEN AN AMENDMENT MAY BE MADE.

4388. As to the *time* when amendments may be made, it may be observed, that before their termination, the courts will frequently permit the pleadings filed to be altered, for the purpose of effectuating justice, as the interests of the parties may require, except in case of answers put in upon oath, in which no change will be allowed, for very obvious reasons.(a) After the witnesses have been examined, no part of the pleadings can, in general, be altered, or added to, but under very special circumstances, or in consequence of some subsequent event, except that if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend it, for the special purpose of adding the necessary parties.

Though in general with respect to the original parties, and their interests, no amendment will be permitted after the cause *is at issue, and witnesses have been examined and publication passed*; yet a plaintiff has been permitted, under such circumstances, to amend his bill by adding a prayer omitted by mistake. Even upon hearing, the court having the whole case before it, and being embarrassed in its decision, by defects in the pleadings, has permitted amendments both to bills and answers, under very special circumstances.(b)

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(a) Amendments to pleadings to which the parties have deliberately made oath, are allowed with great caution. *Verplanck v. The Mercantile Insurance Company*, 1 Edw. R. 46. But in matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity will permit amendments to answers. *Smith v. Babcock*, 3 Sumn. 410; *Mitf. by Jer.* 328.

(b) *Mitf. by Jer.* 331.

4389. When *new matter* has been discovered, by either plaintiff or defendant, *before a decree* deciding on the rights of the parties has been pronounced, a cross bill has been permitted to bring such matter before the court to answer the purposes of justice, instead of allowing an amendment of a bill or answer, where the nature of the matter discovered would admit of its being so brought before the court; and after a decree, upon a similar discovery, a bill of review, or a bill in the nature of a bill of review, has been allowed for the same purpose, both those forms of proceeding being in their nature similar to amendments of bills or answers, calculated for the same purposes, and generally admitted under similar restrictions.(a)

Sometimes, upon the hearing of the cause, it has appeared that matter properly in issue, or at least stated in the proceedings, has not been proved against parties, who have admitted it by their answers, although not competent so to do, for the purpose of enabling the court to pronounce a decree. In these cases, the court has permitted the proper steps to be taken to obtain the necessary proof, and for this purpose has suffered interrogatories to be exhibited; and where the plaintiff has neglected to file a necessary replication, he has been allowed to supply the defect.(b)

4390. In most of these cases, the indulgence given by the court, is allowed to the mistakes of the parties, and with a view to save expense. But, when injury may arise to others, the indulgence has been more rarely granted; and, so far as the pendency of a suit can affect either parties to it, or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent, from the time of the amendment, except that where a bill seeks a

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(a) Mitf. by Jer. 331, 332.

(b) Mitf. by Jer. 329.

discovery from a defendant, and, having obtained that discovery, the bill is amended by stating the result, it should seem that the suit may, according to the circumstances, be considered as pendent from the filing of the original bill, at least as to that defendant, and perhaps to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might include, in general terms, the subject of the amendment.(a)

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CHAPTER II.—OF THE AMENDMENTS BY THE PLAINTIFF.

4391. Amending the bill is useful for various purposes; for the correction of mistakes or the suppression of impolitic admissions in the original statement; for adding parties; for inquiring into additional facts; or the further investigation of facts which have been partially disclosed; and for putting in issue new matter stated in the answer.(b)

Amendments are allowed to correct errors occasioned by the omission of making proper parties, or where a bill is defective in its prayer for relief, or there has been an omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself,(c) nor repugnant thereto.(d) Or, if when the defendant has put in his answer, the plaintiff thereby obtains new light, as to the circumstances of his case, he may amend his bill, in order to shape his case accordingly. Imperfections in the frame of the bill may be remedied by amendment as often as occasion may require; but the

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(a) Mitf. by Jer. 329, 330.

(b) Gresl. Ev. 21, 22.

(c) Lyon v. Talmadge, 1 John. Ch. 184. See Dodd v. Astor, 2 Barb. Ch. R. 395; Cock v. Evans, 9 Yerg. 287.

(d) Verplanck v. The Mercantile Insurance Company, 1 Edw. R. 46.

matter introduced by amendment must not be matter which has happened since the filing of the bill, unless the defendant has not put in his answer, in which case the bill may be amended by adding such supplemental matter.(a) When matter has been discovered after the answer has been filed, which is then called *new matter*, it cannot be introduced by amendment, the only way to introduce it is by filing a supplemental bill.(b)

It is a rule that before issue joined the only way to introduce matter which occurred before the filing of the bill, is by way of amendment. It cannot be introduced by way of supplemental bill. The reason assigned for this is, that the original cause is still *in fieri*. After issue joined it is no longer so, and such matter may be introduced by a supplemental bill, which may be filed by leave of court. Such supplemental bill, however, cannot be brought without the leave of the court, because the plaintiff cannot introduce new matter into the same cause, after the time for amendment has passed, so as to make a part of it, without permission of the court.(c)

After a plea set down for argument, the plaintiff may amend his bill; and though taking exceptions to an answer accompanying a plea is an admission of the plea, yet amending the bill, after the plea, is said not to have the effect of allowing the plea. So at any time before a demurrer is allowed, the plaintiff may amend the bill. If, upon hearing the cause, the plaintiff appears entitled to relief, but the case made out by the bill is insufficient to ground a complete decree, the court will not allow an amendment, but will sometimes give the plaintiff leave to file a supplemental bill, to bring before the court such matter as is neces-

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(a) Coop. Eq. Pl. 332; Mitf. by Jer. 324.

(b) Mitf. by Jer. 326; Stafford v. Howlett, 1 Paige, 200; Hammond v. Place, Harring. Ch. 438.

(c) Story, Eq. Pl. § 890.

sary, in addition to the case made out by the original bill. If the addition of parties only is wanted, an order is usually made for the cause to stand over, with liberty for the plaintiff to amend his bill by adding the proper parties,<sup>(a)</sup>

4392. Considering infants under its protection, the court will not permit an infant plaintiff to be injured by the manner in which his bill has been framed. Therefore, where a bill on behalf of an infant submitted to pay off a mortgage, and, upon hearing the cause, the court was of opinion that the infant was not bound to pay the mortgage, it was ordered that the bill should be amended by striking out the submission. And when, by the bill, a matter has not been properly put in issue, to the prejudice of the infant, the court has generally ordered the bill to be amended.<sup>(b)</sup>

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CHAPTER III.—OF AMENDMENTS BY THE DEFENDANT.

4393. A defendant may also amend his pleadings, but this is allowed with much more caution than in the case of a plaintiff. These amendments may be allowed with regard, 1, to demurrers; 2, to pleas; 3, to answers.

SECTION 1.—OF AMENDMENT OF DEMURRERS.

4394. A demurrer cannot, as a plea, be good in part and bad in part, with reference to its extent, or the quantity of the bill covered by it; and if it is too general, it must be overruled; but, in such case, the court will exercise a discretion, when a fair case is made, to give the defendant leave to amend, and to narrow it, upon proper terms, which is a guard upon the practice.<sup>(c)</sup>

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<sup>(a)</sup> Coop. Eq. Pl. 334; Mitf. by Jer. 326, 327.

<sup>(b)</sup> Mitf. by Jer. 327; Coop. Eq. Pl. 335; Story, Eq. Pl. § 892.

<sup>(c)</sup> Coop. Eq. Pl. 336.

## SECTION 2.—OF THE AMENDMENT OF PLEAS.

4395. Although the court will permit pleas to be amended, when there has been an evident mistake or slip, and the material ground of defence appears sufficient, yet the court always expects to be told precisely what the amendment is to be, and how the slip happened, before the allowance of the amendments takes place. But though leave will be given to amend pleas, yet the defendant is usually tied down to a very short time in which to amend. In some cases where the amendment of the plea cannot be made in consequence of its construction, the court have granted the defendant leave to withdraw his plea, and plead *de novo* in a fortnight.(a)

When a plea is clearly good in substance, but is considered as objectionable in point of form, as not concluding in bar or otherwise, and not stating some other necessary things, leave will be given to amend.(b)

## SECTION 3.—OF THE AMENDMENTS OF ANSWERS.

4396. When the defendant has given the sanction of an oath to his defence, the court cannot allow amendments for obvious reasons, except in small matters not of any substantial importance, unless upon evidence to the court of surprise. The most common case of amending an answer, is where, through inadvertency, a defendant has mistaken a fact or a date; then the defendant will be permitted to amend to prevent his being prosecuted for perjury.(c) In general, however, this indulgence is confined to mere mistake or surprise;(d) and the amendment will be allowed or refused in the sound discretion of the court.(e)

(a) *Nobkissen v. Hastings*, 2 Ves. jun. 85.

(b) *Coop. Eq. Pl.* 236; *Newman v. Wallis*, 2 Bro. Ch. R. 143, 147.

(c) *Coop. Eq. Pl.* 337; *Mitf. by Jer.* 328; *Story, Eq. Pl.* § 896.

(d) *Mitf. by Jer.* 328.

(e) *Wiggin v. Dorr*, 3 Sumn. 410.

4397. A distinction has also been made between the admission of a fact, and the admission of a consequence in law or in equity. When, therefore, a defendant, after putting in an answer, discovered a ground of defence to a bill of which he was not before informed, a purchase by the person under whom he claimed, without notice of the plaintiff's title, which could only be used by way of defence, and could not be the ground of a bill of review, the court allowed the answer to be taken off the file, and the new matter to be added, and the answer resworn.<sup>(a)</sup>

4398. When a fact, which may be of advantage to a defendant, has happened subsequently to his answer, it cannot with propriety be put in issue by amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill, in which the fact can be put in issue, be brought to a hearing with the original suit; and a bill for this purpose seems to be in the nature of a plea *puis darrein continuance* at the common law.<sup>(b)</sup>

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TITLE VII.—OF THE PROCEEDINGS AFTER THE PLEADINGS.

4399. Having explained the various proceedings in a chancery suit, the selection of parties, the several kinds of bills, and the defence which may be set up to the charges of the plaintiff, the whole course of pleadings, and how a cause is brought to an issue, the next object of examination will be the proceedings which follow. These will be considered in three chapters, relating to, 1, the evidence; 2, the hearing; and 3, the decree.

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<sup>(a)</sup> *Patterson v. Slaughter*, Ambl. 292; Mitf. by Jer. 328, 329; Coop. Eq. Pl. 337; Story, Eq. Pl. § 897.

<sup>(b)</sup> Mitf. by Jer. 329.

## CHAPTER I.—OF THE EVIDENCE.

4400. Although evidence in courts of equity, in many respects, differs in its character and many of its rules, from that which is used in the courts of common law, it is scarcely less extensive as a subject for dissertation. Many of the rules applicable at law have equal force in equity, so that it will be unnecessary here to repeat those rules which will be found in another part of this work. The principal points of difference are the following :

4401.—1. While evidence at law may be extended to every thing connected with human affairs, in equity its *ulterior object is more limited*. In trials at law, crimes, damages, and an infinity of various matters, are the issues, toward which the evidence must be directed ; but these are generally excluded from tribunals whose jurisdiction is confined principally to afford a remedy in cases where there has been some “ fraud, accident or mistake.”(a)

4402.—2. Evidence in equity is somewhat circumscribed by the *nature of the tribunal itself*, and the distinct character of its proceedings. Matters are frequently brought into a trial at law, on which there can be no question in the mind of the judge and the bar as to the proper verdict, yet a great latitude is allowed for the production of evidence which may influence the feelings and prejudices of an inexperienced and irresponsible jury. On the contrary, an equity suit is to be deliberately decided by calm reason alone ; it usually contains points of real legal difficulty, and depends upon the close application of principles to the main facts of the case. Consequently, much discursive matter is pruned away from the evidence in equity, and suits are not unfrequently decided upon mutual admissions alone.(b)

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(a) 1 Mad. Ch. Pr. 23 ; Gresl. Ev. 1.

(b) Gresl. Ev. 2.

4403.—3. There is a marked difference between the *laxity* allowed in certain cases in equity, and the *strictness* insisted upon at law. At law, for instance, a mass of cases and rules may be found under the head of *variance*; courts of equity, on the contrary, do not readily admit the importance of a mistake or inaccuracy, and will, without difficulty, allow a flaw to be remedied by amendment.(a)

4404.—4. Sometimes courts of equity allow a *minuteness* and an *extension* when an investigation has been fairly entered upon in equity, which leads into innumerable ramifications. For example, a dispute concerning a trust requires due proof of deeds and wills, and thence may lead to questions of forgery and conspiracy, and trench upon the criminal jurisdiction. In cases of fraud and trusts, a court of equity does not confine itself within strict rules, as they do at law, but for the sake of justice and equity will enter into the merits of the case, in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds.(b)

4405.—5. The whole system of evidence in the courts of equity is an engrafting of the rules established amongst English lawyers upon the *forms* used by the civilians, for the maxim *aquitas sequitur legem* applies with full force to this branch of the law.(c)

#### SECTION 1.—OF THE MATTERS TO BE PROVED.

4406. This section may be conveniently divided into three heads: 1, of admissions; 2, of the onus probandi; 3, of the confinement of the evidence to the matters in issue.

##### § 1.—Of admissions.

4407. It is a general rule that whatever is neces-

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(a) Gresl. Ev. 2.

(b) *Man v. Ward*, 2 Atk. 229.

(c) *Reynish v. Martin*, 3 Atk. 333.

sary to support the case of the plaintiff so as to entitle him to a decree against the defendant, or in the case of the defendant, to support his own case, as made by his answer against that of the plaintiff, must be proved, unless it is admitted by the other party. This leads us to consider what admissions will render the production of proof unnecessary.

*Admissions* are the declarations, which a party, by himself or those who act under his authority, make of the existence of certain facts. The admission is simply the testimony which the party admitting bears to the truth of an obligation or of a fact against himself. Admissions are either, 1, upon the record; or, 2, by agreement between the parties.

*Art. 1.—Of admissions upon record.*

4408. These are actual, or such as appear in the bill or the answer; or constructive.

1. *Of actual admissions upon record.*

4409. *Actual* admissions are said to be plenary or partial. They are plenary by force of the terms used, not only when the answer runs in this form, “the defendant admits it to be true,” but also when he simply asserts, and, generally speaking, when he says, “he has been informed, and believes to be true,” without adding a qualification, such as, “that he does not know of it of his own knowledge to be so, and, therefore, does not admit the same.” Partial admissions are those which are delivered in terms of uncertainty, mixed up, as they frequently are, with explanatory or qualifying circumstances. The admission must be very explicit and unqualified, to dispense with the production of that which constitutes the foundation of the suit.<sup>(a)</sup>

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(a) *Cox v. Allingham*, Jac. 339.

The *plaintiff*, of course, cannot read any part of his own bill as evidence in support of his case, unless it is corroborated by the answer, and so much as is so corroborated may be considered as embodied in the answer, and it is, therefore, an admission of its truth.

4410. Though, at law, it is a general rule that a bill in chancery will not be evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the deposition of the witnesses, and that it cannot be admitted to prove any facts either alleged or denied in the bill; yet a different rule prevails in equity, and the bill may be read in evidence by the *defendant* of any matter therein averred.(a)

This right of the defendant to read the plaintiff's bill, as evidence, is confined to the bill as it *stands on the record*; for if it has been amended, the amended bill is the only one upon record.(b)

4411. An answer is evidence of almost irresistible strength *against the defendant who files it*, or any person claiming under him, for it is a deliberate statement, on oath, of the truth of all it contains. It is only so far conclusive that it may be proved to have been sworn to under erroneous impressions. The answer of an infant cannot be read against him in another suit; but it may be used against the guardian in a cause which he defends in a different capacity, for it is his admission upon oath.(c)

When, instead of replying to the defendant's answer, the plaintiff sets down the cause for hearing on bill and answer, the defendant is at liberty to read his answer as evidence in favor of his own case, and the decree is made on the assumption that every fact stated by the defendant is true. If the plaintiff files a replication, he precludes the defendant from reading

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(a) *Ives v. Medcalfe*, 1 Atk. 63.

(b) 2 Dan. Ch, Pr. 398, 399.

(c) *Beasley v. Magrath*, 2 Sch. & Lef. 34.

his answer, except as to costs, and imposes upon him the necessity of proving the statements therein contained by an examination of witnesses. The answer of the defendant may be read on a question of costs to the extent only of showing that, either from some offer or some statement contained in it, the whole or part of the costs incurred subsequent to the answer were unnecessary.<sup>(a)</sup>

2. *Of constructive admissions upon record.*

4412. With respect to *constructive* admissions, the most ordinary instance of them is, when a plea has been put in by a defendant, either to the whole or a part of the bill; in that case, the bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admitted to be true. When the plaintiff has replied to a plea, he may, therefore, rest with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover, unless the plea is a negative plea, in which case it will be necessary to prove the matter negatived, for the purpose of disproving the plea, in the same manner that he may enter into evidence for the purpose of disproving the matter which has been pleaded affirmatively.

For the same reason, where a special replication is put into an answer, all those parts of the answer which are not denied by the replication are admitted to be true.

4413. There is a great difference between actual and constructive admissions, with respect to the manner in which they are represented to the court; the former are read to substantiate the case of the party reading them, in the same manner as other proofs in the cause; the latter are presented to the court at the outset of the hearing, by the counsel opening the

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<sup>(a)</sup> Smith's Ch. Pr. 340; 2 Dan. Ch. Pr. 404.

pleadings, for the purpose of showing what are the matters in issue between the parties.(a)

*Art. 2.—Of admissions by agreement between the parties.*

4414. These admissions are in general made to save expense or to prevent delay. They should be in writing and in explicit terms, without ambiguity, and signed by the parties or their solicitors, the solicitor employed by the party being considered sufficient to bind his principal, as it is inferred that he had authority for that purpose.

The parties of course may admit what they please, but they are not allowed to make admissions which will violate the known principles of law; as where a husband was willing his wife should be examined as a witness against him in an action for a malicious prosecution.(b)

§ 2.—Of the onus probandi.

4415. When the facts are not admitted by an actual agreement, nor by implication, they must be proved, and the first question to be considered is, upon whom is the burden of the proof, or the *onus probandi*, cast.

It has already been laid down as a general proposition that the point in issue is to be proved by the party who asserts the affirmative, according to the principle of the civil law; *ei incumbit probatio qui dicit, non qui negat*.(c)

§ 3.—The proof must be confined to the matter in issue.

4416. As the party on the other side does not come prepared to answer any thing but what is put in issue,

(a) 2 Dan. Ch. Pr. 397.

(b) *Barker v. Dixie*, Rep. temp. Hard. 264.

(c) Dig. 22, 3, 2; Tait on Ev. 1; 1 Phill. Ev. 194; 1 Greenl. Ev. § 74; *Dranguet v. Prudhomme*, 3 Louis. R. 83; 2 Dan. Ch. Pr. 408. See ante, B. 4, t. 8, c. 11, s. 3, § 3, br. 1, art. 2.

it is a fundamental maxim, in equity as well as at law, that no proof can be admitted of any matter which is not noticed in the pleadings. It is for this reason that, in the frame of bills, an introduction of every fact which the plaintiff means to prove, is required, and that a defendant must state in his answer every thing of which he intends to avail himself in his defence.<sup>(a)</sup>

4417. But, to the rule thus broadly laid down, there are certain exceptions. The cases in which these exceptions are principally applicable are those where the character of an individual, or his general behavior, or quality of mind comes in question; as, when, for example, it is alleged that a man is *non compos*, it is the experience of every day that you may give particular acts of madness in evidence, and not the general evidence only that he is insane. For the same reason, where a bill charges that a man is addicted to drinking, and liable to be imposed upon, the plaintiff is not in general confined to prove drunkenness generally, but particular instances are allowed to be given. In like manner, where a bill charged that the defendant was a lewd woman,\* evidence of particular acts of incontinence was allowed to be read.<sup>(b)</sup> In cases of this nature, however, it is necessary, in order to entitle the party to read evidence of particular facts, that they should be pointed directly to the charge.<sup>(c)</sup>

4418. It is not only a rule that the evidence must be confined to the issue, but that the *substance* of the case made out by the pleadings *must be proved*; that is, all the facts in the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions, either in the plead-

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<sup>(a)</sup> 2 Dan. Ch. Pr. 411.

<sup>(b)</sup> Clark v. Periam, 3 Atk. 333, 340.

<sup>(c)</sup> 3 Atk. 333; Sidney v. Sidney, 3 P. Wms. 269. See Wheeler v. Trotter, 3 Swanst. 174, n.

ings or by agreement, must be established by evidence.(a)

4419. Not only must the substance be proved, but the evidence must be substantially *the same case* as that which the party has stated upon the record; for the court will not allow the party to be taken by surprise by a case, proved on the other side, different from that upon the record, as set up by him in his pleadings.

SECTION 2.—OF DOCUMENTARY EVIDENCE.

4420. When treating of the evidence which might be given in a suit at law, the subject of documentary evidence was so fully examined that it will be unnecessary here to repeat the rules there laid down.(b)

SECTION 3.—OF ORAL TESTIMONY.

4421. By *oral testimony* is meant the evidence given verbally by a witness. As to the manner in which it is given in chancery, it is proper to consider, 1, the competency of the witnesses; 2, their examination by an examiner; 3, their examination under a commission; 4, of depositions taken under the act of congress; 5, demurrers to interrogatories; 6, proceedings on the return of the evidence.

§ 1.—Of the competency of witnesses.

4422. This subject has been fully considered in another place.(c)

§ 2.—Of the examination of the witnesses by the examiner.

4423. Witnesses in chancery are not in general examined as they are at law in open court in the

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(a) 2 Dan. Ch. Pr. 415.

(b) Ante, n. 3094, et seq.

(c) Ante, n. 3159, et seq.

presence of the judges. There are three modes of examining them, namely, by an examiner appointed by the court, or by commission under the seal of the court, or under the act of congress.

When the witnesses reside within the distance prescribed by law or the rules of the court, it is usual to apply to the court to appoint an examiner, who is generally a counsellor or solicitor in the court, who is thereupon authorized to take the depositions of the witnesses for either party.

In general, the witnesses attend voluntarily before the examiner, but should they refuse, they may be compelled by subpoena and attachment for contempt, for disobeying it.

Interrogatories in writing are sometimes filed, and these are to be answered by the witness, but in some jurisdictions questions are asked of the witnesses by the solicitors or counsel of the parties.

Before the witness is examined, the examiner administers an oath or affirmation to him. In the examination he is not bound by the interrogatories to the letter, but he ought to explain every matter to the witness which arises necessarily upon them. He ought to put the interrogatory to the witness, take down the answer in writing upon paper, concluding the answer to each interrogatory before another is put.(a)

When all the interrogatories have been gone through, the examiner should carefully read the whole of the deposition to the witness, who, if he be satisfied with it, signs it, or, which is the safer mode, signs each sheet in the presence of the examiner. If he wishes to vary his testimony, or to make any alteration in, or addition to it, he must do so before signing the deposition; for after it is complete, there is no reason why they should not sign it before leaving the ex-

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(a) 2 Dan. Ch. Pr. 483.

aminer. So important is the signature of the witness to his deposition, that should he die after his examination is completed, and before it is signed, the deposition cannot be made use of.<sup>(a)</sup> It seems, however, that if a witness having signed his examination in chief, dies before he is cross-examined, his deposition may be read in evidence; the court, however, bearing in mind that the cross-examination had not taken effect, especially if it appeared that the party had lost any material fact, which was within the knowledge of the witness, and could not have been proved by other means.<sup>(b)</sup>

§ 3.—Of the examination of witnesses by commission.

4424. When a witness resides, or is abroad, so that his attendance cannot be procured before the examiner, a commission to take his deposition may be issued. This is done either by leave of court, specially granted, or by virtue of a general rule of the court, or of some legislative act.

Interrogatories are filed in the proper office, and notice is given to the opposite party, or his counsel, of the same. Within the time prescribed by the rules of the court, cross-interrogatories may be filed. Commissioners may be named by either party, and then the commission issues. This authorizes the commissioners to call before them the witnesses, and to take their depositions in writing; and commands them to return the same, together with the interrogatories and the writ, sealed up, generally within the time therein limited; but before they proceed to the examination of witnesses, it directs them severally to administer the oath accompanying the commission, to each other, and also to the clerk or clerks employed in transcribing or engrossing the depositions.

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<sup>(a)</sup> *Copeland v. Stanton*, 1 P. Wms. 414.

<sup>(b)</sup> *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158.

The commissioners execute the commission by reducing to writing the several answers to the interrogatories as the witnesses give them, having first administered an oath or affirmation to each witness to make true answers to the said interrogatories, and also to the clerk or clerks employed to take and write down, transcribe and engross the depositions of all and every the witness and witnesses produced and examined by the commissioners, or any of them named in the commission.(a)

After the commission has been thus executed, the commissioners annex the depositions of the witnesses to it, together with a copy of the oath they have taken, and indorse on the commission, "The execution of this commission appears in certain schedules hereto annexed;" this is signed by the commissioners; they next wrap the whole in an envelop, which is sealed, and the names of the commissioners written upon it. It is then addressed to the person designated, and is either delivered to a messenger, or put into the post office, to be transmitted by mail.(b)

§ 4.—Of depositions taken under the act of congress.

4425. In the courts of the United States, depositions may be taken under the act of congress, without giving notice. By the rules of practice for the courts of equity of the United States, it is ordered that in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission, or by a new deposition taken under the act of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.(c)

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(a) 2 Dan. Ch. Pr. 499 ; 1 Smith's Ch. Pr. 367.

(b) 1 Smith's Ch. Pr. 369, 370.

(c) Rule 68.

## § 5.—Of demurrers to interrogatories.

4426. By a *demurrer to interrogatories* is understood the reasons which a witness tenders or assigns for not answering a particular question in interrogatories.(a) Every witness is bound by the form of the oath administered to him previous to his examination “to make true answers to all such questions as shall be asked of him upon the interrogatories” filed for his examination. If this obligation were to be strictly insisted upon, it might, in many cases, be productive of great injury either upon the witness himself, or upon others, by compelling him to disclose matter which it is against the principles by which the courts are usually governed, that he should discover. In a court of law, a witness has it in his power immediately to take the opinion of the presiding judge, as to his right to withhold an answer to any question which may be put to him, but in courts of equity a witness has no such power; nor can the examiner or commissioners before whom a witness is examined, not being authorized to pronounce a judgment as to the propriety of the question put to the witness; still the witness is not left without a remedy, and a method is provided by which he may submit his objection to answer the various questions proposed to him to the decision of the judge. This is done by a demurrer to interrogatories.(b)

The word demurrer has not the same meaning as when it is applied to a bill; there is a marked difference. Demurrers to interrogatories differ from demurrers to bills in this, that the former depend upon extrinsic facts, and are supported and opposed by affidavits.(c) The witness states on oath his reasons

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(a) *Parkhurst v. Lowten*, 2 Swanst. 194.

(b) 2 Dan. Ch. Pr. 354, 355.

(c) *Nightingale v. Dodd*, Mos. 229; *Parkhurst v. Lowten*, 3 Madd. R. 266.

for refusing to answer,(a) which are taken down and sworn to by him, with the interrogatories.

4427. There is no particular *form* either for the demurrer or for the affidavits, and only one material restriction, namely, that the witness must not state what would have been the effect of his answer if given, for that would allow evidence to transpire before publication has regularly passed.(b)

The grounds upon which a witness may protect himself from answering to interrogatories, are nearly the same as those which a defendant has a right to insist upon as a reason for not giving the discovery required by the bill. These are principally reduced to two: 1, that he is incompetent to give the evidence demanded of him, as that he is a party interested, or that the information required of him was obtained professionally; or, 2, he may state a particular privilege which permits any individual to remain silent, when a direct answer might subject him to penalties.

*Art. 1.—Of demurrer to interrogatories on the ground of incompetency.*

4428.—1. The ground of objection to an interrogatory because the witness has an *interest*, that is, that the answer to it may lead to a decree against him, is available in those cases where the witness is a party to the suit, or has a direct interest in the subject matter.(c)

4429.—2. The objection on the ground of *professional confidence*, proceeds upon the same principles as are applicable to the case of defendants, by which counsel, attorneys, solicitors and proctors, are restricted in their testimony. They are not permitted to disclose any information which they may have obtained in the

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(a) *Bowman v. Rodwell*, 1 Madd. R. 266.

(b) *Parkhurst v. Lowten*, 2 Swanst. 213.

(c) 2 Dan. Ch. Pr. 556, 557.

capacity of professional advisers. They are considered as the same person with their clients, and are intrusted with their secrets.<sup>(a)</sup> As a professional man, well acquainted with the facts and pleadings, is or ought to be himself best able to fix the point beyond which his examination cannot properly be extended, the objection is generally brought before the court in the form of a demurrer to interrogatories; but the right to withhold the answer is the privilege, not of the witness, but of the client; it amounts to a species of incompetency. One of its properties is, that it may at any time be waived by the client.

*Art. 2.—Of the privilege of the witness.*

4430. When the right of the witness is a personal privilege, and he chooses to waive it, he may do so, and he will be competent. The objections usually made to answering interrogatories, and which are the grounds of demurrer, are four in number.

1. *Because the answer may subject the witness to a criminal charge.*

4431. No man is bound to criminate himself; he may therefore demur to an interrogatory, the answer to which, however remotely connected with the fact, might have a tendency to prove him guilty of a crime or misdemeanor.<sup>(b)</sup> An instance, showing the great extent to which this principle has been carried, occurred at *nisi prius*. In an action for a libel, in the shape of an extra-judicial affidavit sworn before a magistrate, it was held that the magistrate's clerk was not bound to answer whether, by the defendant's orders, he wrote it out and delivered it to the magistrate, because, copying and showing a libel is assisting to publish it.<sup>(c)</sup>

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<sup>(a)</sup> Gilb. Ev. 138; Parkhurst v. Lowten, 2 Swanst. 194, where the cases are collected.

<sup>(b)</sup> Paxton v. Douglass, 16 Ves. 242; S. C. 19 Ves. 227.

<sup>(c)</sup> Maloney v. Bartley, 3 Camp. 210.

2. *Because the answer might subject the witness to a forfeiture.*

4432. Whenever the answer to the interrogatory might subject the witness to a forfeiture of his estate, or any thing in the nature of a forfeiture, he may demur; the rules respecting this ground of protection, are very similar to those where the ground of protection is a penalty.(a)

3. *Because the answer would degrade the witness.*

4433. A man's honor is as valuable as life itself, and the law will not permit it to be unnecessarily assailed, and will protect it. A witness may demur to an interrogatory, the answer to which may show disgraceful conduct on his part. The principal question in cases of this kind is what shall be so considered.(b) Indeed, a case may be found where a demurrer by a witness to answer an interrogatory defamatory of a third person, and not material to the case, was allowed.(c)

4. *Because it is against public policy.*

4434. Whenever it is against public policy that the witness should disclose his knowledge of facts, he may demur to interrogatories requiring him to testify as to them. Thus, a grand-juryman may demur to a question requiring him to disclose what passed in the jury room; one who possesses *secrets of state*, the disclosure of which would be prejudicial to the public interest,(d) may demur.

§ 6.—Proceedings on the return of the evidence.

4435.—1. After the evidence has been returned

(a) Lord Uxbridge *v.* Staveland, 1 Ves. 56.

(b) See matter of Kip, 1 Paige, 601.

(c) Parkhurst *v.* Lowten, 2 Swans. 198, n., where is cited Mulgrave *v.* Lord Dunbar.

(d) 1 Greenl. Ev. § 250; Gresl. Ev. 68. See Gray *v.* Pentland, 2 S. & R. 23; Goter *v.* Sanno, 6 Watts, 150; Law *v.* Scott, 5 Har. & John. 438.

either by the report of an examiner or an executed commission, it must pass *publication*. By this term is understood, in chancery practice, that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by the consent of the parties, or the rules of the court, to show the depositions openly and to give out copies of them.<sup>(a)</sup>

4436.—2. The next matter to be considered is whether there are any such defects in their substance or form, or the manner of taking them, as will induce the court to *suppress the depositions*. The ground upon which they will be suppressed is either that the interrogatories upon which they have been taken are leading; or that the interrogatories and the depositions taken upon them, or the depositions alone, are scandalous; or else that some fraud or irregularity has occurred in relation to them. A deposition may also be suppressed, because a witness has disclosed some matter which has come to his knowledge as solicitor or attorney of the party applying.<sup>(b)</sup>

4437.—3. As a general rule, there can be no reëxamination of a witness, after he has once signed his name to the deposition, and turned his back upon the commissioner or examiner,<sup>(c)</sup> for fear of tampering with him or inducing him to retract or qualify what he has sworn to. But justice requires in some cases that a second examination of the same witness should take place, and it will be ordered accordingly. Thus, where the depositions have been suppressed for some irregularity in the conduct of the cause, accidental and unintentional, the court will direct the witnesses to be reëxamined and cross-examined upon the original interrogatories,<sup>(d)</sup> unless the depositions

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<sup>(a)</sup> Pract. Reg. 297; 1 Harv. Pr. 345; Blake's Ch. Pr. 143; 2 Dan. Ch. Pr. 562.

<sup>(b)</sup> Sandford v. Remington, 2 Ves. jun. 189.

<sup>(c)</sup> Lord Abergavenny v. Powell, 1 Mer. 130.

<sup>(d)</sup> Perry v. Sylvester, Jac. 83.

have been suppressed on account of the interrogatories being leading, in which case, it must be upon a new set of interrogatories to be settled by the master.<sup>(a)</sup> In some cases, too, where the depositions have not been suppressed, the court will make an order after publication, for the examination of witnesses, for the purpose of proving some fact which has been omitted to be proved upon the original deposition; as where the loss of a deed had been omitted to be proved by mistake, upon petition the plaintiff was allowed to exhibit an interrogatory before the examiner for the purpose of proving that the deed was lost.<sup>(b)</sup>

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CHAPTER II.—OF THE HEARING.

4438. When the case has been fully prepared, it is set down for hearing; that is, the cause is put upon a list containing all the causes to be argued or heard, which list is made out for the use of the court. The cases are regularly called, and upon being reached they are argued by counsel or continued. The most usual reasons for applying to continue a cause, are the discovery of some defect in the pleading which may render an amendment of the bill necessary.<sup>(c)</sup>

Before the hearing, the counsel prepare a paper book, or brief, for the hearing, which contains the title of the cause, a copy of the bill and answer, and such depositions as may have been taken, and such other matters which are spread out upon the record, so as to show all the points of the case.

When the case is called up, the counsel for the plaintiff generally open and close. The judges afterward make their decree, and generally give an opinion and the reasons upon which they found it.

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<sup>(a)</sup> *Spence v. Allen*, Prec. in Chan. 493; 1 Eq. Cas. Ab. 232; *Arundell v. Pitt*, Ambl. 585.

<sup>(b)</sup> *Cox v. Allingham*, Jac. 137.

<sup>(c)</sup> 2 Dan. Ch. Pr. 619.

## CHAPTER III.—OF THE DECREE.

4439. After having heard the arguments of the counsel of the respective parties, and fully considered the facts and the law of the case, the court pronounces its decree, which is a sentence or order of the court determining the right of all the parties to the suit, according to equity and good conscience. The decree is pronounced in open court, and entered upon the record.

In the further consideration of decrees, it will be convenient to distribute the subject into the following heads: 1, of the several kinds of decrees; 2, of their form; 3, upon whom the decree is binding; 4, how it is enforced.

## SECTION 1.—OF THE SEVERAL KINDS OF DECREES.

4440. The several kinds of decrees may be reduced to four: 1, decrees *nisi*; 2, decrees taken *pro confesso*; 3, interlocutory decrees; and 4, final decrees.

§ 1.—Of a decree *nisi*.

4441. By the English practice, when a cause is put in the paper of causes for hearing, it is called in its rotation, and the bill is opened by the junior counsel for the plaintiff; if the defendant does not then appear by his counsel to open his answer, the court calls upon the plaintiff to prove the service of the *subpœna* to hear judgment, and upon that being done, the plaintiff's counsel pray what decree they are of opinion will be most advantageous to their client, and the court accordingly pronounce the same, superadding thereto a provisional clause, "that the decree is to be binding upon the defendant, unless, being served with process, he shall, within a limited time, show cause to the contrary." This decree, being *sub modo* only, is

emphatically called a decree *nisi*, or unless cause is shown.(a)

In praying a decree of this sort, the counsel ought to be very careful to embrace in it such directions only as he will be able to support in case the defendant appears to show cause, because a decree of this nature is not considered as a judgment of the court, but as an act of the party who obtains it, conceiving what the judgment would be if the other party had appeared, and it is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs.(b) In this respect it differs from a decree taken *pro confesso*, which is an act of the court, and not of the party.(c)

§ 2.—Of a decree taken *pro confesso*.

4442. A decree on a bill taken *pro confesso* is one entered by the court when the defendant has made a default in appearing within the time prescribed by the rules of court; by the rules of practice for the courts of equity of the United States,(d) “in default of appearance at the proper time, the plaintiff may, at his election, enter an order as of course, in the order book, that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*, and the matter may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed.” “And such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant.”(e)

(a) Gilb. Ch. 156.

(b) *Carew v. Johnston*, 2 Sch. & Lef. 300; *Knight v. Young*, 2 V. & B. 186.

(c) *Geary v. Sheridan*, 8 Ves. 192.

(d) Rule 18.

(e) Rule 19.

Unlike the case of a decree *nisi*, when the bill is to be taken *pro confesso*, the court hears the pleadings, and itself pronounces the decree, and does not permit the plaintiff to draw it up, as it does in ordinary cases, where the defendant makes default at the hearing ;(a) and where, upon the hearing, it appears that the plaintiff had no equity, the bill will be dismissed.(b)

But there are some cases where a decree will not be made on a bill taken *pro confesso*, to avoid collusion, and because it is contrary to sound policy. A final decree of divorce *à mensâ et thoro*, therefore, is not made merely upon the bill *pro confesso* in the usual form. The facts of the case must be first ascertained.(c)

§ 3.—Of interlocutory decrees.

4443. An *interlocutory* decree is one made when some material circumstance or fact necessary to be made known to the court, is either not stated in the pleadings, or so imperfectly ascertained by them, that, by reason of that defect, the court is unable to determine finally between the parties; or when further directions generally is reserved till a future hearing. Such further hearing is termed a *hearing upon further directions*, or upon the equity reserved.(d)

It very seldom happens that a first decree can be final, or conclude the cause; for, if any matter of fact be strongly contested, and there is some doubt, the court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties by such trial, but will refer the matter to be tried by a jury. As jurors are never summoned to attend the court of chancery, the fact is usually ordered to be tried at the bar of one of the courts of law, upon a feigned issue.(e)

(a) Geary v. Sheridan, 8 Ves. 192.

(b) Molesworth v. Lord Verney, 2 Dick. 667.

(c) Barry v. Barry, Hopk. R. 118.

(d) Seton on Decr. 2.

(e) The nature and use of a feigned issue have been explained. See B. 4, t. 8, c. 8, sec. 3, § 2, art. 4.

The necessary consequence of sending a feigned issue to be tried at law, is, that no final decree can be made until the feigned issue has been tried. The first decree, directing the feigned issue,(a) is therefore, merely an interlocutory decree, directing the issue, and reserving the consideration of the further questions in the cause, until after the trial of the issue.

§ 4.—Of final decrees.

4444. A *final* decree is one which disposes of the whole cause, and leaves nothing further to be done;(b) it does not reserve the consideration of the points of equity, arising upon the determination of the legal rights of the parties, or of the further directions upon the master's report, or the costs of the suit, but when made and enrolled, it may be pleaded in bar to any new bill of the same matter. A decree is final, not only when it adjudicates as to the rights of the different parties, but also when it dismisses the plaintiff's bill;(c) for, in such case, the decree may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill. Directions of this sort are inserted, where the dismissal is occasioned by some slip or mistake in the pleadings or in the proof.(d)

(a) This is not, properly speaking, a *decree*, it is more of the nature of a direction for a preliminary inquiry, and, for this reason, it is termed "*an order*;" it is in the nature of a "*decretal order*," but, strictly speaking, it is not a decretal order, which is an order in the nature of a decree, made upon motion or petition. 2 Dan. Ch. Pr. 637.

(b) *Tennant's Heirs v. Paterson*, 6 Leigh, 196. See *Haskell v. Raoul*, 1 McCord, Ch. 32; *Patterson v. Gaines*, 6 How. R. 585; *Harvey v. Branson*, 1 Leigh, 108; *Larue v. Larue*, 2 Litt. 251; *Field v. Ross*, 1 Munroe, 137; *Weatherford v. James*, 2 Ala. 170; *Wright v. Miller*, 3 Barb. Ch. 382.

(c) *Holmes v. Remsen*, 7 John. Ch. 286; *Thompson v. Clay*, 3 Munroe, 361.

(d) 2 Dan. Ch. Pr. 638.

## SECTION 2.—OF THE FORM OF DECREES.

4445.—In their form it may be observed that decrees consist of three parts: 1, the date and title; 2, the recitals; and 3, the ordering part.

## § 1.—Of the date of the decree.

4446. The decree commences with a recital of the day of the month and year when it was pronounced, and the names of the several parties to the cause. Both parties should have the titles in the decree which are given to them in the bill; if, for example, the plaintiff is described as executor in the bill, he must be so named in the decree.

## § 2.—Of the recitals in the decrees.

4447. Formerly, the decree contained recitals of the pleadings in the cause, which became a great grievance. Some of the English chancellors endeavored to restrain this prolixity. By the rules of practice for the courts of equity of the United States, it is provided, that in drawing up decrees and orders, neither the bill, nor the answer, nor other pleading, nor any part thereof, nor the report of any master, nor any other prior proceedings, shall be stated or recited in the decree or order.<sup>(a)</sup>

## § 3.—Of the ordering part of the decree.

4448. The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it. It is manifest these directions must depend upon the nature of the particular case which is the subject of the decree; when the decree is merely interlocutory, it directs an issue, or a case at law, or

an inquiry to be made, or an account to be taken by a master; it usually contains a reservation of the further matters to be decided, and, generally, also the costs of the suit, till after the event of the issue, or of the inquiry, or account shall be known.(a)

SECTION 3.—UPON WHOM THE DECREE IS BINDING.

§ 1.—What persons are bound by the decree.

4449. All the original parties to the suit, and those who are afterward made parties, either to the suit or the decree, of full age, *compos mentis* and *sui juris*, and their privies, and such as claim under them, by an act done *pendente lite*, are regularly bound by the decree.(b)

4450. When one comes in *pendente lite*, and while the suit is in full prosecution, without any color of allowance or privity of the court, in such case a general decree binds such person; but if there were any intermission in the suit, or the court were made acquainted with the conveyance, the court will order upon the special matter according to justice and equity.(c)

But to render thus a purchaser *pendente lite* bound by a decree, the decree must put a conclusion to the *matter in question*. The pendency of the suit is presumed to be known, because all persons, for this purpose, are presumed to know what passes in courts of justice, and the presumption is established to prevent great mischief which otherwise would arise. When it is only a decree to account, that is, still such as affects the purchaser with notice; but when money is secured upon an estate, and there is a question depending in the court of chancery upon the rights or about that money, but no question relating to the estate upon which it is secured, a purchaser of the estate pending

(a) 2 Dan. Ch. Pr. 667.

(b) Pract. Reg. 125; 1 Harr. Ch. Pr. 433.

(c) Toth. 45.

the suit will not be affected with notice by such implication as the law creates by the pendency of a suit.(a)

§ 2.—What persons are not bound by the decree.

4451. It is one of the cardinal principles, both at law and in equity, that no judgment or decree shall be rendered against any one who is not a party to the proceedings, and who has not had an opportunity of being heard; though a court of equity will, in the first instance, decree against the party ultimately responsible, where the parties are before the court at the time of the decree, but not otherwise.(b)

In general, not only parties, but all privies to the parties before the court, are bound by the decree. Therefore, though ordinarily the decree only binds the parties to the suit, he who purchases during the pendency of the suit, is bound by the decree which may be made against the person from whom he derives title. An assignee of an equity of redemption, pending the suit for redemption, is bound by the decree.(c) For the same reason, a purchaser of an estate charged with debts, pending a suit by creditors, is bound by the decree.(d)

It is a rule that a conveyance made pending a suit, does not vary the rights of the parties in the suit; *pendente lite nihil innovatur*. Such conveyance gives no better right to the purchaser than the grantor had, and has no effect with reference to any beneficial result against the plaintiff in the suit; for the litigating parties are not required to take notice of a title acquired under such circumstances.

But the decree does not bind any one who comes in *bonâ fide* by a conveyance from the defendant before

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(a) 3 Atk. 392.

(b) Garnet v. Macon, 6 Call. 308; Sparhawk v. Buell, 9 Verm. 41.

(c) Garth v. Ward, 2 Atk. 175.

(d) Walker v. Smallwood, Amb. 676.

the bill exhibited, and where he is not a party, either by bill or order.<sup>(a)</sup>

SECTION 4.—OF ENFORCING THE EXECUTION OF DECREES.

4452. In some of the states, statutes have been passed giving a remedy different from the one at common law, where the writs used in the law courts have been adapted to enforce the execution of decrees in equity.<sup>(b)</sup>

At common law, independently of any statute, according to the English practice, the courts of chancery act upon the person, and not upon the estate, so that a decree will not bind the right of the defendant in his land. But still those courts possess the power not only to commit the parties for their non-compliance with their decrees, but also will sequester personal estate and land, and, by a writ of assistance, order the delivery up of the possession of the estate itself.

The modes of enforcing a decree, where there is no statutory provision for that purpose, according to the English practice, which may still be pursued in some of the states, are as follows: 1, by writ of execution and attachment; 2, by sequestration; and 3, by writ of assistance.

§ 1.—Of the writ of execution and attachment.

4453. When a decree or order has been made, directing some act to be done by any party on record, its performance may be enforced by the personal service of a writ of execution of the decree or order upon that party; and upon a neglect to comply with it, an attachment will issue against him, for in that case he will be acting in contempt of the court.

<sup>(a)</sup> See Beam, Ord. 7.

<sup>(b)</sup> *Coombs v. Jordan*, 3 Bland, Ch. 303; *The Cape Sable Company's Case*, 3 Bland, Ch. See *Norton v. Tallmadge*, 3 Edw. Ch. 301; *Hall v. Dana*, 2 Aik. 381; *Laffin v. Relyea*, 7 Paige, Ch. 368; *Coleman v. Cocke*, 6 Rand. 618; *McNair v. Ragland*, 2 Dev. Ch. 42.

There is a marked difference in the effect of a commitment, between that process in equity, and a commitment under a *capias ad satisfaciendum* at law; the former does not operate as a satisfaction of the decree, and, therefore, the plaintiff may have any other means allowed by law for the purpose of enforcing it. The commitment of the defendant for a contempt in not obeying the decree of the court, will be no bar to a sequestration, nor any other remedy. On the contrary, at law, the commitment of the defendant under a *capias ad satisfaciendum* is a complete bar at common law against any further proceeding.

§ 2.—Of the sequestration.

4454. When the attachment is returned *non est inventus*, the plaintiff must proceed to a sequestration. If, on the contrary, the defendant has been arrested under the attachment, and committed for the contempt, the party prosecuting the contempt is at liberty to move for a sequestration against him.(a)

*Sequestration* in chancery practice is a writ or commission, sometimes directed to the sheriff, but, most usually, to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real and personal estate of the defendant, and to take the rents, issues and profits into their hands, and keep possession of them, or pay the same, as the court shall order and direct, until the party who is in contempt shall do what he is enjoined to do, and which is especially mentioned in the writ.(b)

§ 3.—Of the writ of assistance.

4455. When the sequestration has not been executed, in consequence of any obstacle lawfully inter-

(a) See *Dunkley v. Scribner*, 2 Mad. 443; *Errington v. Ward*, 8 Ves. 314.

(b) 1 Harr. Ch. Pr. 191; Newl. Ch. Pr. 18; *Blake's Ch. Pr.* 103; 1 *Smith's Ch. Pr.* 432; *White v. Gevaerd*, 1 Edw. Ch. 336.

posed in the way of the commissioners or sheriff, the complainant may have a *writ of assistance*; or when possession is not given, upon an affidavit of the personal service of the writ of execution and demand of possession, and refusal, the plaintiff may then also obtain *an order of course* for a writ of assistance, which is drawn up in this form, "that a writ of assistance do issue, directed to the sheriff of \_\_\_\_\_ county, to put the said plaintiff in possession of the premises in question, pursuant to the said decree."

The writ is directed to the sheriff of the county in which the lands lie, and, after reciting the ordering part of the writ of execution, authorizes the sheriff to put the party into possession, and to maintain him there, and commands him, on the receipt of the writ, to enter into the premises and eject the defendant therein named, his tenants, etc., from the same, and to put the complainant in possession, and to defend him from time to time, in case any interruption shall be offered to such possession.

A writ of assistance will be granted, after a sequestration, where the possession of the land was in the defendant at the time of the decree, and afterward such possession has been delivered to a third person, though for a personal demand, and oblige the person in possession to come before the court and be examined *pro interesse suo.*<sup>(a)</sup>

#### CONCLUSION.

4456. Having attained the end of our labors, if we take a retrospective view of the subjects which have so long occupied our attention, we will naturally be struck by the fact that the number of rules and their exceptions, of which our code is composed, is immense. Without a correct classification, this mass would be a

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<sup>a</sup>) Bird v. Littlehales, 3 Swans. 299, n. (a).

perfect chaos. When properly arranged, these rules are not only easily understood by the diligent student, but can be recollected. He who would study chronology without a division of time, would not accomplish much to advantage; but by its proper arrangement into days, months, years, and centuries, it is not difficult to place any event which may have happened, in the course of ages, where it ought to be.

To the unlearned and superficial observer, it may appear strange that so many rules should be required for the guidance of men in the common affairs of life. If these rules are so many laws binding on them, it will be asked, why is a code made so complex? Is it not unjust to require that all persons should know these numerous provisions, or be punished for an ignorance, which is almost unavoidable, when they violate any of them? It cannot be denied that some of the requirements of the law are arbitrary, and not easily understood by any but experienced lawyers, yet most of its provisions are founded on that common sense which men generally possess. These rules are a mere amplification of the principles of natural justice. Most of them, both at law and in equity, have their foundation on the sublime gospel command, "all things whatsoever ye would that men should do unto you, do ye even so to them."<sup>(a)</sup> Unless laboring under mania, or some other mental defect, men generally perceive right from wrong.

But in a country where the laws are and must reign supreme, it is of the greatest consequence that they should be certain, and, for this purpose, they must be very numerous. When the balance of justice is put in the hands of so fallible a being as man, he must have a rule by which to exercise his power; to restrain him from doing wrong, when his prejudices incite him to it; to keep him within proper bounds, in the exer-

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(a) Matth. vii., 12.

cise of his functions; and to support and encourage him, when he is in the right. The law is a lamp in the path of the judge, to guide him in his difficult course; a barrier to the oppressor; a shield to the innocent; a protection to the weak; and a blessing to all. In a despotic country, where the will of the sovereign, or his minions, disposes of the lives, the honor and the property of his subjects, laws are unnecessary. The same power which makes them, puts them into execution; there, the code is very simple—the will of a tyrant.

While, like all other human institutions, the law is not perfect, and many of its excrescences might be profitably pruned; though it might be greatly simplified by casting away many of the provisions which grew upon it in a dark age; yet it is the greatest monument human wisdom ever erected, and no country can be happy without it; it is the ark of safety, its presence secures order and peace, its absence produces chaos and anarchy: *in societate civili aut lex aut vis valet.*(a)

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(a) Bacon, De Augmentis Scientiarum, lib. viii. c. 3, Aph. 1.

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